

INDUSTRIAL RELATIONS COMMISSION (SA)

PERKINS, Ashley Bert

v

GOLDEN PLAINS FODDER AUSTRALIA PTY LTD
MACPRI PTY LTD

JURISDICTION: S 108 Arbitration

FILE NO/S: 3706 and 3707 of 2001

HEARING DATES: 4, 5 and 6 November 2003

JUDGMENT OF: Commissioner AJ Dangerfield

DELIVERED ON: 3 February 2004

CATCHWORDS:

Termination of employment - Whether Harsh, Unjust or Unreasonable - Refusal to take a random drug test - Whether lawful and reasonable request - Drug and alcohol policy included in AWA - Concept of 'zero tolerance' discussed - AWA Drug and Alcohol Policy analysed - Whether Policy reasonably provided for zero tolerance - Policy unclear and internally inconsistent - No valid reason for dismissal - Dismissal harsh, unjust and/or unreasonable - Compensation awarded - Ss 108, 109 Industrial and Employee Relations Act 1994

Harker v Naval, Military and Air Force Club [2002] SAIRComm 29

Occupational Health, Safety and Welfare Act 1986

Workplace Relations Act 1996 (Cth)

Debono v TransAdelaide 1031/99 S Print R8699

Musicians Union of Australia v Warner (1985) 52 SAIR 202

REPRESENTATION:

Counsel:

Applicant: Mr J Rau

Respondent: Mrs M Shaw QC

Solicitors:

Applicant: White and White Lawyers

Respondent: Phillips Fox

THE APPLICATIONS

1. This matter concerns two applications by Ashley Bert Perkins (“the applicant”), one against the first respondent Golden Plains Fodder (Australia) Pty Ltd (“GPF”) and the other against the second respondent Macpri Pty Ltd (“Macpri”).
2. The applications allege that the applicant was dismissed from his employment with either the first or second respondent on 11 May 2001 for refusing to comply with a management direction to provide a urine sample for a random drug test, in alleged breach of a relevant employment policy, in circumstances that rendered the dismissal harsh, unjust or unreasonable in the terms of ch 3 Pt 6 of the *Industrial and Employee Relations Act 1994* (“the Act”).

THE EVIDENCE

3. The applicant gave evidence¹ in support of his application. Expert evidence was also called from Professor Jason Mark White², of the Department of Clinical Experimental Pharmacology at the University of Adelaide. Professor White is also Director, Treatment and Rehabilitation Services, Drug and Alcohol Services Council, a member of the Hanson Institute and Adjunct Professor, Division of Health Sciences, University of South Australia.
4. For the respondent, evidence was given by:-
 - Stuart Barry Price³, who in addition to being a Director of the first respondent GPF and Secretary of the second respondent Macpri, is also Managing Director of SP Hay Pty Ltd and sole Director of Price Agri Export Services Pty Ltd.
 - Benjamin John Wigzell, a former maintenance employee and Maintenance Manager with the respondent and now self-employed as a maintenance contractor in Western Australia. Wigzell and the applicant were co-workers in their employment with the respondent.
 - Eyvonne Linda Price⁴, Office Manager.

¹ Oral testimony supported his statement, which was before the Commission as Exhibit A23.

² Professor White’s extensive credentials were outlined in his CV and attached list of publications, both of which were included in Exhibit A16.

³ His statement was before the Commission as Exhibit R6.

⁴ Her statement is Exhibit R12

- Darren James Hosking⁵, currently the General Manager of SP Hay Pty Ltd but previously Production Manager for the GPF operations up to June 2002;
 - Willy Karl (“Frederich” or “Fred”) Weisz, Plant Operator. Mr Weisz has worked for the respondent(s) for well over eight years, driving forklifts and loading containers.
5. I note that several of the witnesses are related to one another. For example, Mr Hosking’s wife is a member of the Price family (278) and Mr Weisz also has a family connection (286). I mention this only for the sake of context. I do not consider it to have any significance in this case to my assessment of the credibility of any of the evidence. I might also mention that several of the statements were substantially ‘culled’ to omit aspects that were the subject of objection by one or other of the parties on grounds of relevance, hearsay and the like.
 6. There were a number of factual disputes of varying significance. I have resolved them having regard to my first hand impression of the witnesses, the credibility and consistency of their testimony and the likelihood of the various versions of events and possible occurrences.
 7. The applicant gave evidence to the best of his ability. I found him to be fundamentally credible. Although the general outline of his evidence was sound enough, he did however have difficulty recalling numerous important details. Where his evidence conflicts with that of the respondent’s witnesses, particularly on matters of detail, I have generally preferred the evidence of the latter. Where the applicant’s evidence has been preferred, I have specifically said so.
 8. I found all the respondent’s witnesses to be credible. As with the applicant, it was not surprising that given the lapse of time between the dismissal and the matters coming to trial, some were unable to recall specific details as well as others.
 9. The evidence of Stuart Price, Ben Wigzell, Darren Hosking and Fred Weisz was relatively straightforward. The evidence of Eyvonne Price was more difficult to assess. She came across as a thoughtful witness who gave careful consideration to each question asked of her. With one or two exceptions⁶ I consider her evidence on events and circumstances to be generally credible and reliable. Where her evidence occasionally conflicts with that of the applicant, I have tended to prefer her evidence. However, her evidence on certain aspects of the relevant

