

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 195/10  
File Number: 5306614

BETWEEN Brenda Toatoa  
Applicant

AND City Line NZ Limited t/a Valley  
Flyer  
Respondent

Member of Authority: Denis Asher

Representatives: Tanya Kennedy for Ms Toatoa  
Susan-Jane Davies for the Company

Investigation Meeting On the papers and by way of submissions, Wellington,  
18 November 2010

Submissions Received 24 November 2010

Determination: 7 December 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Was the Company fairly and reasonably able to discontinue the offer to the applicant of its Alcohol & Drug Free Policy (the Policy) and from a Drug & Alcohol Rehabilitation Contract (the Contract) it signed with Ms Toatoa, prior to dismissing her? Was the dismissal justifiable?

[2] If the applicant was unjustifiably dismissed, what remedies if any – including reinstatement – are appropriate?

### **The Investigation**

[3] During a telephone conference call on 23 July 2010 the parties agreed to a one day investigation in Wellington on 18 November. Timelines for the provision of witness statements and an agreed bundle of documents were also put in place. References in this determination to documents are to those contained in the agreed bundle.

[4] As it happened, Ms Toatoa was hospitalised just prior to the agreed investigation date. Another conference call was therefore convened on 10 November. During that call the parties requested, and – consistent with the Authority’s low-level and speedy statutory function – I agreed, that rather than reschedule the investigation to sometime in 2012, it proceed on 18 November on the papers and with the assistance of submissions from the party.

### **Background**

[5] The relevant facts are set out in the agreed statement of facts and chronology received on 2 September. They can be summarised as follows:

[6] Ms Toatoa was employed as a driver by the Company from June 2009.

[7] She was a member of the Tramways Union and her terms and conditions of employment are contained in the relevant collective employment agreement.

[8] The Policy and the Contract are administrative provisions adopted by the Company and are not contained in the collective agreement; the Contract signed by Ms Toatoa was not identical to the example contained in the Policy.

[9] Ms Toatoa attended a meeting with Company representatives including its general manager on 29 March 2010. The applicant was not forewarned as to its purpose.

[10] At that meeting, and amongst other things, the Company's representatives said that for various reasons they wanted Ms Toatoa, via its Policy, to undertake an alcohol and drug test. The various reasons including her level of absenteeism and, "*Putting it all together. Have a drug and alcohol policy (and there was) reasonable cause*" to require that she be tested (respondent's general manager, pg 34A doc 2).

[11] The general manager advised her that she "*Shouldn't feel threatened by this exercise. It's to protect you and you'll be supported*" (above). But, he also warned that, "*If test refused potential serious misconduct*" (pg 34B, above).

[12] At that meeting Ms Toatoa declined to undergo an alcohol and drug test and the Company suspended her while it investigated its concerns relating to her failure to follow a reasonable and lawful instruction, namely to undertake the test (letter of confirmation of suspension dated 30 March, doc 3).

[13] Another meeting took place on 31 March. Ms Toatoa was reminded that the Company would view her failure "*to follow a fair, reasonable, lawful instruction ... as serious misconduct – outcome could be ... termination*" (pg 41A, doc 4).

[14] At a subsequent meeting on 15 April meeting Ms Toatoa consented to take a drug test (doc 8).

[15] By letter dated 16 April the Company confirmed the lifting of Ms Toatoa's suspension, and thanked her for her "*continuing cooperation ... we look forward to your return to work*" (doc 9). However, I understand that Ms Toatoa never returned to work before her dismissal on 18 May and have seen no explanation why that was.

[16] In the meantime, and by letter dated 12 April, Ms Toatoa's union advised of, amongst other things, a "*personal grievance on the grounds that your request (the applicant undertake an alcohol and drug test) was not lawful*" (doc 6).

[17] On 23 April a drug and alcohol test (the first test) came back as positive for cannabis (doc 10).

[18] A meeting took place on 6 May to discuss the first test. During the meeting Ms Toatoa said she did not like drugs but admitted going “*out with friends and had one*” (pgs 57A & 57B, doc 13), i.e. consumed cannabis on the Wednesday night, prior to the test conducted on the Friday two days later. In reply to concerns expressed by the respondent’s representatives, Ms Toatoa provided the assurance that she wanted “*to make things right*” (above), i.e. undertake rehabilitation.

[19] Because of the positive result and the Company’s requirement she be drug free in the workplace, and consistent with its Policy, and after explaining the Contract, the respondent advised Ms Toatoa that “*It’s up to you Brenda to get further support from Salvation Army’s Hope Services*” (pg 57B, above).

