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Unjustified Dismissal – Failing a drug test at work



We recently acted for an employee who was a heavy transport driver. The employer had a comprehensive Drug and Alcohol Policy in place. The employee was randomly selected to provide a urine sample for drug testing. He returned a non-negative test (a fail). His sample was sent off for laboratory testing which also came back as testing positive for the

presence of THC (cannabis). The employee was invited to a disciplinary meeting and was suspended without pay during the investigation process. The employee was then dismissed for serious misconduct for attending work under the influence of drugs and returning a positive drug test. The case went to the Employment Relations Authority.

The employee's dismissal was held to be unjustified because of a myriad of procedural defects. The Authority found that the drug test was invalid because the test was not conducted in accordance with the terms of the Drug and Alcohol Policy. Therefore the Authority found that there was no evidence of a failed drug test. The Authority also found that the employer had pre-determined the decision to dismiss the employee before the disciplinary meeting and did not correctly exercise its discretion under the Rehabilitation Policy.

The Authority found that the employee was unjustifiably disadvantaged because there was no contractual basis to place him on unpaid suspension.

This case is a good example of how procedural defects can go to the heart of the justification for a dismissal. In other words, even though it appeared that the employer had good reason to dismiss; the decision to dismiss was rendered unjustified by the process the employer adopted.

The lessons to be learnt from this case for employers are:

1. Make sure that we are acting for you and not for your employee;
2. If you have a Drug and Alcohol Policy make sure that you are familiar with it and that you **strictly** follow it;

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3. If you are the decision maker make sure that you are familiar with the company's Policies and Procedures and do not rely on your HR adviser to tell you what the Policies mean. You are the one who will have to give evidence before the Authority justifying the decision to dismiss;
4. Make sure that you understand what the drug test results mean. Engage the services of a toxicologist to explain the results to you. Do not act on assumption, hearsay or ignorance;
5. Allow the employee to present their explanation and do not limit the information that you are prepared to take into account;
6. If you do not accept an employee's explanation or have formed adverse views you should put these concerns to the employee for their comment before you make a final decision.
7. If you have a rehabilitation policy, read the policy and make sure that you comply with it. If the Policy states that the employer has a discretion whether or not to offer rehabilitation, that discretion has to be exercised reasonably. If you take into account irrelevant factors, that may render the decision not to offer rehabilitation unjustified;
8. If you are going to suspend an employee, check their employment agreement and your Policy to see whether the contract allows you to suspend on pay or not. In this recent case there was no ability to suspend without pay. The HR manager dealing with the matter knew that but decided from a tactical perspective to suspend without pay anyway. The Authority criticised her for that decision and awarded compensation to the employee for the breach.

A copy of the full decision is available on our website. We are available to assist you with any enquiries you may have in regard to this complex area.

If you require a Drug and Alcohol Policy we have a comprehensive Policy available for purchase.

Welcome to the Team

Goldstein Ryder has recently added a new staff member to our team:

Rachelle Crequer—Case Manager

Rachelle is responsible for the daily management of client files, including providing support to Linda and Jeff. Rachelle studied Law and Arts at Canterbury University while working for the NZ Police. Rachelle uses the skills she has developed while working for the Police to maintain positive relationships with other parties, government departments and deal with matters in strict confidence.

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