⁵ His statement is Exhibit R6

⁶ See for example, cross-examination at tr 238

policies and procedures, and their application, was at times confusing. I refer to my concerns in this regard elsewhere in these reasons.

10. Numerous exhibits were also before the Commission. They are nearly all referred to in the factual outline that follows. All the evidence, including the statements, the oral testimony and the documentary exhibits, has been carefully considered in determining the matter.

THE FACTS

Employment Commencement

11. The applicant commenced employment on 4 January 1999 as a forklift driver and plant operator at the Golden Plains Fodder Hay Plant run by what he thought was the first respondent, GPF. He was initially engaged as a casual, but it is accepted that at the time of his dismissal he was a full-time employee.
12. The job was the applicant's first full-time employment after having left high school and having completed a 12 month TAFE course in metal fabrication.
13. The applicant attested to the fact that up to the time of his dismissal he had good relationships with management, including Stuart Price, Barry Price and Darren Hosking. He found them easy to talk to and happy to talk to him about any problems he had (40-41, 55).

Evidence re the Identity of the Employer

14. The applicant's work rosters were all headed 'Golden Plains Fodder'. The training materials that he received also referred to that entity. However he subsequently received group certificates from the second respondent, Macpri.
15. Stuart Price gave evidence⁷ that Macpri was established in 1996 for the sole purpose of providing labour to the hay press plant at Price's Road, Paskeville, known as Golden Plains Fodder ("GPF"). There was no formal written contract between GPF and Macpri for this purpose, neither were any formal invoices raised, but GPF did pay a fee to Macpri for the supply of labour. Macpri advised GPF of what was due each month. In the normal course GPF would then transfer those amounts to Macpri.
16. The Australian Workplace Agreement ("AWA") that the applicant subsequently entered into was expressed to be with GPF. Eyvonne Price

⁷ Par 4 of R6

stated⁸ that this was done on advice from an officer from the Office of the Employment Advocate who had previously had the relationship between Macpri and GPF fully explained to her.

17. While Mr Price agreed that all of the documentation signed by the applicant pointed to him being employed by GPF, he was in fact paid by Macpri “*from day 1*” and Macpri was still in existence at the time his employment was terminated. The applicant’s group certificates referred to Macpri and Macpri also paid his superannuation.
18. The Directors of Macpri delegated authority to GPF management to deal with most issues involving their employees. Although GPF management did not report back to Macpri about staff issues, there were in any event “typically” two of the three Macpri Directors present at those meetings as well. GPF management had authority to make decisions about Macpri employees “in conjunction with GPF policies”⁹.
19. Mr Price said that some decisions were made only by the Directors of Macpri. These included the decision to do the random drug testing on 11 May 2001 that led to the applicant’s dismissal.
20. Mr Price told the Commission (119) that Macpri is essentially a non-trading entity with very minimal assets and that in the event of the Commission recording a judgment against Macpri, the capacity of Macpri to attend to the satisfaction of any such judgment would be greatly limited.
21. Mr Price was cross-examined by Mr Rau, for the applicant, at considerable length (119-128) on the relationship between GPF and Macpri. The key things to be gleaned from that section of the evidence are:-
 - “without understanding the legal side of things” Mr Price said that his view was that the applicant was probably working for GPF;
 - Price did not consider that the AWA was in error in describing GPF as being the applicant’s employer.
 - The earlier drafts of the AWA did in fact list the employer as “Golden Plains/Macpri”

⁸ At par 37 of Eyvonne Price’s statement, Exhibit R12.

⁹ Par 7 of R6

- The applicant was clearly working under the day-to-day direction of GPF;
- The applicant undertook his employment on premises that were both controlled and owned by GPF;
- The only real practical involvement that Macpri ever had was to act as the payroll medium for staff.