[20] Ms Toatoa was also advised by the general manager that, “*You need to know Brenda, if you fail throughout the random testing process in future it will be immediate termination for you*” (pg 57C, above).

[21] The general manager also advised Ms Toatoa that, “*Once clean you will be rostered for normal work. Until you come clean on drug and alcohol test you will not be paid*” (above).

[22] Ms Toatoa signed the Contract (doc 15). It provided for, amongst other things, the following (verbatim):

*I Brenda Toatoa acknowledge that I have been entered in the NZ Bus health rehabilitation plan and my continued employment with NZ Bus is subject to the following:*

*I am committed to full participation in the Plan with the service provider(s) specified by NZ Bus.*

*I authorise the service provider to release the following information to NZ Bus:*

- *Whether I have kept appointments*
- *Whether the service provider has recommended a course of treatment*
- *Whether I am following that course*
- *Whether to return to work is appropriate and within what timeframe*

- *Whether I have completed the required treatment*
- *Whether a return to work is to full or alternative duties*

...

*I agree to take 6 subsequent drug/alcohol tests per year in the twelve months following treatment and agree that the results are to be released to my employer.*

*I accept that if:*

- *I do not attend or complete the required course;*
- *On any future occasion, including the subsequent tests above, I return a positive drug/alcohol screen, and or*
- *I fail to comply with any aspect of the Rehabilitation Contract*

***My employment with NZ Bus will be terminated with immediate effect.***

*I accept the terms of this rehabilitation contract.*

(signed by applicant, general manager and witnessed)

(emphasis added; doc 15)

[23] The words set out above, “*My employment with NZ Bus will be terminated with immediate effect*” do not appear in the contract example, attached as Appendix 5 to the original Policy (pg 110, Doc 23). However, no other words appear in the contract example which therefore renders it meaningless.

[24] During and after the Authority’s investigation the respondent’s counsel confirmed her client was not relying on those words in that they were not, on this occasion, a reason for the dismissal although, it was submitted, the words could have entitled the Company to dismiss as they were a relevant circumstance at the time of the dismissal: s. 103A of the Employment Relations Act 2000.

[25] The Company also arranged for Ms Toatoa to be retested that day (the second test – par 71 of the applicant’s first witness statement): the resulting advice, dated 10 May (doc 16), confirmed a positive result for cannabis use.

[26] In the meantime Ms Toatoa had contacted the Salvation Army who, because of resourcing, was unable to see her until June 2010 (par 72 of her first witness statement).

[27] By letter dated 11 May, and because of the two positive tests, the Company required another meeting with Ms Toatoa. Its purpose was stated as further investigation of the applicant's commitment to her rehabilitation plan (doc 16).

[28] The meeting was held on 14 May. During the meeting, and amongst other things the general manager advised, "*Results back ... non negative. Had a chance to reflect on results and commitment to rehab plan. We're not convinced – considering termination*" (pg 68A, doc 17).

[29] Ms Toatoa advised the Company she was awaiting an appointment with the Salvation Army and said that she had "*only ever done drugs once (and wanted) to go through rehab programme to do things right*" (above).

[30] The Company accused her of going to a party while suspended and taking drugs: Ms Toatoa's representative stated that, while suspended, she unintentionally took food (mini-muffins) laced with drugs. In reply to an inquiry from the Company's representative, Ms Toatoa said she did not know how long it would take to be clear (i.e. for her to return a negative test result). The Company's representative responded with the view that, "*If a one off, it shouldn't take longer than 2 weeks*" (above).

[31] Ms Toatoa repeated that she was "*prepared to do what's required*" and promised she would commit and gave her word (pg 68B, above). Her representative repeated that the applicant did not knowingly take drugs. The minute does not record her as responding to an invitation from the Company's general manager, that "*You need to tell us now if there's anything else*" (above).

[32] Another meeting followed on 18 May. It opened with the respondent's general manager commenting on the rehabilitation programme and Ms Toatoa's statements that her drug consumption was a "*one-off (and she) hated drugs*" (pg 72A, doc 18).

[33] The general manager also, “*Explained further re test analysed further and no reduction – hence concerned about her commitment*” (above).

[34] Ms Toatoa replied with, “*Thinks next test will be clear*” (above).

[35] Following an adjournment the meeting reconvened and the respondent produced a comparison report. Amongst other things, it stated:

*Comparison reports are prepared to compare THC-Acid results for the same person. The reason why the THC-Acid levels are not compared directly is that urine is always changing. For example the more fluid you drink the more dilute the urine is and subsequently any drug levels are lower. When comparing THC-Acid levels, the calculated THC-Acid levels are adjusted to take into account the urine strength. The adjusted results are called “normalised levels for THC-Acid”.*

...

