

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 81
5417733

BETWEEN AARON SIM AND 75
 OTHERS (see Appendix)
 Applicants

AND CARTER HOLT HARVEY
 LIMITED trading as
 Woodproducts New Zealand
 Respondent

Member of Authority: Christine Hickey

Representatives: Anne-Marie McNally, Counsel for Applicant
 Daniel Erikson, Counsel for Respondent

Investigation Meeting: 11 and 12 March 2014 in Nelson

Determination: 27 May 2014

DETERMINATION OF THE AUTHORITY

- A. The applicants have personal grievances of unjustifiable disadvantage.**
- B. Carter Holt Harvey Limited has breached its duty of good faith to the applicants.**
- C. The parties are directed to mediation as soon as possible to set the amount of compensation to pay each applicant, unless they are able to agree without the assistance of the Mediation Service. Leave is granted to return to the Authority to determine compensation and/or costs if agreement is not possible.**

Employment relationship problem

[1] Seventy-six members of the Engineering Printing and Manufacturing Union (the union)¹ who work at Carter Holt Harvey Limited's (CHH) Eves Valley Sawmill site claim that in March 2013 they were unjustifiably disadvantaged in their employment by being:

compelled ... to submit to drug testing in breach of the respondent's drug and alcohol policy.

[2] The applicants also say that CHH breached:

- the Drug & Alcohol Free Workplace Operating Procedures and the Drug & Alcohol Free Workplace Policy by requiring all employees to submit to drug testing; and
- its duty of good faith by misusing the Drug & Alcohol Free Workplace Operating Procedures and the Drug & Alcohol Free Workplace Policy and by misrepresenting the requirements of the Operating Procedures in order to compel employees to submit to the drug testing.

[3] By way of remedy the applicants claim compensation of \$2,500 each and a penalty for breaches of good faith in the amount of \$20,000.

[4] CHH denies that the applicants were disadvantaged but if they were it says its actions were justified. CHH argues that it was justified in undertaking reasonable cause drug testing. CHH also says that was no breach of good faith and there are no grounds for the imposition of a penalty.

Sequence of events

[5] Both parties agree that the Sawmill is a safety sensitive site. On 7 March 2013 two cannabis plants were found growing in the grounds outside the sawmill buildings.

[6] Because of the discovery the site manager, Darryn Adams, directed that all employees be subjected to a *reasonable cause*² drug test. He considered the sawmill

¹ The list of applicants is annexed to the back of this determination.

² Operating Procedures and Policy set out below at paragraph [17] onwards

site was only accessible by CHH staff and was unlikely to be easily accessed by the public.

[7] Over the afternoon and evening of 7 March and during 8, 10 and 11 March 2013 approximately 190 employees, including managers, were subjected to urine tests. The urine was tested for the presence of drugs. It is agreed that not all employees were tested, for example, those who were away on holiday, or sick leave or rostered off over that period.

[8] On 7 March a delegate contacted the EPMU's area organiser, George Hollinsworth, to tell him about the testing. Mr Hollinsworth telephoned Mr Adams and told him that the EPMU considered that the testing would be in breach of the drug and alcohol policy. The EPMU considered that the testing was neither random testing nor testing for reasonable cause. Mr Adams said that the testing would continue that evening; which it did.

[9] The next day Mr Hollinsworth was again contacted and told testing was continuing. He contacted Mr Adams again who agreed to halt testing so that Mr Hollinsworth could meet with union delegates and Mr Adams. Mr Hollinsworth and the delegates told Mr Adams the union did not believe the situation fell within the *reasonable cause* category and *that he didn't have the right to test all of the staff in relation to the discovery of the plants*. The union told its members that although it considered CHH did not have the right to undertake the testing that anyone who refused to comply could be subject to disciplinary action. The testing continued.

[10] Testing was carried out in the back of one of two specially designed vans operated by the New Zealand Drug Detection Agency (NZDDA). The vans have a toilet cubicle, without a separate door, a wash basin and a table which is screened from the toilet.

[11] The identity of each employee was confirmed by a workmate or manager. Each employee went into a van and was asked to sign an informed consent form. They were directed to put any bags down and to remove any bulky outer clothing. They were then directed to wash their hands and to enter the toilet cubicle to give a sample.

[12] Both vans were staffed by men from the NZDDA (the testers). While a male employee was urinating he did so with his back to the tester who stood behind him

approximately one metre from the toilet itself and slightly to the test subject's right. The tester faced the employee's back.