Conditions of Employment

22. Eyvonne Price stated that from 1994 to 1999 when employees began work at GPF there was only a simple one-page “employment agreement” in place, a copy of which was attached to her statement¹⁰. It is clear that the applicant would have been provided with a similar document. The document is headed “GOLDEN PLAINS FODDER AUSTRALIA PTY LTD **Job Specification as from May 24th, 1999**”. Cl 13 purports to relate the document to:-

“... the employment, health and safety requirements for all employees at the work place Golden Plains Fodder Australia Pty Ltd; pending the formalisation of an Enterprise Agreement between all employees of Golden Plains Fodder Australia Pty Ltd.”

23. I note that, amongst other things, the document included reference to:-

“...
6. No drinking of alcohol is allowed on the premises.
...
8. Instant dismissal will take place for ... drinking or drug taking on the job or under the influence of same ... and a direction (sic) in accordance with a Health and Safety misdemeanour.
...”

The Applicant’s Duties

24. Upon commencement, the applicant initially worked on what was called the ‘cuber line’. The process on that line was used to produce animal feed pellets. The pellets were produced by a machine which fed into bags. The

¹⁰ Attachment ‘EP 1’ to Exhibit R12

bags were sewn up by a hand-held sewing device. They then proceeded up a conveyor belt and were taken off at about head height by other workers in another section of the plant. The bags were then carried over to, and stacked on waiting pallets.

25. After he had been working on the hay processing line for a few months the applicant started doing occasional shifts as a “Press Operator” when the person normally rostered on that work was absent.
26. The applicant got a forklift licence after some three months or so into his employment. From about the middle of 1999 to the end of that year the applicant was mainly engaged in work as the “bale drag forklift driver”. Then from about December 1999 he mainly worked in what he described¹¹ as “container loader duties”.
27. The hay processing line operated on 2 x 12-hour shifts. The “day shift” started at 7.00 am and went through to 7.00 pm. The “night shift” started at 7.00 pm and went through until 7.00 am. There was a meal break of about an hour’s duration midway through each shift. The applicant said he occasionally worked night shift and sometimes there would be a few months where he would actually spend more time on night shift than day shift.

Initial OH&S Policy Statement - 1999

28. At or about the time of starting work (the applicant said it was several weeks after starting work) the applicant was asked to sign an Occupational Health and Safety Statement¹², which amongst other things, provided that:-

“ ...

DUTIES OF WORKERS:

- (1) **An employee shall take reasonable care:** comply with all requirements of Section 21 of the Occupational Health, Safety and Welfare Act 1986 and appropriate regulations and Golden Plains Fodder Australia Pty Ltd Company policies.
 - (a) ...
 - (b) ...

¹¹ Par 14 of A23

¹² In the form of the document, a copy of which was included in the applicant’s statement at “BTG3” and in the statement of Eyvonne Price (R12) as ‘EP2’

and in particular, **shall** so far as is reasonable (but without derogating from any common law right) -

(c) ...

(d) obey any reasonable instruction that his or her employer may give in relation to health or safety at work;

...

(e) ...

...

(f) ensure that he or she is not, by the consumption of alcohol or a drug, in such a state as to endanger his or her own safety at work or the safety of any other person at work, ie to give proper attention to their work.

...”

29. The applicant said¹³ that at no time during his employment did he consume any drug or medication while working at the hay plant which might have affected his ability to perform the duties for which he was employed. Although he said he had been present at approved social functions at the hay plant where he was permitted to consume beer supplied by management, he had never consumed alcohol at the plant to such an extent that his ability to perform tasks or operate machinery had been adversely affected. There is no evidence to the contrary and I have no reason not to accept the applicant’s evidence on this.

The Applicant’s Employment Record

30. A “first warning” was issued to the applicant on 27 April 2001¹⁴ (about a fortnight before his dismissal) for “preventable fork lift damage”. This followed a “final warning” issued to the applicant some thirteen months earlier on 21 March 2000¹⁵ for circulating a company docket without the authority to do so. In accordance with the accepted disciplinary procedure outlined in his AWA, a “Final Warning” was listed as “Step B”. It followed “Step A - First Warning” and preceded either “Step C - Notice

¹³ Par 9 of A23

¹⁴ Exhibit R2

¹⁵ Exhibit R1

of Termination” or “Step D - Instant Dismissal”. It is evident that the respondent took the view (quite rightly in my opinion) that the “final warning” in March 2000 had become ‘stale’ by the time of the incident that gave rise to the applicant’s dismissal in May 2001.