*(The normalised level findings in respect of Ms Toatoa were estimated as 900 nanograms per milligram for the first test, on 23 April, and 1000 for ng/mg for the second, on 6 May)*

...

*A non regular user of cannabis is expected to return a negative result within 2-3 days after cannabis use whereas a regular user can take up to 20 days to return a negative result. The normalised level for both samples can only be estimated due to the high levels of THC-Acid in each sample. **There is no reduction in the normalised level between sample dates (13 days apart) indicating consumption of cannabis has continued after 23 April 2010.***

**This report is intended to be a guide only.** Physiological characteristics of the individual have not been considered. We recommend discussion of this report with an appropriate health professional.

(Signature and position; dated 18 May 2010)

(emphasis added; doc 19)

[36] Ms Toatoa's representative observed that it indicated "... *consumption has continued after test on 23/4*" (page 72B, doc 18), and asked if the report's recommendation that it be discussed with an appropriate health professional had been acted on, and was advised no. He also sought another test.

[37] Another adjournment occurred. On the resumption of the meeting the general manager advised, "*From our point of view it was about (the applicant) being truthful. During meetings we have explained trust and confidence, and commitment in rehab plan. (The applicant) has said she hates drugs and it was a one off. Questions trust and confidence – I don't have trust and confidence in you ... . also put the safety of our people at risk. Dismissed with immediate effect.*" (above & pg 72C).

[38] A letter dated 19 May (doc 20) set out the respondent's reasoning and confirmed its decision. It included the following:

*On Friday 14 May and Tuesday 18 May 2010 the Company held investigation meetings with you to discuss concerns about your commitment to the rehabilitation plan. In particular your admission that you ingested drugs on Wednesday 21 April 2010 (albeit unwittingly in your suggestion) whilst suspended on full pay pending the outcome of drug testing, and while recovering from an operation.*

*Further, we discussed the comparison report comparing THC-Acid results from the drug tests conducted ... on 23 April and 6 May 2010 and further analysed by the ... (ESR).*

*I raised my concern that your decision to attend a five day party ... while suspended on full pay for suspected drug use was not a good indication of your commitment to rehabilitate. Your admission that you took drugs during this time, even if I were to accept that this was by mistake, is cause for alarm. You were supposed to keep yourself available on short notice in case we needed to meet. As it happened we were unable to meet with you or make any contact for several days because you left your mobile phone in Palmerston North while visiting your daughter.*

*Following adjournments, I explained that I did not believe you were committed to the rehabilitation plan, despite your statements and those of your representative ... . Your actions have caused me to lose trust and confidence in you and I am not*

*prepared to risk the safety of our customers, your fellow employees and the public by continuing your employment.*

[39] At the time of her dismissal Ms Toatoa had not been able to commence the rehabilitation programme due to provider unavailability.

[40] By letter also dated 19 May Ms Toatoa's union advised, "*This serves to raise the matter of your decision yesterday to dismiss Brenda Toatoa, as a personal grievance*" (doc 21). The union sought mediation assistance at the same time.

[41] A third test dated 24 May returned a positive result for cannabis use (doc 22).

[42] Ms Toatoa attended the rehabilitation process and counselling post-termination of her employment.

[43] A later test dated 16 November returned a negative result in respect of various drugs including cannabinoids (attachment to applicant's reply submissions received on 24 November). The Company disputes the relevance of this evidence which it has left to the Authority to determine.

[44] Ms Toatoa's efforts to find employment since her dismissal have been unsuccessful. In her witness statements she has described in detail the impact the dismissal had on her.

### **Summary of Parties' Positions**

[45] In Ms Toatoa's amended statement of problem received on 22 September, the applicant said she was unjustifiably disadvantaged by her suspension on 29 March, causing her lost wages and distress, the respondent breaching its Policy, breaches of good faith and as a result of her substantively and procedurally unjustified dismissal on 18 May.

[46] Ms Toatoa sought compensation for wages lost since 18 May and during the period of her suspension, reinstatement, penalty for breaches of good faith, compensation of \$10,000 for the suspension and \$15,000 for the dismissal, and costs.

[47] In its amended statement in reply received on 20 October, the Company said Ms Toatoa did not raise a personal grievance for unlawful suspension within the statutory 90-day period, and it did not consent to the same being investigated by the Authority, and no exceptional circumstances existed which could confer jurisdiction on the Authority.

[48] The only unjustified disadvantage personal grievance raised by the applicant within the statutory 90-day period was in respect of the Company's request on 29 March that she undertake reasonable cause alcohol and drug testing: the applicant alleged the request was unlawful and fell outside of the respondent's drug Policy.

