IN THE EMPLOYMENT COURT
WELLINGTON

[2015] NZEmpC 48
EMPC 307/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BERNIE THORNE Plaintiff
AND	KIWIRAIL LIMITED Defendant

Hearing:	25 and 26 March 2015 (heard at Wellington)
Appearances:	A McKenzie, counsel for the plaintiff P Chemis and J Howes, counsel for the defendant
Judgment:	16 April 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] On 27 May 2014, there was a train accident in Wellington. A Tranz Metro passenger unit overshot the end of the line at Melling Station and crashed into a solid concrete block stop. It was reported that the incident caused significant damage to the Matangi train and the stop block as well as the overhead electricity wires that were brought down. Two of the 12 people on board the train suffered minor injuries. The train was operated by the defendant (KiwiRail) and was being driven by the plaintiff, Mr Thorne.

[2] On the day of the accident, in keeping with KiwiRail's normal procedures, Mr Thorne was required to undergo a post-incident drug and alcohol test. The test, carried out by ESR (Institute of Environmental Science & Research Limited), proved positive for cannabis. It confirmed a level of 60 ng/ml which was above the

50 ng/ml cut-off level for concentrations of cannabis. After undergoing a disciplinary process, Mr Thorne was dismissed by KiwiRail effective from 20 June 2014. He then commenced proceedings in the Employment Relations Authority (the Authority) claiming that his dismissal was unjustified. In a determination dated 30 October 2014, the Authority dismissed Mr Thorne's claims.[1] He proceeded to challenge that determination in this Court seeking a full rehearing of the matter.

[3] There was no evidence before me to indicate that Mr Thorne had caused or contributed in any way to the accident. He claimed that the brakes on the train had failed. In an incident report completed on the day of the accident he described what happened, stating at one point:

> At around 100-200m from Melling Station, I did not believe the train would stop in spite of all brakes applied so I opened the cab door and warned the passengers to brace themselves - "Brace yourselves, I cannot stop the train, we are going to hit the stop block".

[4] An article from the Dominion Post website "Stuff", dated 24 July 2014, headed "Train crash driver had 'smoked cannabis'" was produced by consent. It referred to interim findings into the crash that had been released that day by the Transport Accident Investigation Commission. In reference to the train's braking system, the article stated:

> Investigator Tim Burfoot said its tests had showed the brakes had the correct air pressure and were responding to the driver's inputs correctly. The wheel-slide protection control valves were also working fine, he said.
>
> But because the brakes were so badly damaged, investigators had not been able to perform a full performance test and could not rule out malfunction.

[5] The Dominion Post article reported that the Commission hoped to wrap up its full investigation by March 2015 but the Court was told that it is not now expected to release its report until September 2015.

[6] None of these matters were of any direct relevance to the case before me. Mr Thorne was dismissed for failing the drug test, not for anything to do with the accident.

---

1 *Thorne v KiwiRail Ltd* [2014] NZERA Wellington 110.

Background

[7] Mr Thorne is 53 years of age. He began working for NZ Rail as a Trainee Traffic Assistant in 1979 graduating to a Traffic Operator in 1980. In 1987 he joined the Locomotive Branch and became a Train Operator. In 1989 Mr Thorne suffered a serious motorcycle accident and was off work on Accident Compensation until he was rehired by NZ Rail in 2001 as a Train Examiner Operations. In 2002 he applied for and obtained a position as Locomotive Engineer, Trans Metro which was the position he held at the time of his dismissal.

[8] After two years of driving, Mr Thorne became a Tutor Driver training other drivers. In late 2013 he was appointed to the "relay roster" which is a position available to long-serving drivers. The appointment required a period of additional training following which Mr Thorne took up the duties of Relay Driver which involved both Mainline driving and shunting work with diesel locomotives.