TAFE Occupational Health and Safety Training

31. Sometime in early 2000 Darryl Barr from the local TAFE college visited the plant on several occasions and spoke to the workforce about occupational health and safety topics. The applicant described these visits¹⁶ as “very low key” and “more a general chat than any formal lecture”. The topic of drugs and alcohol was covered in these discussions together with signs to look for as indicating that a person might be under the influence of drugs or alcohol “such as giggling, strange behaviour or drowsiness”. The applicant stated¹⁷:-

“Basically the idea was that if anyone was observed to be so affected by drugs or alcohol to be impaired in their ability to work, they would be looked after by a supervisor and given counselling. There was no talk at this stage of any form of random drug test or people being sacked for being under the influence of drugs or alcohol at work.”

32. Ben Wigzell said that he recalled a drugs and alcohol session run by Darryl Barr from TAFE about three months prior to the employees being given their Australian Workplace Agreement (AWA). The TAFE session was supported by a video presentation. He said that there was talk during the session about the respondent’s drug and alcohol policy and there was mention of it being a ‘zero tolerance’ policy, which he understood to mean that “if you had any drugs in your system then it was dismissal” (200), or (later in cross-examination) either “attending work under the influence of drugs or alcohol” or “taking drugs or alcohol at work”¹⁸.

TAFE-initiated ‘Alcohol & Other Drugs Policy’

33. Eyvonne Price stated that when Darryl Barr conducted the first of his training sessions he presented a document on GPF letterhead titled “**ALCOHOL & OTHER DRUGS POLICY**”¹⁹. According to Mrs Price²⁰ this document “came to be interpreted as applying at the

¹⁶ Par 18 of A23.

¹⁷ Par 18 of A23

¹⁸ These were descriptions put to the witness by Mr Rau, which the witness agreed to be the meaning of ‘no tolerance’ in this context.

¹⁹ A copy of this was attached to Eyvonne Price’s statement as attachment ‘EP4’.

²⁰ Par 34 of R12

worksite in March 2000”. Amongst other things that document²¹ issued to the employees, including the applicant, stated:-

“ALCOHOL & OTHER DRUGS POLICY

INTRODUCTION

- ...
- The inappropriate use of **drugs and alcohol** can impair an ability to maintain safe work practices.
- ...
- All employees or people engaged to work on behalf of, or at the direction of Golden Plains Fodder, have a responsibility to present for and remain at work **unimpaired by drugs or alcohol.**
- ...

DEFINITION: For the purpose of this policy document

1 UNIMPAIRED BY DRUG OR ALCOHOL MEANS:

- Work performance is unimpaired
- Ensuring no increased risk of endangering the safety of the employee, other employees or plant and machinery or property
- Impaired by drug or alcohol means impaired work performance and an Occupational health & Safety risk.

2 AIM:

The aim of Golden Plains Fodder is to minimise the impact of drugs and alcohol for their employees at their work place.

...

²¹ This was attached to the applicant’s statement (A 23) as ‘BTG 8’

5 EMPLOYEES

- Each employee has a responsibility to ensure that he or she is not, by the consumption of a drug or alcohol, in such a state as to endanger his or her own safety at work or the safety of any other person at work
- Each employee must present for work and remain unimpaired by drugs or alcohol ...

...

7 IMPLEMENTATION OF POLICY

Wherever a manager or supervisor observes work safety is at risk by an employee who is possibly impaired by drugs or alcohol, the following procedures will be followed:

- ...
- Management shall ensure that rehabilitation and assistance is offered to any employee who is identified as having a problem which affects their work performance due to a perceived drug or alcohol issue.
- The incident will be recorded in the employee's personal file and Golden Plains Fodder employment policy will be followed and referred to implement action if necessary under conditions of employment.

...”

34. The applicant stated²² that this policy did not suggest to him, neither was there any suggestion in the talks given by Darryl Barr that:-

- a worker's employment would be terminated for being at work under the influence of drugs or alcohol, or
- that there would be random drug testing, or
- that either a refusal to undergo a test or failing a test would result in termination of employment.

²² Par 19 of A23.

35. The document was quite different from a further policy put in place about 2 months later in 2000 and the one subsequently incorporated into the Australian Workplace Agreements that were presented to employees in May 2000. While this initial TAFE-initiated ‘policy’ is not strictly relevant to the specific issues for determination in this case, it is worth noting that, amongst other things, it:-

- neither used nor implied the term ‘zero tolerance’.
- emphasised the need for employees to present for work and remain “unimpaired by drugs or alcohol”
- reminded employees that they had a responsibility to ensure that they were not, by the consumption of a drug or alcohol, in such a state as to endanger their own safety at work or the safety of any other person at work;
- set out procedures for when a manager or supervisor observed work safety was at risk by an employee “who is possibly impaired by drugs or alcohol”;
- advised that management would offer rehabilitation and assistance to any employee identified as “having a problem which affects their work performance due to a perceived drug or alcohol issue”
- stated that any such incident would be recorded in the employee’s personal file and “...referred to implement action if necessary under conditions of employment (sic)”

The Introduction of Australian Workplace Agreements (AWAs)

36. Arrangements for AWAs for the GPF site were put into place in May 2000. They had a long gestation period in the sense that GPF began planning for them in early to mid-1999 (215). During the course of this planning, management was in contact with the Office of the Employment Advocate. Management also obtained from the Office of Workplace Services a copy of an October 1997 WorkCover publication titled ‘Guidelines for Drugs, Alcohol and the Workplace’²³.