[49] The Company said its relevant actions and decisions were in all the circumstances justified. Its Policy does not have contractual status hence any departures from it do not give rise to any actionable breaches of contract.

[50] The contract signed by the parties on 6 May (doc 15) did not confer any obligation on the Company to continue with the rehabilitation plan, but was "*merely a unilateral declaration of commitment from the applicant*" (par 1.11 of the respondent's amended statement in reply filed on 13 October).

[51] The Company says its decision to set aside the contract and resume its disciplinary process was justified in the circumstances prevailing at the time, as was the decision to dismiss Ms Toatoa, who anyway contributed wholly or substantially to her dismissal.

## **Discussion & Findings**

### **Unjustified Disadvantage Allegation**

[52] I am satisfied that Ms Toatoa's union's letter of 12 April (doc 6) barely but adequately amounts to reasonable notice of the applicant's alleged unjustified disadvantage personal grievance in respect of the suspension and the requirement she be drug tested and thereby meets the requirements of s. 114 of the Act. I reach this conclusion because I find the letter contains sufficient particulars of Ms Toatoa's two allegations supported as it was by the discussions between the parties at the time (and

which were within the statutory 90-day period). I am satisfied the breadth of Ms Toatoa's grievance allegations would have come as no surprise to the Company.

[53] I do not accept, however, that Ms Toatoa was unjustifiably disadvantaged by the respondent's decisions to request testing of her or to suspend her. First, evidence in support of the Company's concerns is found in the record of Ms Toatoa's extensive absenteeism (35 or 37 days in less than a year's employment), in the evidence of her forgetfulness of shifts she was rostered to work and – I add – in the context of her role as a driver, responsible for transporting paying passengers on public roads.

[54] Second, vindication of the Company's initiative rests in Ms Toatoa testing positive on three occasions for cannabis use. Those results confirm the justifiability of the Company's reasonable cause decision, and its decision to unilaterally suspend Ms Toatoa from driving duties because of the threat she posed to herself, passengers and other road users; see *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587.

[55] I also find that any damage done to Ms Toatoa by being summonsed to a meeting (on 29 March) without forewarning as to its content and the risk to her employment was put right shortly thereafter by subsequent meetings at which she was represented where she did know clearly in advance the purpose of those meetings.

[56] Finally, even if Ms Toatoa had been unjustifiably disadvantaged by the request she undertake an alcohol and drug test and by her suspension then no compensation would be payable because her actions in consuming cannabis (as explained below) inexorably result in a finding of 100% contributory fault: s. 124 of the Act applied.

### **Unjustified Dismissal Allegation**

[57] The Company expressly set aside its initial disciplinary process (by withdrawing the applicant's suspension) when Ms Toatoa accepted its requirement she be tested. Following the first positive test it then entered into, by contract, a rehabilitation plan with the applicant. The consideration enjoyed by Ms Toatoa was the suspension of the initial disciplinary process, and in particular the respondent setting aside the option of disciplinary action in respect of the positive test.

[58] Was the Company then obliged to allow Ms Toatoa to complete the rehabilitation process? Or was it able, later, because of the second positive test, to revive or initiate an entirely new disciplinary process, culminating in her termination? If it was, was that termination justified?

[59] Per s. 103A of the Act, the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[60] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances. It is not a question of what the Authority or the Court might apply.

[61] In that judgement the Court rejected conflating the employer's decision to decline to offer its drug rehabilitation programme with a finding that *V* was unjustifiably dismissed.

[62] In *Parker v Silver Fern Farms Ltd* [2009] ERNZ 301, Chief Judge Colgan observed that:

*Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the respondent, these should be interpreted and applied strictly.*

(par 26)

[63] As is made clear in the record of the 18 May meeting (doc 18) and the letter of 19 May (doc 20), the general manager terminated Ms Toatoa's employment because of the following,

- He was concerned the applicant was not truthful;
- He did not have trust and confidence in her;
- He believed she put people's safety at risk;
- Ms Toatoa admitted to ingesting drugs on 21 April while on full pay pending the outcome of drug testing and while recovering from an operation;
- Ms Toatoa's decision to attend a five day party while suspended on full pay for suspected drug test did not indicate she was committed to rehabilitation;
- She admitted to taking drugs and even if it was accepted that was by mistake it was cause for alarm;
- The applicant was supposed to keep herself available on short notice in case the respondent needed to meet with her, and as it happened the respondent was unable to meet with her or make contact for several days because she had left her mobile phone elsewhere;
- He did not believe she was committed to the rehabilitation plan despite her statements and those of her representative; and
- Continuing her employment would put the safety of customers, fellow employees and the public at risk.