[9] Mr Thorne was employed under a multi-employer collective agreement (MECA) negotiated between KiwiRail and his union, the Rail and Maritime Trade Union (the Union). The MECA in force at the time of the accident covered the period 1 July 2012 - 30 June 2014. It contained a new Drug and Alcohol Policy which had been agreed to between KiwiRail and the Union. Mr Graeme Boomer, the Industrial Relations Manager for KiwiRail, said in evidence that it had taken approximately 18 months to conclude the implementation of the new policy which involved the presentation of road-shows and meetings with all KiwiRail employees.

[10] Mr Boomer explained that under the previous drug testing regime there had been no provision for random testing. The previous Drug and Alcohol Policy that applied was known as the "three strikes" policy. It involved:

(a) a written warning after the first positive drug test;

(b) a final warning after the second positive drug test with a referral to drug and alcohol assistance and rehabilitation; and

(c) at KiwiRail's discretion, dismissal after the third positive test.

[11] Mr Boomer told the Court that KiwiRail had become concerned about the effectiveness of its three strikes policy and its inability to invoke random drug testing. He acknowledged that about the same time the Union was also focused on achieving better safety standards and, given what he referred to as "this alignment of views", the parties were able to agree to a different approach to drug and alcohol testing which was incorporated into the 2012 MECA.

[12] Under the new policy all KiwiRail employees were subject to random testing at any time, even if they had been tested before. The new policy did away with the three strikes policy and, amongst other things, provided that after a confirmed positive result, the manager would be informed of the result and the disciplinary process would commence.

[13] There is one other significant change between the old and new policy which has particular relevance to the present case. It relates to the issue of rehabilitation. The old policy provided:

> 21.5.8 The employer and the union will discuss the merits of the case. Rehabilitation is preferred, but KiwiRail and [the Union] acknowledge that rehabilitation may not be appropriate in all cases. Whether entered into voluntarily or as a required entry, rehabilitation will only be offered to employees on one occasion.

[14] The equivalent provision in the MECA provided:

> 21.5.9 The employer and the union will discuss the merits of the case. Rehabilitation is preferred, but KiwiRail and [the Union] acknowledge that rehabilitation may not be appropriate in all cases. Required entry into, (sic) rehabilitation will only be offered to employees on one occasion. In the event of an employee returning a positive test rehabilitation may be offered. Once rehabilitation has been entered into and successfully concluded, if no further positive test is returned during a period of three years the employee may be offered another period of rehabilitation in the event of he or she returning a positive test.

[15] Mr Thorne was familiar with KiwiRail's new Drug and Alcohol Policy. He said in evidence:

> Drug and Alcohol education was given in the form of a seminar held at Wellington Rail Staff Amenities where Drug paraphernalia along with overhead projectors were used to show us how drugs are used and what the

> effects can be. We were told of the policy that was going to be introduced including random drug tests and post incident drug tests. They explained how the random tests would be determined. They also talked about rehabilitation if one was to fail an initial test (as KiwiRail has done with 4 other drivers). I remember alcohol was discussed as not to come to work under the influence and that a similar means of detecting alcohol to that used by the Police would be used - i.e. a breathalyser.

[16] One of the witnesses for KiwiRail, Ms Victoria Clark, was the Passenger Group, Human Resources (HR) Manager. She went into some detail in explaining how the new Drug and Alcohol Policy had been rolled-out around the country with assistance from an independent expert. Staff had been rostered-off in order to enable them all to attend the presentations. Information was provided to employees to take away with them from the meetings and they were also given the opportunity to consult with their union delegates who were present at the meetings. All these presentations were carried out prior to the final sign-off of the new Drug and Alcohol Policy between KiwiRail and the Union. Ms Clark confirmed that Mr Thorne had attended a session held on 22 February 2013. The new Drug and Alcohol Policy came into effect in April 2013.

The facts

[17] Mr Thorne gave no evidence about his drug use, although it was common ground that he had smoked cannabis with a friend on 16 May 2014 following certain family troubles involving his daughter.