37. It was clear from marks made on the document tendered to the Commission, and confirmed by Mrs Price in her evidence, that during the course of reading this publication, she was concerned to know just “how an ordinary person, like myself or the directors, could identify drug use in

²³ Exhibit R8

the workforce” (217). Mrs Price explained that to this day she is unable to judge whether someone is affected by marijuana. She said that it was because of this difficulty that the directors insisted that the drug and alcohol policy in the AWA be a ‘zero tolerance’ policy, which she said was understood to mean that “if anyone tested positive for an illegal drug or alcohol ... they would lose their employment”. (218) As “ordinary people” none of them believed they could distinguish between recreational or long-term use.

38. Management decided to enforce a zero tolerance policy by means of random alcohol and drug testing. Eyvonne Price sought advice from the Office of Workplace Services on how to go about implementing such a policy and associated random testing. Workplace Services suggested that she speak with an organisation known as ‘Jobfit’. That organisation in turn referred her to Medvet. Mrs Price satisfied herself that the testing conducted by Medvet complied with Australian Standards and on the basis of other information provided by Medvet²⁴ she formed the view that Medvet was an appropriate organisation to conduct random testing (220-221).
39. On Thursday 25 May 2000 the applicant, along with other employees, was handed a copy of an AWA, together with:-
 - a document headed ‘Employee Information re Australian Workplace Agreements’;
 - a copy of the then current ‘Information Statement for Employees’, and
 - the pamphlet ‘What is an Australian Workplace Agreement?’
40. These latter documents were supplied by the Office of the Employment Advocate.

The AWA Drug and Alcohol Policy

41. The AWA contained the following provisions:-

“3. Drug and Alcohol Policy

Consumption of Alcohol or Drugs within the premises of Golden Plains Fodder Australia Pty Ltd or coming to work under the influence of liquor or

²⁴ Exhibit R9

drugs is forbidden. Alcohol can only be consumed in specially designated areas during company functions. The employee may be asked at anytime whilst working on the premises of Golden Plains Fodder Australia Pty Ltd to test for “foreign substances”.

Random Drug and alcohol testing is being introduced at Golden Plains Fodder as part of the GPF Drug and Alcohol policy and program. Testing is considered obligatory at Golden Plains Fodder as employees work in a designated high risk area of employment ie as Operators of complex machinery and/or Plant and Vehicle Operators, and the impact of illegal drug and alcohol use by an employee could result in the loss of a fellow employee’s life and or cause major disruption.

Because the required alcohol and drug tests cannot discriminate between casual, recreational and regular drug and alcohol users and the Golden Plains Fodder Policy prohibits employees from being under the influence of liquor and or drugs while at work, the consequences for an employee who fails a requested drug and alcohol test by returning a positive test result, is loss of employment.

Testing will be conducted according to a rigorous set procedure and the results will be produced from an accredited laboratory.

- (a) When an employee attends for work and is suspected of being under the influence of alcohol and or illegal drugs the Plant Manager and the Directors of Golden Plains Fodder reserve the right at anytime to request a drug and or alcohol blood test, with in the hour requested, by the employee accompanying the employer, and attending the Kadina Medical Clinic at 2 Mine Street Kadina, for a controlled Panel 5 Drug Test.
- (b) The initial refusal to have such a requested drug and or alcohol test will immediately incur a Final Warning Notice (as it is a breach of the Golden Plains Fodder Australia Pty Ltd Occupational health & Safety Policy) which will be confirmed in writing detailing the possible outcome of a further refusal to undertake such a requested test on that same day. Failure to comply with a

second requested drug and or alcohol blood test shall result in loss of employment.

(c) In accordance with the Golden Plains Fodder Disciplinary procedure instant dismissal will take place if the results of the Panel 5 Drug test confirm that an employee was at work under the influence of an illegal drug and or alcohol.”