[13] When a female employee gave a sample the tester would turn off the water in the van, leave the van and close the door, giving the female employee privacy to use the toilet in her own time.

[14] One employee was found to have a *non-negative test*. He is one of the applicants. There was no suggestion in front of the Authority that he had planted the marijuana plants.

Issues

[15] The issues the Authority needs to determine are:

- (a) Did CHH breach its Policy and/or its Operating Procedures?
- (b) Were the employees who were tested unjustifiably disadvantaged?
- (c) If so, what remedy should be awarded?
- (d) Was there a breach or breaches of good faith?
- (e) If so, should a penalty be imposed? How much and paid to whom?

Did CHH breach its Policy and/or its Operating Procedures?

What are the relevant policy and procedures?

[16] The parties agree that the collective agreement obliges employees to abide by company policies, practices and procedures. There is no dispute that the Sawmill is a safety sensitive site.

[17] In August 2012, after consultation with the EPMU, CHH issued the Drug & Alcohol Free Workplace Policy Statement (the Policy) which applies to CHH workplaces throughout the country³. It says:

³ This followed on from and is largely the same as a June 2010 proposed Policy.

Carter Holt Harvey is committed to creating a drug and alcohol free workplace to ensure the safety, health and well being of its people. This commitment:

- *supports the company values*
- *aims to achieve a safer and healthier workplace for our people*

The company will support its employees in achieving this goal through the following initiatives:

Pre-employment Testing

...

Post-accident or post-incident testing

Employees may be requested to participate in a test for the presence of drugs and/or alcohol where they are involved in an accident, incident or 'near miss' which impacts (or potentially impacts) on the safety, health or well being of themselves, other employees, contractors or visitors.

Reasonable Cause Testing

Employees may be requested to participate in a medical test where their actions, appearance, behaviour or conduct suggests that they may be under the influence of drugs and/or alcohol.

Random Testing

Subject to consultation, some CHH Operations may have a Random Testing programme in place. This program (sic) enables employees, contractors, employees of contractors and visitors may (sic) be tested on a random unannounced basis. Please refer to your business HR team for further information.

...

Each CHH business will have operating procedures pertaining to their operations. ...

[18] The Woodproducts New Zealand Drug & Alcohol Free Workplace Operating Procedures document, dated October 2012, is applicable to the Eves Valley Sawmill⁴. It needs to be read in conjunction with the Drug & Alcohol Free Workplace Policy above. The stated purpose of the Operating Procedures is:

...to address the possibly of our workplace safety and the safety of our employees being adversely affected by people who have unacceptable levels of drugs and/or alcohol in their system.

⁴ This was the operative Policy although the union referred to the earlier proposed Operating Procedures in March 2013 when it objected to the testing.

[19] The *Aims* of the Operating Procedures are:

- a. *To meet our obligations under the Health and Safety in Employment Act 1992 and Health and Safety in Employment Amendment Act 2002 to maintain a safe workplace.*
- b. *To create a drug/alcohol free workplace.*
- c. *To recruit only staff who comply with CHH WPNZ's policies/procedures*
- d. *To reduce the number, type and costs of accidents.*
- e. *To ensure high performance, productivity and quality of work.*
- f. *To support and rehabilitate staff with alcohol and/or drug problems.*
- g. *To act as a deterrent to employees contemplating alcohol or drug use at work or immediately prior to starting work.*

[20] The *Standards* of the Operating Procedures provide that a person will be in breach of the procedures if, while on site, they have in their possession, or use, sell, supply, or transfer drugs or report to or undertake work with *risk amounts of drugs ... in their system.*

[21] Section Three of the Operating Procedures outlines the testing procedures and states:

All aspects of the testing procedure will be carried out in a confidential and private manner. The procedures will comply with the strict criteria dictated by AS/NZS 4308: 2008: "Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine."...

- d. *A urine specimen will be provided in private, but accompanied.*

[22] Section Three also contains *Reasons for Testing*:

Drug and alcohol testing will occur in the following circumstances:

- a. ***Pre-employment testing*** – *All preferred candidates must pass a workplace drug and alcohol test. This includes transferring from one site to another and transferring to another CHH WPNZ company.*
- b. ***Reasonable-cause testing*** – *Employees may be tested where there is reasonable-cause (sic) to suspect drug and/or alcohol use.*
- c. ***Post-accident/post-incident/Near miss testing*** – *Employees involved in any accident, incident or near miss that caused or had the potential to cause harm will be tested immediately.*
- d. ***Random testing*** – *Employees employed on a safety sensitive site or in designated safety sensitive roles, and contractors, employees of*

contractors and visitors to (safety sensitive areas of) the site, may be tested on a random unannounced basis.