[18] After receiving Mr Thorne's positive drug test result on 27 May 2014, Mr Mike Fenton, Metro Operations Manager with KiwiRail, issued a letter, dated 6 June 2014 requesting Mr Thorne attend a formal disciplinary meeting. The letter stated that staff affected by drugs or alcohol were a serious safety risk. It also pointed out that in his role as a Locomotive Engineer, Mr Thorne was deemed to be in a "safety critical role" and therefore the matter was being treated as serious misconduct. He was told that the outcome of the meeting could be dismissal and he was strongly encouraged to bring a support person to the meeting. The meeting was scheduled for Wednesday, 11 June 2014.

[19] The meeting was later rescheduled for 13 June 2014. Mr Thorne attended with a lawyer, Mr Ben Thompson, who was representing both the Union and Mr Thorne. Mr Fenton and Ms Clark represented KiwiRail. The file notes of the meeting record that Mr Thorne acknowledged he was aware that KiwiRail had zero tolerance with drugs and alcohol. He admitted that he had made a mistake and he said it would never happen again.

[20] At a further meeting on 18 June 2014, Mr Fenton again stressed that under the new policy there was "zero tolerance" for drug and alcohol matters. He told Mr Thorne and his lawyer that KiwiRail considered Mr Thorne had broken their trust and confidence and they were looking to terminate his employment for serious misconduct. A 10-minute break was then taken following which Mr Thorne made the point that he did not feel his judgement had been impaired and he wanted to keep his job. He also confirmed that he was happy to look at rehabilitation. Mr Thompson referred to three other locomotive engineers who he claimed had recently tested positive for drugs but had been offered rehabilitation; he wanted to know why KiwiRail was not following the same process in the case of Mr Thorne.

[21] On 18 June 2014, Ms Clark advised Mr Thompson by email that she had looked into the three other cases he had referred to at the meeting and her check confirmed that they had arisen and had been dealt with by a previous management team under the old Drug and Alcohol Policy.

[22] A further and final meeting was called for 20 June 2014. On 19 June Mr Thompson sent a lengthy email to Ms Clark and Mr Fenton presenting detailed submissions on Mr Thorne's behalf. He pointed out that as Mr Thorne had admitted to his mistake and wished to undertake rehabilitation to ensure that no such mistake happened again, he considered that KiwiRail's assertion that the relationship of trust and confidence had been irreconcilably damaged was neither fair nor reasonable. Mr Thompson referred to the treatment of the other three employees who had failed tests and stated that although those cases occurred "4/5 years ago" those employees had been provided rehabilitation and still remained with KiwiRail. Mr Thompson claimed that in those circumstances, it would represent a disparity of treatment if Mr Thorne was to be dismissed.

[23] At the meeting on Friday, 20 June 2014, Mr Fenton stressed again that the three cases from four to five years ago were dealt with under a previous management team and under the old Drug and Alcohol Policy. He referred to another case at the end of 2013 as being more relevant. In that case a locomotive engineer had failed a drug test and had resigned. Ms Clark spoke in support of Mr Fenton and highlighted the fact that KiwiRail now had a new senior leadership team whose priority, largely as "a result of Pike River", was focused on the health and safety of staff and passengers.

[24] Following this there was discussion between the parties concerning a settlement agreement which was intended to be referred to a mediator. However, on 4 July 2014, Mr Thompson advised Ms Clark that Mr Thorne had instructed new counsel in the matter. On the same day, Ms Clark wrote to Mr Thorne withdrawing the agreement and confirming KiwiRail's original decision to terminate his employment for serious misconduct effective from 20 [June] 2014.

[25] A Trans Metro roster produced in evidence showed that Mr Thorne had operated passenger trains on approximately 30 occasions during the 11-day period between 16 May, when he smoked the cannabis, and the accident at Melling Station on 27 May 2014.