42. On the same day these documents were handed out (25 May 2000) Eyvonne Price spent about an hour or so explaining the AWA, including these new drug and alcohol provisions and the requirement for random testing (77-78). She said she explained that “if an employee was found to have used drugs his or her employment could be terminated”²⁵. The applicant was present throughout this explanation.
43. Ben Wigzell stated²⁶ that he could not recall any specific information session about the Drug and Alcohol Policy while the AWA was being discussed. While I am satisfied that the explanation did in fact occur, Wigzell’s evidence is an illustration of how concentration levels at the meeting would have inevitably varied from one employee to another and how memories have faded over the last two and a half years.
44. Fred Weisz said that he recalled that a meeting was convened with employees in a “board room” to discuss the AWA. In relation to the AWA Drug and Alcohol Policy, he said he recalled Eyvonne Price saying something to the effect that:-

“... there should be no drug or alcohol in your system whatsoever, and there are going to be random drug tests and everybody is obliged to do them.” (287)
45. He said that the employees were told that the consequences of not doing random drug tests would be “... warnings and the final warning and then you’d get dismissed if you refuse it, or if you’ve got any drug or alcohol in your system, it’s instant dismissal as well”. (287)
46. In cross-examination he agreed (291) that the drug and alcohol policy was only one of a number of issues discussed at the meeting(s) convened to discuss the AWA and that he could not now recall the precise words used by Mrs Price. He did however specifically recall asking at the time about the use of prescription drugs and what would happen if they showed up in one’s system. He said that Mrs Price made it clear that there was a

²⁵ Par 38.11 of R12

²⁶ Refer par 10 of Wigzell’s statement at R7.

difference between prescription drugs and illicit drugs and that if prescription drugs showed up in his system, he would be in the clear (293).

47. The applicant said he tried to avoid having to sign the AWA for as long as possible. While it is not entirely clear why he delayed signing it, there was nothing in the evidence to suggest it had anything to do with the drug and alcohol provisions. He eventually signed it on 11 November 2000. It was subsequently approved by and registered with the Employment Advocate on 8 December 2000.
48. In cross-examination the applicant said that:-
 - although he browsed through the AWA when it was given to him he did not read it as such at the time (79);
 - he did not in fact read it for the first time well after his dismissal (81);
 - he did not ask any questions about it at the time it was given to him (80);
 - although Eyvonne Price spoke to him and others about the AWA in May 2000 he did not recall it having been explained that the AWA superseded other documents that had been issued about drugs and alcohol (80);
 - the provisions in the AWA about random testing were not explained (80), and
 - he could not recall Eyvonne Price saying anything about the drug policy in the AWA being a 'zero tolerance' policy because as an employer they could not discriminate between casual, recreational and regular drug use (81, 89).
49. Darren Hosking said that it was part of his role, along with Stuart Price and Eyvonne Price, to explain the policy to employees. He said he explained to the applicant (and other employees there at the time) that "at any time a random drug test could take place ... and that upon the return of any positive tests would be instant dismissal" (264). He said he remembered using the term "zero tolerance" and explaining that the term meant "no positive test can be returned" (264).
50. Hosking also explained two types of testing that could be carried out; the first type could be done at any time and would cover everyone who was present. The other type of test was where management suspected that

someone was “under the influence, so to speak, at coming to work or during the day or whatever” in which case “we had the right to take them to Kadina to have a drug test in Kadina” (265).

51. In providing background to the policy in the AWA, Stuart Price stated²⁷ that GPF was very safety conscious and pro-active with workplace safety and OH&S management. (No doubt this was prompted in large measure by two industrial accidents in which workers had died at other companies in incidents involving the same type of hay press machine used by GPF.) In addition, Mr Price stated that GPF had experienced several serious workplace incidents of its own since its inception in 1994. He stated²⁸ that he recalled “a number of information sessions” for employees about the AWAs. He personally was involved in explaining some of the contents of the AWAs to staff. He recalled the applicant being present at these sessions, at which the contents of the AWA were explained, including information about the drug and alcohol policy contained in the AWA.
52. In relation to all the evidence on this point **I find that** the AWA Drug and Alcohol Policy was explained on 25 May to all the employees including the applicant. The explanation was part of an explanation of the whole AWA that lasted for about an hour. As with any such meeting, the levels of concentration and understanding would have varied from worker to worker. I find that during the course of the explanation, there probably was mention of the policy being a ‘zero tolerance’ policy but the meaning of the term ‘zero tolerance’ and its ramifications were not clearly and consistently understood by all present. Certainly from the applicant’s perspective, the significance of the concept ‘zero tolerance’ did not ‘sink in’. When he eventually got around to signing the AWA, any explanation given on 25 May and in subsequent discussions had become a distant memory.

The Objective of the Policy in the AWA

53. In cross-examination (131-132) Mr Price explained that the “mischief” at which the Drug and Alcohol Policy in the AWA was directed, was firstly to prevent individuals being impaired at work and thus putting themselves or others at risk and secondly, to ensure that productivity was maintained and that machinery costs, tooling costs and the like were kept in check. He said it was not aimed at preventing workers from consuming alcohol and the like on their days off.