NB: Random testing can mean the periodic random selection of employees, contractors and employees of contractors and visitors to be tested, the random selection of work sites where all employees on the site will be tested, or all employees within a group being retested at random times within a certain period. ...

[23] In Section Four of the Operating Procedures the reasonable cause testing procedure is outlined:

Reasonable-Cause Testing

An employee may be tested for drugs/alcohol where a co-worker/manager/supervisor determines that the employee's appearance, actions, or behaviour suggest they may be affected by drugs/alcohol (see Appendix Four (a)). Normally there will be more than one indicator present. Examples of reasonable-cause indicators are listed in Appendix Four (b).

It is required that a co-worker/supervisor obtains a second opinion to support their reasonable-cause observation(s) from a Manager trained in the Drug & Alcohol Operating Procedures. It will then be the Site Manager's final decision as to whether reasonable cause testing is undertaken.

Procedure

Any person on site where there is reasonable cause to suspect drug and/or alcohol use may be tested. Refer Appendix Four(c).

What is Reasonable Cause?

Reasonable cause to suspect impairment by the observation of symptoms (does not require actual impairment – simply observing the employee and forming a view on reasonable grounds that they appear to be impaired by some substance is sufficient).

Examples of the types of behaviour/actions/conduct that would lead you to test for reasonable cause include, but are not limited to, any of the behaviours/actions/conduct described in Form A.

Who can Initiate Testing?

At least two people must initiate this procedure, one of which must be a Manager trained in the Drug & Alcohol Operating Procedures. The Site Manager (or in their absence, a nominated delegate) must approve the reasonable cause. See Appendix Four (d).

Refusal to consent

Where an employee refuses to undergo a test requested under reasonable cause the refusal shall be treated under the serious misconduct procedures in CHH WPNZ Employee Handbook and the appropriate disciplinary procedures will be applied. ...

[24] Section Five of the Operating Procedures is entitled Working Together and says that all employees will have annual training on issues related to drug and alcohol use. The training:

... will include:

- *Reasonable cause for testing*
- *Understanding the drug & alcohol free workplace procedures and application ...*

[25] I have annexed to this determination:

- Appendix 3 which is a flow chart of testing procedures excluding pre-employment testing;
- Appendix 4(a) which is a flow chart of reasonable cause testing decision-making;
- Appendix 4(b) which is headed “Reasonable cause Indicators”; and
- Appendix 4(c) which is headed “Reasonable cause: Step-by-Step”; and
- Appendix 4(d) which is headed “Reasonable cause: Form A: Record of test” and sets out a record of what behaviour and/or conduct was observed and requires two signatures from a Site Manager, Acting Site Manager, HR Manager or “EHSR”.

Did CHH breach its Policy and/or its Operating Procedure?

[26] CHH submits that the Code of Conduct also applies and should be considered alongside the Policy and Operating Procedures. I agree that whatever version of the Code of Conduct applied in March 2013 should be read alongside the Policy and the Operating Procedures. Unfortunately the only Code of Conduct supplied to the Authority says that it was issued on 15 April 2013 and was reviewed on 31 March 2014. It includes prohibitions on:

- *The use, sale, transfer or possession of drugs, alcohol or controlled substances on site;*
- *Employees, contractors, or company representatives working or using our vehicles while under the influence of drugs, alcohol or controlled substances.*

[27] The Code of Conduct is congruent with the Policy and Operating Procedures but I do not take it into account in considering whether CHH breached the Policy and Operating Procedures. The possession or use of drugs on site is covered in the *Standards* set out in the Operating Procedures.

[28] CHH says that it was justified in testing the employees in the way it did because it was reasonable to assume that whoever planted the marijuana worked at the Sawmill. That employee would have been in breach of his or her responsibility under the Operating Procedures not to *use, sell, supply, transfer or have in their possession drugs*. The argument is that there was reasonable cause to test all employees because CHH has statutory responsibilities to ensure worker safety.