Pleadings

[26] It is pleaded in the plaintiff's statement of claim that his dismissal was unjustified in that:

(a) the defendant failed or refused to consider rehabilitation as the preferred option under the MECA;

(b) the decision to dismiss was "improperly delegated";

(c) the defendant failed to consider "the circumstances of any positive test, the absence of impairment, length of service and previous outcome/s in similar cases";

(d) the defendant failed to properly consider alternatives to dismissal, including redeployment; and

(e) in all the circumstances a fair and reasonable employer could not have summarily dismissed the plaintiff.

[27] Although the following point is not pleaded, Mr McKenzie, counsel for the plaintiff, noted in the introduction to his submissions that failing a drugs test is not listed as an instance of serious misconduct in KiwiRail's Drug and Alcohol Policy. Counsel likened failing a drug test as something akin to failing to observe a safety practice and he submitted that as such it came within the definition of "misconduct" simpliciter rather than "serious misconduct".

[28] In its statement of defence, KiwiRail pleaded that it did consider the option of rehabilitation, which was discretionary; that there was proper delegation; that it considered all relevant circumstances, including alternatives to dismissal and that the dismissal itself was what a fair and reasonable employer could have done in all the circumstances.

Legal principles

[29] Section 103A(1) of the Employment Relations Act 2000 (the Act) provides that whether a dismissal or an action was justifiable must be determined on an objective basis by applying the test in subsection (2). Subsection (2) states:

> The test is 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 dismissal or action occurred.

[30] In applying the test the Court must consider the non-exhaustive list of factors set out in s 103A(3) of the Act:

> (3) …
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[31] In addition to the factors described in subs (3), the Court may consider any other factors it thinks appropriate.[2] A dismissal or action must not be found to be unjustified solely because of minor procedural defects if they did not result in the employee being treated unfairly.[3]

[32] The test of justification contemplates that there may be more than one response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances of a particular case. It is well established that in undertaking its analysis, the Court may not substitute its view for that of the employer. Its role is to inquire into, and assess on an objective basis whether the decision to dismiss (or any other action taken) fell within the range of conduct open to a fair and reasonable employer in all the circumstances at the time. If it did, then it must be found to be justified.[4]

Discussion

[33] The case was rather unusual in that the facts were largely not in dispute. For that reason, the respective submissions of counsel assumed particular significance.

Serious misconduct

[34] A preliminary issue raised by Mr McKenzie in his submissions related to the omission of any mention of failing a drugs test in the list of examples of serious misconduct in KiwiRail's Code of Behaviour Policy. It was not one of the stated grounds of Mr Thorne's challenge, however Mr McKenzie referred to it in this way:

---

2 Section 103A(4).
3 Section 103A(5).
4 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [23] and [25].

> Curiously failing a drugs test is not listed [as] an instance of serious misconduct. In the plaintiff's submission it is more akin to a *failure to observe safety practices, working in an unsafe manner.*

[35] Mr McKenzie's observation regarding the omission from the list of examples of serious misconduct is well made. It would appear to have been an oversight. Ms Clark seemed to be genuinely surprised when Mr McKenzie drew her attention to the omission. She acknowledged that failing a drugs test should have been included in the examples of serious misconduct.

[36] Mr Chemis, counsel for the defendant, nevertheless submitted that the Code of Behaviour Policy made it clear that the list of what constituted serious misconduct was not exhaustive. The code referred to serious misconduct as:

> … an act that destroys or deeply impairs a fundamental aspect of the employment relationship. It usually involves the employer's ability to trust and place confidence in the person. Serious misconduct may include, but is not limited to the following examples of behaviour …

[37] As the Court of Appeal noted in *BP Oil New Zealand Ltd v Northern Distribution Union*, in relation to serious misconduct that would justify summary dismissal:[5]

> Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[38] I accept Mr Chemis' submission that KiwiRail was entitled to regard Mr Thorne's drug use and his subsequent operation of passenger trains after his drug use as an act of serious misconduct. It clearly fell within the class of conduct contemplated by the Court of Appeal in the passage referred to above. Mr Thorne and his legal adviser could have been under no illusion that from the outset KiwiRail regarded his actions as anything other than serious misconduct. This point was made in both correspondence and in the course of the disciplinary meetings. It was not challenged at any stage. I find that the conduct in question did amount to serious misconduct in terms of KiwiRail's policy.