²⁷ Par 21 of R6

²⁸ Par 17 of R6

54. When he was asked about the objective of the policy (270) Mr Hosking agreed that it was to ensure that employees in the workplace could perform their duties “unimpaired” or not affected by drugs or alcohol.
55. In their evidence, both Stuart and Eyvonne Price referred to an incident some years earlier at another hay plant, Balco, where an experienced leading hand had been accidentally crushed to death on an almost identical hay-pressing machine to the one operated by GPF. It was clear that preventing incidents such as these was very much in the directors’ minds when formulating and approving inclusion of the concepts of “zero tolerance” and “random testing” in their drug and alcohol policy.
56. With reference to the opening words of the Drug and Alcohol Policy in the AWA (highlighted in bold), Mr Price confirmed in cross-examination (184, 187, 189) that the applicant was **not** dismissed for consumption of alcohol or drugs within the premises, nor for coming to work under the suspected influence of liquor or drugs. He was also never at any stage invited to attend the Kadina Medical Clinic for any form of test prior to being dismissed.

‘Zero Tolerance’

57. Mrs Price confirmed in her evidence that at the information session about the AWA, she explained to employees, including the applicant, that the policy contained in the AWA was “zero tolerance”. When asked what she told employees was meant by “zero tolerance” she said:-

“It meant that no-one could be at work under the influence of alcohol or drugs.”

58. She was then asked whether she explained the term “random testing”. She replied (222):-

“Yes ... It meant that no-one could be at work under the influence of drugs or alcohol. They could not test positive to drugs or alcohol in a random drug or alcohol test.”

59. In cross-examination (243) she was asked about breath tests for alcohol and asked whether she understood that the threshold test for those tests was zero. The following interchange took place:-

“A. I believed it was zero because the directors wanted it to be zero tolerance.

Q. Of being impaired?

A. No zero tolerance.”

60. Fred Weisz said that in speaking to the policy, Eyvonne Price explained to employees that there could be nothing whatsoever in their system (288). Weisz said that in discussions with the workers he told them the same thing but he did not know whether they understood or acknowledged it because he found them a bit hard to understand at times (289).
61. Ben Wigzell stated²⁹ that he knew that company policy was a ‘no tolerance’ policy “because I believe it was explained to me and it clearly says it in the AWA which I signed”³⁰. When cross-examined on this (203), he firstly admitted that he personally could not recall any specific exchange with anyone in authority on the subject of the Drug and Alcohol Policy in the AWA, although he thought Darren Hosking had probably said something. He was then asked to identify where in the AWA he understood it to mean that it was a ‘no tolerance’ policy. In reply, Mr Wigzell identified the words in the third paragraph:-
- “... the Golden Plains Fodder Policy prohibits employees from being under the influence of liquor and or drugs while at work ...”
62. He said he understood this to mean that if a person was drunk at work or was drinking at work, or came to work “stoned” or was found smoking marijuana or something similar at work, certain consequences would follow. This is what he understood by the term ‘no tolerance’. Despite an attempt in re-examination to get him to expand his answer to include the whole paragraph, the witness confirmed that rest of he paragraph was only relevant to the ‘no tolerance’ issue in that “if a person wasn’t going to have loss of employment for drugs in their system, then it wouldn’t be zero tolerance” (209).
63. I have no criticism of Mr Wigzell as a witness. He plainly ‘called it as he saw it’. He came across as an intelligent, uncomplicated, honest witness. For all that, it is however clear that he for one, had not grasped what the description ‘no tolerance’ really meant at all. The evidence also demonstrates that Mrs Price was similarly confused about its meaning.
64. In his re-examination on this issue, Mr Price was referred to the third paragraph of the Drug and Alcohol Policy in the AWA that refers to tests being unable to discriminate between casual, recreational and regular drug

²⁹ Par 11 of R7

³⁰ Of course whether or not the AWA has that effect is for the Commission to decide, not the witness. This part of his statement was allowed into evidence on this clear understanding - refer tr 212.

and alcohol users. He was asked why that part of the Policy was included in the context of provisions about random drug testing. He replied that it was intended to introduce a 'zero tolerance' policy because of management's inability to determine safe operating levels. He said:-

“... we thought it was fair that - and the reason we put in the nil policy is that we didn't want to be put in the place for these very types of issues that we're here today about, debating over whether someone is safe at work or not safe at work, or whether they're safe to others or not. So it was easier for us, we decided at the time to put in a nil policy. It was far simpler that - we assumed at the time we were doing the right thing by saying that, okay, if everyone knows that it is a nil policy, they've got the right to choose to work under those conditions or not. And certainly when we introduced the AWA we explained that very point, that we didn't want to play, shall I say, God and say what a safe level was, at the time.” (195)

65. I find that whatever else might or might not have been conveyed to the employees, this was at least management's intention.