[29] I leave to one side the question of whether an employee planting or placing marijuana plants in the Sawmill grounds could be said to be in breach of the Operating Procedures by being in *possession* of drugs.

[30] CHH concedes that the testing was not in strict accordance with the Policy and Operating Procedures but says it was motivated by a strong desire to protect its employees and so the testing was justified.

[31] CHH's argument is premised on the unstated assumption that whoever planted the drugs may have been impaired by drug use while at work thus endangering themselves and/or other employees. It is that assumption it relies on to say that it had reasonable cause to test as it did.

[32] It is clearly correct that CHH has statutory responsibility to ensure the safety of all of its employees. However, no reasonable employer breaches its Policy or Procedures⁵ made with the express purpose of keeping its employees safe. In this case if CHH was concerned that an employee was, or a number of employees were, impaired it had a clear Policy and Procedures for identifying and testing those employees.

[33] In the case of *NZ Amalgamated Engineering Printing and Manufacturing Union Inc. v Air New Zealand Limited*⁶ a full bench of the Employment Court considered in an employer's right to have a drug and alcohol testing policy using

⁵ Except perhaps in some unforeseeable emergency situation when it needs to act to save people and/or property from injury or harm.

⁶ [2004] 1 ERNZ 614

urine testing for drug detection. In relation to Air New Zealand's proposed policy the Court concluded:

Because of the [Health and Safety in Employment] Act's accent on safety, it is reasonable to assume that employers should be able to discharge this duty by a variety of available practicable means, including drug testing in safety sensitive areas. We further hold that the same facility should be available where there is reasonable cause to suspect that an employee's behaviour is an actual or potential source of harm and that this is the result of the employee being affected by alcohol or drugs.⁷

[34] In this case there was no suspicion that any one of the employees tested was exhibiting any of the conduct, appearances or behaviour that is set out in the Operating Procedures Appendix Four (b), neither was the reasonable cause step-by-step process, from Appendices Four (c) and (d), followed.

[35] The testing did not fall within any of the other situations for which the employer had policies and procedures that allowed for drug testing.

[36] In the Employment Court case of *Hooper v Coca-Cola Amatil (New Zealand) Limited*⁸ the Judge Ford agreed with counsel's submission that:

It is a "reasonable cause" testing scheme. This means that before a test occurs, the defendant must have reasonable cause to test. There must be some nexus between the reasonable cause and the test, as the test is seen as corroborative of the reasonable cause.

[37] Judge Ford went on to say:

The company's managerial prerogative in relation to drug testing ... was subject to ... the collective agreement. The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.

[38] Reasonable cause testing in the CHH collective agreement requires evidence to suspect an **individual** employee is affected by drugs before deciding to test. It applies to individual employees and not to a whole shift or whole workforce. There is no ambiguity in the documents that mean reasonable cause testing is a catch-all kind of testing that can be carried out on a suspicion of something wider than or different from signs of impairment observed in one or more individual employees.

⁷ Ibid, at 674

⁸ [2012] NZEmpC 11

[39] I conclude that CHH breached its Policy and Procedures and in doing so breached its employees' employment agreement, in this case the collective agreement. I deal below with CHH's argument that the testing was justified by its motivation to keep its staff safe.

Were the employees unjustifiably disadvantaged?

[40] An unjustifiable disadvantage claim is a claim:

... that the employee's employment, or 1 or more conditions of the employee's employment... is or are ...affected to the employee's disadvantage by some unjustifiable action by the employer...⁹

[41] First, I have to be satisfied that the employees suffered disadvantage because their employment or one or more conditions of their employment were affected to their disadvantage by CHH's action.

[42] Mr Erickson submits that because no employee was subject to any disciplinary sanction they could not have been disadvantaged. CHH presents a number of reasons that it considers there was not and could not have been any disadvantage.

[43] Mr Erickson submits that the employees had no grounds to feel *aggrieved and humiliated as they were all asked to submit to a process they could have been required to undertake at any time if randomly chosen for testing.*

[44] Some of the applicants had previously been randomly tested¹⁰ and some of them more than once. Others had never been subjected to urine testing for drug use.

[45] I heard evidence from five of the applicants; four men and one woman. Each gave evidence from their own perspective about how the testing made them feel. Some of the evidence related to a comparison between random testing and the testing carried out in March 2013. Generally, the union and many of its members view random testing as a 'necessary evil' and accept that urine testing is also acceptable in the other three scenarios, including for reasonable cause. However, in this case the testing was not random and therefore a number of them felt as if they were under suspicion by CHH. For example, Aaron Sim said:

⁹ Section 103(1)(b) of the Employment Relations Act 2000.