---

5 *BP Oil New Zealand Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 (CA) at 487.

Rehabilitation

[39] The principal ground of the plaintiff's challenge was that KiwiRail did not give "thorough consideration" to the question of rehabilitation. Mr McKenzie acknowledged that Mr Thorne did not have a "right" to rehabilitation after testing positive but he submitted that KiwiRail had an obligation under its policy to inquire into the breadth and depth of the plaintiff's drug habit and his rehabilitation prospects and until it had that information then it was not in a position to terminate his employment. Mr McKenzie noted that Mr Thorne had had two previous post-incident drug tests which had proven negative and he submitted that, given his length of service, he had the right, on this occasion to have rehabilitation "seriously considered".

[40] In response, Mr Chemis highlighted the different wording between the old "three strikes" policy and the new policy which applied at the time Mr Thorne returned his positive test result. Mr Chemis submitted that there was no obligation on KiwiRail under the new policy to make the inquiries about Mr Thorne's rehabilitation prospects which Mr McKenzie had suggested. Mr Chemis accepted that KiwiRail had an obligation to discuss rehabilitation with the Union but he stressed that there was no evidence that the Union had complained about the adequacy or quality of those discussions or about the decision not to offer Mr Thorne rehabilitation. Mr Chemis submitted that apart from discussing the merits of the case with the Union, KiwiRail had a discretion as to whether to offer rehabilitation in any particular case.

[41] I consider that Mr Chemis' analysis of the situation is correct. Although the policy states that rehabilitation is the preferred option, it also records that both KiwiRail and the Union acknowledged that rehabilitation may not be appropriate in all cases. The issue of rehabilitation was discussed with the Union's solicitor. In his submissions, Mr Chemis identified the documentation where those discussions were recorded. As noted above, it is not for the Court to substitute its views for those of the employer. If the Court considers that, in all the circumstances at the time, a fair and reasonable employer could have reached the same decision, namely, that rehabilitation was inappropriate, then that is sufficient to justify KiwiRail's decision.

[42] In this regard, the relevant circumstances would include the fact that the roll-out of the new Drug and Alcohol Policy had been a major undertaking for KiwiRail. Witnesses spoke about what the exercise had involved. The new policy was one of the steps that KiwiRail had taken to re-emphasise the importance of health and safety issues following the Pike River disaster. The MECA records that it was developed by both KiwiRail and the Union. The policy reinforced this point by stating, *"KiwiRail and [the Union) want their employees/members to be safe at work."*[6] As Mr Chemis expressed it, "the policy framework and intent is clear. KiwiRail and [the Union] are trying to prevent impairment and the associated dangers and risks by requiring employees '*to come to work free from being under the influence of drugs and/or alcohol'* the focus is on achieving this goal and thereby reducing risks in the workplace".

[43] During the disciplinary meetings and in correspondence, KiwiRail made it clear to Mr Thorne that they had lost trust and confidence in him. It is not difficult to understand why that should have been the case. Mr Thorne was a long serving senior train driver. He had trained other drivers. He drove passenger trains. He worked in what Mr Fenton referred to in correspondence as "a safety critical role". Mr Thorne knew all about the introduction of the new Drug and Alcohol Policy. At the first disciplinary meeting, Ms Clark made it clear to him that he had broken their trust and confidence. She pointed out that KiwiRail had the responsibility of carrying thousands of passengers every day and the health and wellness of those passengers and their crew were of "the top priority".