[64] Some of these grounds do not withstand scrutiny:

- a. No evidence was provided by the Company to support one of the grounds for Ms Toatoa's dismissal, that her continued employment would put others at risk. The evidence before the respondent (and the Authority) was that the applicant was either suspended, not working or on clear notice she could not resume working until she

provided a clean test (refer pg 57C, doc 13). She was clearly in no position to threaten the wellbeing of any passenger or employee. A fair and reasonable employer, objectively measured, would not have relied on this finding as a ground to terminate the applicant.

b. Ms Toatoa did not admit to attending a five-day party but gave evidence instead of unintentionally ingesting cannabis at a party on the night of Wednesday 21 April, before the first test on Friday 23 April (pg 57B, doc 13). She also attributed the second positive test to that unintended consumption. There was no evidence produced by the respondent (or put to the Authority during its investigation process) contradicting her claim of attending a party only on 21 April. A fair and reasonable employer, objectively measured, would not have relied on this finding as a ground to terminate the applicant's employment; and

c. There is no evidence of the respondent instructing Ms Toatoa, or making it a condition of her suspension, that she was to keep herself available at short notice to meet with it. That requirement is not mentioned in the minutes of the 29 March meeting (doc 2) or the written confirmation of suspension (doc 3) where other requirements are set out (e.g. not to attend the workplace or any work locations unless specifically requested by the general manager). A fair and reasonable employer, objectively measured, would not have relied on this finding as a ground to terminate the applicant.

[65] However, fundamental to the respondent's decision to dismiss, I find, and as set out in the record of the dismissal meeting of 18 May, was its view that Ms Toatoa was not truthful and, as is made clear in the termination letter of 19 May, the Company did not believe that the applicant was committed to the rehabilitation plan, despite her statements and those of her representative, and had lost trust and confidence in her.

[66] In *Zendel Consumer Products Ltd v Henderson* [1993] 2 ERNZ 377 the Employment Court found that, where independent grounds for justifying summary

dismissal existed, the failure to prove other grounds for dismissal might not render the dismissal unjustified.

[67] Those conclusions derived from the comparison report and its indication that Ms Toatoa had continued to consume cannabis after 23 April (pg 73, doc 19). While some questions have been raised by counsel for the applicant as to the reliability of the comparison report, the applicant and her representatives do not question the fundamental findings of the report, i.e. consumption of cannabis continued after 23 April.

[68] Ms Toatoa also does not challenge that she tested positive on a third occasion, after her dismissal, on 24 May.

[69] The Company looked at the passage of time between the first test on 23 April and the second, on 6 May, a period of 13 days, and contrasted that time with the statement set out in the comparison report, that *“a non regular user of cannabis is expected to return a negative result within 2-3 days after cannabis use whereas a regular user can take up to 20 days to return a negative result”* (pg 73, doc 19).

[70] The employer had, on a balance of probabilities basis, evident reason to question Ms Toatoa’s mini-muffin account for testing positive on the second occasion.

[71] Consistent with the discretion permitted by its own rehabilitation procedure flowchart (pg 115, doc 23), I am satisfied that the respondent was able to commence or recommence disciplinary action (see that part of the flowchart leading from *“Positive random test returned within agreed period”* to *“Disciplinary procedure”*; above), which ultimately culminated in the applicant’s termination. No definition is provided in the Policy in respect of agreed period, but I am satisfied it should be understood as commencing from the date the applicant signed the rehabilitation contract – if not sooner, i.e. the date when Ms Toatoa agreed to undertake rehabilitation.

[72] The applicant has not challenged the comparison report’s statement as to expectations of returning negative results; she herself expressed an expectation her third test would be clear. It was not, and while it was after her dismissal and a result

the employer could not have taken into account, occurring as it did 31 days after the first, I am satisfied the third positive test reinforces the balance of probabilities conclusion reached by the respondent in respect of the second test.

[73] In the event that Ms Toatoa was unjustifiably dismissed, I am satisfied that her contributory fault, i.e. her two drug failures, and her subsequently discovered failure to stay drug free, is such that – in equity and good conscience - no remedies, including reinstatement, would be open to her: s. 124 of the Act and *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] ERNZ 155 applied.

### **Conclusion**

[74] In a nutshell, I can find no restraint in law, and in particular in the employment arrangements between the parties, restraining the respondent from resiling from an agreed rehabilitation programme when it has good reason, as was the case in this situation, and commencing disciplinary proceedings leading to a justified dismissal.

### **Determination**

[75] Ms Toatoa was justifiably dismissed.

[76] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**