¹⁰ A random selection of six employees of the Sawmill is tested every month.

The fact of having to do the test upset me. It seemed like I was having to prove myself to the company and after ten years' service I don't think that is reasonable. It felt unjust and unfair and uncomfortable.

[46] Chris Hollis made the point that random testing does not imply an accusation of drug use but says that reasonable cause testing has suspicion underlying it.

[47] It was also commonly felt that providing a urine specimen was invasive. For example, Mr Sim says:

It is a very intrusive and demeaning thing to be required to do when it is not for medical purposes. There has been some acceptance that we have no choice but to go along with random testing under the policy but there has always been a safeguard that you wouldn't be tested at any other time unless you were behaving in a way that gave reasonable cause to suspect that you were under the influence, so for the great majority of us that meant there was no reason to think we would ever be tested outside of random testing. Then suddenly every one of us was herded up and made to give urine samples for testing.

It made people feel that everybody was being accused of being drug users and that we were not trusted and had to prove our innocence. "Guilty until proven innocent" is the way a lot of people have described it, and that is how I felt.

[48] Whilst the *Air New Zealand* case was decided on a fact-specific basis and was more particularly about random testing the court discussed the invasive nature of urine testing of employees in response to submissions that:

[48] ...drug testing by urine sample cannot measure or give the employer any indication of whether the employee was impaired at the time the test was taken or at any time up to the taking of the sample. On that assumption the plaintiffs see the implementation of testing as an exploitative attack on the employee's privacy, dignity and autonomy.

[49] We accept that testing for the presence of drugs is by its nature intrusive. There is a degree of humiliation in providing a urine sample on demand and, ... the specimen provided by the donor has to be inspected by the collector to establish the correct temperature, colour and volume. We agree with him that there might be less than full or adequate comprehension of the discomfort, if not indignity, that the process might cause. ...

[49] In November 2012¹¹ a number of Sawmill employees were tested in a similar manner when a bag of what appeared to be cannabis was found on the site. Only employees that had access to the particular area it was found in were tested and they were tested before any confirmation of what was actually in the bag. Mr Erickson says

¹¹ Or perhaps November 2011. The date was referred to as being either 2011 or 2012. The exact date is not crucial.

that because no personal grievances were raised in relation to that testing then no personal grievances should be found in this case.

[50] However, Mr Hollinsworth says that the union did raise its concerns with the process used – *the incident in 2012 was strongly opposed by the Delegate on site*. I accept that there was a protest at the time from the union. Mr Adams also accepted that at the investigation meeting. That cannot have led CHH to believe that there would be no action taken by the union or its members at any time in the future.

[51] A material disadvantage or a disciplinary sanction is not required for there to be a disadvantage. Therefore, it is not determinative that no disciplinary action was taken against the applicants.

[52] The fact that Policy and Operating Procedures may possibly have been breached previously but the fact that no employee raised a personal grievance at that time is not relevant to whether any employee was unjustifiably disadvantaged by the March 2013 testing.

[53] Mr Erickson also submits that no specific complaints about the March 2013 testing procedure were raised at the time of testing and submits that all the tested employees signed informed consent forms, giving their permission to be tested. The implication is that therefore the testing was justifiable.

[54] Those factors are possibly explained by the fact in that the Policy and Operating Procedures both set out that an employee who refuses to consent to a test may be subject to disciplinary action. Also on 8 March 2013 Mr Hollinsworth told employees that the union considered that the employees *were not legally compelled to undertake the test* as testing was *not in line with company policy*. However, he told them there were risks in refusing to submit to testing in that they could be subject to disciplinary action.

[55] While there may not have been any individual complaints formally raised with CHH a protest to the testing on behalf of union member employees was raised on 7 March and again on 8 March by Mr Hollinsworth by phone, in person and by email.

[56] The urine testing carried out on the Sawmill employees in March 2013 disadvantaged the applicants in that it affected a condition or conditions of their employment to their disadvantage. They understood and acquiesced in the Policy and

Operating Procedures, which allow random and reasonable cause testing, out of a mutual commitment with CHH to safety in their employment. However, the employees were required to undertake an invasive procedure imposed by their employer outside of the conditions of their employment.