[44] KiwiRail heard all the arguments made on behalf of Mr Thorne by his solicitor at the time as to why he should be given another chance and the opportunity to undergo rehabilitation. They may have been persuaded. Indeed, under the old Drug and Alcohol Policy it seems likely that rehabilitation would have been offered. In 2014, however, KiwiRail was operating a new Drug and Alcohol Policy under a new management team. Health and safety issues had become a paramount consideration after Pike River and the new Drug and Alcohol Policy fell under the health and safety umbrella. At the end of the day, KiwiRail was not convinced that rehabilitation for Mr Thorne was the appropriate option. That was a decision open to

---

[6] Clause 21.5.1.

them. In my view, a fair and reasonable employer in all the circumstances at the time could have reached precisely the same conclusion. On that basis, KiwiRail's decision not to grant Mr Thorne rehabilitation was justified.

Impairment

[45] The second ground advanced by the plaintiff in support of its challenge was that KiwiRail had failed to carry out a "contextual analysis" and give proper consideration to factors such as the "absence of any impairment or poor performance" on the part of Mr Thorne. Mr McKenzie submitted that it was incumbent on KiwiRail to make a full and fair investigation of the circumstances in which the plaintiff had tested positive. The points raised under this head of the challenge were that:

- even though he had tested positive for cannabis, there was no evidence of impairment or poor performance by Mr Thorne;
- that he acted in the "honest belief" that there was no impairment, and
- the "low level" of 60 ng/ml where the cut-off level was 50 ng/ml.

[46] Mr McKenzie referred to the decision in *De Bruin v Canterbury District Health Board* in which a mental health worker had been summarily dismissed for slapping a patient's face.[7] Judge Couch concluded that Mr de Bruin had been unjustifiably dismissed. He found that the investigation into the assault failed to meet the standard required under s 103(A)(3)(a) of the Act in that the Health Board had failed to make adequate inquiries into issues such as the amount of force used and whether the slap was deliberate.[8] Mr McKenzie made the submission that although the assault in that case was of "serious moment", as he accepted was the conduct of a train driver failing a drug test, it did not automatically lead to a dismissal. Counsel submitted that the wording of s 103A(2) of the Act required the employer's actions to be judged "in all the circumstances at the time the dismissal occurred".

---

7 *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.
8 At [48]-[51].

[47] To further illustrate his submission, Mr McKenzie referred to *Scully v Complaints Assessment Committee of NZ Teachers Council*, which was a case involving a teacher having sexual relations with a student. Mr McKenzie sought to rely upon the following passage of Judge Tuohy's decision:[9]

> There is no question that for a teacher to have a sexual relationship with a student at the school where she is teaching is serious misconduct at a high-level. Cancellation of registration will often be the only appropriate outcome. However, it is well established that it is not the only possible outcome. This must depend upon a careful scrutiny of all the circumstances of an individual case.

[48] This submission involves similar issues to those considered above in relation to the plaintiff's argument on reinstatement. The short answer to the bullet point matters listed in [45] above is that they had all been raised with KiwiRail by Mr Thorne's solicitor in his explanatory letter of 19 June 2014 and/or at one or more of the disciplinary meetings. In other words, I am satisfied that they were matters which had been drawn to KiwiRail's attention and taken into account in the decision-making process, the end result being the decision by KiwiRail to proceed with the dismissal. As noted above, in my view that was an action that a fair and reasonable employer could have taken in all the circumstances at the time and for that reason, it was justified.

Disparity of treatment

[49] No authorities were cited by the plaintiff in support of this ground of the challenge but it was advanced by Mr McKenzie under two limbs. First, in relation to the three historical cases referred to in [20] above, Mr McKenzie submitted that before KiwiRail could distinguish those three cases from the present, it must have had adequate information concerning matters such as the level of cannabis detected in the tests; the level of culpability that each of the employees may have had in any incident and details of the number of shifts they may have worked after their drug consumption.

[50] In response, Mr Chemis submitted that an employee claiming disparity of treatment must be able to demonstrate that another employee in the same or very

---

9 *Scully v Complaints Assessment Committee of New Zealand Teachers Council* [2010] DCR 159 at [21].

similar position was treated differently. Mr Chemis referred to *Samu v Air New Zealand Ltd*, where the Court of Appeal stated:[10]

> Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.[11]

[51] Mr Chemis submitted that there was no disparity in the present case because the three other locomotive engineers failed their tests four or five years ago when a different contractual provision and Drug and Alcohol Policy were in place. Mr Chemis, in reliance on *Samu*, further submitted that even if there was disparity of treatment, it was irrelevant because there was an adequate explanation for the disparity "i.e. the passage of time and the different contractual and policy setting".