[57] That was to their disadvantage not only because giving a urine sample in an employment setting is invasive and compromising of an employee's dignity and privacy but particularly because the requirement was not in line with any of their terms and conditions of employment. It was also to their disadvantage to be treated by their employer as if they were suspected of planting and/or using marijuana in breach of their employment agreement and the criminal law.

[58] The applicants were disadvantaged because CHH's actions breached the employment agreement and negatively affected the necessary relationship of confidence and trust between them and CHH.

Was the disadvantage justifiable?

[59] The applicants were disadvantaged and CHH now has to prove that its actions were justified. Section 103A of the Employment Relations Act 2000 (the Act) makes the test of whether an employer's action was justifiable an objective one with the test being:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the ... action occurred.

[60] CHH submits that it had good cause to test its employees for drug use and that it did so in the interests of staff safety. Mr Hollinsworth says that Mr Adams gave him two reasons for the testing; that it was *a health and safety issue* and *that he wanted "to send a strong message" to the employees.*

[61] Mr Hollinsworth sent Mr Adams an email on 8 March in response to their discussions that morning in which he wrote:

The Company's decision to use Health & Safety Policy to "send a strong message" to the staff is also a clear breach ...

[62] Mr Adams says he did not tell Mr Hollinsworth that he wanted to *send a strong message to staff.* However, Mr Hollinsworth's contemporaneous email

supports his evidence, and I accept that Mr Adams told him Mr Hollinsworth one of the reasons for the testing was to send a strong message to staff.

[63] A desire to send a strong message that drug use will not be tolerated, whilst in line with CHH's expressed desire to uphold strong health and safety standards, is not a consideration that fair and reasonable employer could use to override the terms of the Policy and Operating Procedures and does not justify the testing.

[64] Mr Adams says that he sought agreement from his manager and advice from CHH's human resources staff who confirmed he had the right to test for reasonable cause in the way he proposed. In light of my findings, that advice was incorrect. The advice to Mr Adams does not justify the testing. A fair and reasonable employer in all the circumstances could not have been so confused by or ignorant of its own Policy and Operating Procedures.

[65] Even though Mr Adams thought he had good cause to test he did not have reasonable cause, in terms of the Policy and Operating Procedures, to test one employee let alone most employees. The testing was not justified on the basis of Mr Adam's health and safety concerns.

[66] CHH argues the way the testing was handled was justified as it was carried out in a professional and sensitive manner because the NZDDA complied with AS/NZS 4308:2008. It submits testing was conducted so as to preserve employees' dignity and privacy to the greatest extent possible.

[67] The applicants disagree and in particular argue that the observed or monitored collection of the urine samples from the male employees, especially compared with its process for the female employees, is in breach of the AS/NZS standard and was unjustifiable.

[68] Mr Erickson submits that there are two considerations to be balanced; the integrity of the testing process and the employee's dignity. That is correct in so far as the submission goes. He submits that CHH got that balance right in the way the urine tests were conducted.

[69] However, there is a pre-cursor consideration and that is whether the testing was reasonably required and allowed in the first place. In this case the testing was not in line with the applicant's employment agreements, and in addition it was not ever

going to be able to identify who planted the marijuana plants. In setting its Policy and Operating Procedures CHH struck a balance between the competing interests by setting out specific conditions for undertaking reasonable cause testing. However, the integrity of the testing process cannot be used as a justification for breaching the employment agreement.

[70] Mr Erikson refers to Steven Williams' evidence to support the proposition that all practicable steps were taken to preserve the dignity and privacy of the test subjects. Mr Williams is the managing director of the company that owns and operates the Nelson based NZDDA franchise. He says:

NZDDA conducts monitored, but not directly observed, testing. In the case of male donors.... Remaining in the van provides a further safeguard against the donor tampering with the sample. AS/NZ 4308:2008 provides ... the sample is to be taken "in an area such that individual privacy is maintained". We consider it is acceptable to stay in the van while a male donor provides the sample because there are sufficient safeguards for privacy. ...

In the case of female test subjects, our practice is that the tester will leave the van and close the door. This is because the female donors are seated while they provide a sample. Their privacy would not be protected to the same extent as the male donors if the tester remained in the van.

[71] The union submits that the AS/NZ standard does not allow the kind of *monitoring* that was carried out with the male applicants. Ms McNally submits that the way testing was carried out for male applicants was not in line with the AS/NZ standard and was no more acceptable than it would have been to watch the women urinate. She points out that the standard allows for *observed collections where there is an unacceptable risk to the integrity of the specimen*¹².

[72] Mr Williams' evidence was that there was *no unacceptable risk* to the integrity of the specimens in the March 2013 testing.

[73] Because the testing was not for reasonable cause, in that no employee was showing signs of impairment, I agree that there was no unacceptable risk to the integrity of any of the specimens. That appears to be evidenced by the fact that CHH and the NZDDA did not consider that the female employees needed to give specimens while being observed. Therefore, it is certainly arguable that the way the testing was conducted for male employees was outside of the bounds of the AS/NZ standard. However, Section Three of the Operating Procedures says that urine specimens will

¹² Page 12 of the Standard at clause 2.2.2.

be provided *in private, but accompanied*. It is arguable that the female employees were not accompanied in that they were alone in the van with the door closed. It is not clear what was intended when that provision was drafted. For example, could all donors be accompanied but given adequate privacy by the tester remaining in the body of the van perhaps at the table without directly observing any donor?

[74] I do not need to make a determination on whether the NZDDA breached the AS/NZ standard and I do not have enough evidence to do so.

[75] However, I will deal with the difference in the way male and female employees were treated under the consideration of compensation. As a part of that I will consider whether male employees were more disadvantaged than female employees because they were accompanied or observed during the provision of the sample.

[76] A fair and reasonable employer could not have made the decision to test all employees for reasonable cause in all the circumstances at the time and therefore the applicants have a personal grievance that they are unjustifiably disadvantaged which leads to a consideration of remedies.

[77] CHH breached the employment agreement. However, the applicants have not claimed that a penalty should be imposed.

Did CHH breach its duty of good faith to the applicants?

[78] Ms McNally says that CHH had an obligation to know the legal basis on which it was justified in drug testing its employees. The union drew to CHH's attention that the testing was not in line with its Policy and Operating Procedures and CHH decided to carry on nonetheless.

[79] Ms McNally submits that in proposing and carrying on the testing CHH breached s.4(1)(b) of the Act that provides the parties to an employment relationship, in addition to dealing with each other in good faith, must not, whether directly or indirectly, do anything to mislead or deceive each other or do anything that is likely to mislead each other. Presumably this refers to CHH telling the applicants it was justified in testing them under the reasonable cause provisions and an allegation that was misleading.

[80] Ms McNally also says that CHH breached s.4(1) of the Act because s.4(4)(d) of the Act applies to *a proposal by an employer that might impact on an employee*. Although unstated I assume the *proposal by CHH* was to test the employees for drug use using the reasonable cause provision.

[81] Mr Erikson submits that there was no breach of CHH's duty of good faith because at all times it openly communicated with the union about what it was proposing to do and that it allowed the union to address its members. In addition, CHH was motivated by a genuine desire to ensure the health and safety of its employees.

[82] The Court of Appeal in *Carter Holt Harvey Limited v National Distribution Union Inc.* considered the question of how to assess whether there has been a breach of good faith:

*The matter is not greatly assisted by seeking to characterise the inquiry as subjective or objective. Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.*¹³

[83] Mr Adams sought approval from his manager to test the site as he proposed and advice from CHH's Human Resources department. He imposed the testing and continued with it, despite Mr Hollinsworth's views having been communicated.

[84] Mr Adams impressed me as honestly and genuinely holding the view that the circumstances allowed him to undertake the testing under the Policy and Operating Procedures. However, his view of his ability to undertake drug testing under the reasonable cause provision of the employment agreement was incorrect. He also knew that the union has previously protested about CHH's reliance on reasonable cause testing in November 2011. CHH's approach was wrongheaded but I do not find that Mr Adams acted with a lack of honesty and openness. However, he did have an ulterior purpose or motivation, which was one not allowed for in the employment agreement. CHH intended to find whoever had planted the plants and to send a strong message to its staff that it would not tolerate drugs or drug use on site.

¹³ [2002] ERNZ 239 at para 55

[85] I consider that CHH knew that its actions were not provided for in the applicants' employment agreements but proceeded nonetheless, perhaps not to start with on 7 March before Mr Hollinsworth's intervention but certainly on 8 and 11 March 2013. It is likely that CHH knew in light of the protest raised by the union about the November 2012 testing that it was not acting in line with Policy and Operating Procedures but went ahead anyway. That was a breach of its duty to use good faith to maintain a productive employment relationship.