[52] I accept that on the face of it and without further explanation there is some force in Mr McKenzie's submission that there was an apparent disparity of treatment between this case and the three earlier cases referred to. I agree with Mr Chemis, however, that there is a sound explanation for the disparity. The cases from four or five years ago were considered and dealt with under a different contractual and policy regime and all KiwiRail employees, including Mr Thorne, were fully aware that this was the case. In the circumstances, as was noted in *Samu*, the apparent disparity becomes irrelevant.

[53] The second limb of the argument advanced under this head by Mr McKenzie related to the locomotive engineer who failed a drugs test towards the end of 2013. Mr McKenzie noted that in that case the driver tested positive and resigned prior to dismissal. He noted:

(a) That the drug in that case was the more serious methamphetamine;

(b) That the drug was found to exist at a high-level;

---

10 *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636, at 639.

11 See also *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 at [42].

(c) That the driver missed and went through a red light (with all the safety issues that this entails).

[54] After making these points, Mr McKenzie submitted:

> These factors make the case very dissimilar to the current case.
>
> To that extent the defendant has failed to make a case that the disparity that is evident was permissible.

[55] With respect, as I may have indicated at the hearing, I have some difficulty understanding this particular submission. If the driver in the 2013 incident had kept his job and been placed on a rehabilitation programme then that would have been highly relevant to the present case in terms of disparity of treatment because it was a case that fell to be considered under the new MECA and Drug and Alcohol Policy. That was not the situation, however. The driver resigned before he was dismissed. The case does not give rise to, or demonstrate, any disparity of treatment.

Improper delegation

[56] The thrust of Mr McKenzie's submission on the delegation issue was that under KiwiRail's "Disciplining with Fairness Policy" the authority to dismiss Mr Thorne was vested in the General Manager of his Business Unit, Ms Deborah Hume, and she was to consult first with the HR Resources Manager, Ms Clark, but the evidence was that Ms Clark had been the decision maker in the case. Mr McKenzie submitted that that was "unfair and in breach of policy" and it was "not a trifling matter".

[57] In response, Mr Chemis submitted:

> Ms Clark was the "investigating manager" and she decided on the preliminary outcome in consultation with Mr Thorne's direct manager, Mr Fenton. Prior to the final decision Ms Clark discussed this matter with Ms Hume, the General Manager of the Business Unit, who delegated authority to dismiss [to Ms Clark].
>
> If there were any defects in the process, KiwiRail says that they were minor and did not result in Mr Thorne being treated unfairly.

[58] In the recent case of *Hall v Dionex Pty Ltd*, Judge Inglis concluded that the decision to dismiss was unjustified because it was not made by the employer or representative of the employer and, even if it was otherwise lawful to delegate the decision-making function, there had not been any valid delegation in that case.[12]

[59] In the present case, the relevant provisions in the policy provided in a delegations box that authority to dismiss an employee was vested in the General Manager of the Business Unit, in this case Ms Hume, but it could be delegated to the "relevant Manager". In the next box in the policy there is a requirement: "Consult first with HR Manager in BU". The HR Manager in the Business Unit in this case was Ms Clark. The term "relevant Manager" was not defined. I agree with Mr Chemis, however, that it is likely to be a reference to the "investigating manager" which is the term appearing thereafter. It is not necessarily a reference to the employee's manager because there is a later provision in the policy requiring the investigating manager to consult with the employee's manager "and any other relevant managers" once a preliminary outcome is decided.