[86] Section 4A of the Act makes a party who fails to comply with its duty of good faith liable to a penalty if the failure was *deliberate, serious and sustained*.

[87] Ms McNally submits that CHH's behaviour warrants the imposition of a penalty under s.4A(1) of the Act because CHH made a deliberate decision to subject the applicants to reasonable cause testing when it was not justified. Mr Adams was shown the wording of the policy and procedures but he deliberately elected to continue testing in breach of the Policy and Operating Procedures. Ms McNally submits the breach was serious and was sustained because the testing continued over a number of days.

[88] Mr Erikson submits that even should the Authority find that there was a breach of good faith a penalty is not warranted as the breach was not deliberate, serious and sustained. He submits that this is not the kind of situation that warrants a penalty.

[89] In deciding whether to award a penalty I need to decide whether this is a situation that warrants punishment and requires deterrence. Whilst in a different category, that of breach of good faith during bargaining, in the Employment Court case of *Waikato District Health Board v New Zealand Public Service Association Incorporated*¹⁴ a full bench of the Court said:

*...the facts of this case would not meet the very high tests of egregious bad faith required under s 4A of the Act before a penalty can be imposed for bad faith.*¹⁵

[90] According to the online Oxford Dictionary *egregious* means *outstandingly bad or shocking*. Whilst I consider CHH acted in breach of good faith I do not consider that the facts in this case amount to outstandingly bad or shocking conduct amounting

¹⁴ [2008] ERNZ 80

¹⁵ *Ibid.*, at 89

to egregious bad faith. The breach was deliberate, but was not so serious and so sustained as to warrant a penalty being imposed.

[91] I consider that the purpose of deterrence is likely met by this determination that CHH was in breach of its policy and has unjustifiably disadvantaged the applicants. However, a future similar breach of the policy and procedures would be likely to result in a penalty.

Compensation

[92] The finding that the applicants have been unjustifiably disadvantaged means that I need to consider compensation.

[93] However, because the employment relationship between CHH and most, if not all, of the applicants is an ongoing one I consider is more suitable for the parties to make efforts to agree on the amount of compensation payable to the applicants than for me to make orders at this stage. If the Authority was required to make compensation orders it would need to hear evidence from all 76 applicants (71 more witnesses); an exercise that will be very time consuming and costly for both parties.

[94] To assist the parties I indicate that I have reached a preliminary view that if there was no unacceptable risk to the integrity of the urine specimens for the female applicants so that the tester did not need to remain in the van and observe them from behind, or to *accompany*¹⁶ them, there was also no unacceptable risk to the integrity of the specimens for male employees. It follows that the tester did not need to stay in the van and observe the male employees from behind and in doing so infringed the male applicants' rights to privacy and to be treated with dignity. I stress that this decision is limited to the facts of this case and does not necessarily apply to genuine reasonable cause testing.

[95] I accept Mr Williams' evidence that the testers could not see the stream of urine and/or the donor's genitalia when standing behind the male applicants. However, in setting the amount of compensation I would take into account that the applicants say they did not know at the time their genitalia and stream of urine could not be seen and felt embarrassed and uncomfortable.

¹⁶ As the Operating Procedures would allow for.

[96] I note that compensation under s.123(1)(c)(1) of the Act for unjustified disadvantage is generally less than that for unjustified dismissal.

[97] There is no suggestion that the applicants contributed towards the situation which gave rise to their personal grievances so were I to decide on the amount of compensation to pay each applicant there would be no reduction to their compensation on that basis.

Summary of findings

[98] The applicants have been unjustifiably disadvantaged.

[99] CHH breached its duty of good faith to the applicants. However, no penalty for breach of good faith is imposed.

[100] The parties are directed to mediation as soon as possible to set the amount of compensation to pay each applicant, unless they are able to agree without the assistance of the Mediation Service. Leave is granted to return to the Authority to determine compensation if agreement is not possible.

Costs

[101] Costs are reserved. Costs should also be discussed at mediation and may be resolved there. If agreement on costs is not obtained at mediation, whether or not agreement is reached on compensation, leave is reserved to the party seeking costs to provide a memorandum to the Authority within 28 days after mediation. The other party has a further 14 days to respond.

Christine Hickey
Member of the Employment Relations Authority