[60] When the investigating manager has determined that the appropriate outcome is dismissal then the following provision in the policy becomes operative:

> **Dismissal**
>
> In the case of serious misconduct employees may be liable to dismissal without notice. The General Manager of the Business Unit is to seriously review the case to ensure that no bias has been shown and the process has been procedurally fair. If the General Manager, after the review of the case agrees that the serious misconduct warrants dismissal they may delegate their authority to dismiss to the investigating manager.

[61] The General Manager of the Business Unit was Ms Hume. The evidence was that Ms Clark was the "investigating manager" and she decided on the dismissal outcome in consultation with Mr Thorne's direct manager, Mr Fenton. Mr Fenton had been involved at all stages of the investigation and disciplinary process and he worked closely with and supported Ms Clark in her decision-making.

---

12 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [46].

[62] Ms Hume also gave evidence about her ongoing discussions with Ms Clark during the course of the disciplinary investigation. She gave rather detailed evidence about the meeting she had with Ms Clark prior to Ms Clark's final meeting with Mr Thorne. She satisfied herself that Mr Thorne had committed serious misconduct and that KiwiRail had lost trust and confidence in him. Ms Hume told the Court that after satisfying herself that KiwiRail had acted consistently and lawfully in the investigation and shown no bias or disparity of treatment, she then delegated authority to Ms Clark to terminate Mr Thorne's employment.

[63] The point made by Mr McKenzie in his submissions, as I understand it, was that once Ms Hume delegated the authority to dismiss Mr Thorne to Ms Clark then it was impossible for Ms Clark to consult with the HR Manager (see [59] above) because that was the position which she held. I accept that the wording in the policy document is not as clear as it could have been but it seems to me that the obligation to consult with the employee's Business Unit HR Manager rests on the General Manager of the Business Unit rather than the investigating manager. On the facts, such consultation took place. If I am wrong on this construction of the delegation section of the policy and the obligation to consult was intended to rest on the investigating manager then, in terms of the provisions of s 103A (5) of the Act, referred to in [31] above, I hold that this defect in the process was minor and did not result in Mr Thorne being treated unfairly.

Conclusions

[64] Mr McKenzie raised some other "residual matters" in his submissions and those matters that were relevant to the pleadings have been dealt with above. He stressed that Mr Thorne's length of service with KiwiRail had not been given sufficient weight and he was also critical of the concern expressed by some KiwiRail witnesses about Mr Thorne's failure to disclose that he had worked a number of shifts between the day that he had consumed the cannabis and the date of the accident. He made the point that any employee who had failed a drug test must have failed to disclose it.

[65] I have no doubt that KiwiRail did give proper consideration to Mr Thorne's length of service but as Mr McKenzie acknowledged, that can be something of a double-edged sword. What was clearly of overriding concern to the KiwiRail witnesses was the fact that given his employment history, his seniority and length of service, KiwiRail ought to have been able to trust Mr Thorne to observe its new Drug and Alcohol Policy but he let them down. Under s 4 of the Act, the parties to an employment relationship have a duty to deal with each other in good faith, which includes mutual obligations of trust and confidence. KiwiRail concluded, after its disciplinary investigation, that they could no longer have trust and confidence in Mr Thorne. As indicated above, that was an option clearly open to them on the facts.

[66] I also fail to see why KiwiRail's witnesses should be criticised for expressing concern about the number of shifts Mr Thorne worked prior to the accident while the level of cannabis in his system would have inevitably exceeded the accepted cut-off point. That was a conclusion which they were able to draw from the facts. Mr Thorne let his employer down. As a train driver, the well-being and lives of others were placed in his hands and judgment. KiwiRail recognised that and they were not prepared to take any more risks. They terminated his employment.

[67] For the reasons explained above, which are basically the same as the conclusions reached by the Authority in its well-structured determination, Mr Thorne's dismissal was justifiable. He, therefore, fails in his challenge.

[68] The defendant is entitled to costs. If they cannot be agreed Mr Chemis is to file submissions within 28 days and Mr McKenzie is to have a like period of time in which to file submissions in response.

A D Ford
Judge

Judgment signed at 3.30 pm on 16 April 2015