Expert Evidence

66. It is convenient at this point to refer to the evidence of Professor White, who was called by the applicant to give expert evidence. The Professor's credentials and his expert status were not challenged by the respondent.
67. Professor White had prepared a report dated 9 July 2003 in respect of the related dismissal of one of the applicant's co-workers, Mr Brian Griffiths. Certain aspects of that report were deleted from the material accepted by the Commission as Exhibit A16. The remainder of the report however was of a generic nature and was accepted into evidence.
68. In that report and his supporting oral evidence Professor White stated that:-
- Alcohol concentration is most commonly determined using a breath test, but can also be evaluated using a blood test. These two give essentially similar results.
 - For other drugs, a blood test is required to give an indication of whether a drug is affecting an individual (ie, whether the individual is under the influence of a drug). For most drugs the concentration of the drug in the body is a reasonable indicator of the amount of effect it is producing.

- In contrast, while urine tests³¹ are useful in detecting the presence of a drug in the body and thus exposure to a drug, they are not useful for indicating the degree of effect that the drug is having.
- Drugs are generally detectable for longer periods of time in urine than in blood, often well beyond the period of time over which the drug is influencing the individual.
- In the case of cannabis, blood tests can detect the presence of tetrahydrocannabinol (THC), the major active component of cannabis, as well as the breakdown product of THC in the body, sometimes known as carboxy THC. Urine tests normally detect only the presence of an inactive metabolite of THC, or possibly a combined quantity of THC and its inactive metabolite.
- In the case of blood testing, the sooner the blood test is taken the more likely it is to obtain an accurate result. Even a delay of an hour or two could make a dramatic difference to whether the results of the blood test were of any use or not (144).
- Most experts would agree that there are effects of consuming cannabis if a person's blood concentration exceeds five nanograms per ml of THC (151). The extent of the effects however would vary from individual to individual. There might be some effects that would not be noticeable or in fact of any moment at all (152).
- The inactive metabolite of THC (Carboxy THC) may be detectable in urine many days or even weeks after the last use of cannabis, long past the time at which a person is affected by cannabis. Urine tests for cannabis therefore serve only to determine that a person has used cannabis or been exposed to it, not whether they are under its influence.
- The inactive metabolite or breakdown product (Carboxy THC) stays in the body for a longer period of time than THC. If the aim is only to determine whether a person has been exposed to cannabis, the breakdown product can therefore be a better indicator (137).

³¹ Professor White's evidence was supported by "Manufacturer's Material" regarding standard urine testing, which was before the Commission as Exhibit A24.

- For someone who is only an occasional smoker of cannabis, the breakdown product Carboxy THC will probably be detected for about five days after they last consumed cannabis. For a very frequent consumer however, it can sometimes be detected for periods of up to five or six weeks (138).
- If a urine test demonstrates the presence of the metabolite it is not possible to tell from the urine test alone whether the person being tested is a heavy user or infrequent user of the drug (138).
- With the smoking of cannabis, there is a very rapid onset of action, within minutes, even seconds of first inhaling the smoke. The peak effect will be reached in the first hour. The effects will then gradually wear off over a period of about four hours (139).
- It is possible to get a positive urine test from the passive smoking of cannabis (143).
- Ingesting cannabis in food achieves a peak effect of about half that achieved by smoking cannabis (162). In addition, it takes longer to be absorbed into the blood (an hour or two as opposed to just a few minutes with smoking).
- If a person uses cannabis in a regular pattern, then tolerance will develop to the dose taken. This is particularly important in the context of areas of activity where performance might otherwise be impaired. For example, in driving a vehicle or operating machinery, repeated experience of carrying out these tasks under the influence of cannabis would lead to significant tolerance development, so there would be little adverse effect of the drug on the ability to perform these tasks. However, it is not possible to completely rule out any adverse effects of cannabis on the ability to operate complex machinery and perform complex tasks.
- The detection of drugs present in one's system via a urine test is not necessarily indicative of illicit drug use, eg if one tests positive for opiates in a urine test, that is usually an indicator of the consumption of morphine, but morphine can come from various sources, including from 'over the counter' formulations such as Panadeine. For some drugs therefore, a

second factor to take into account is what therapeutic or ‘over the counter’ medications one may have consumed (165).

69. In a hypothetical question from Mr Rau (139-140), Professor White was asked to consider a person performing manual work over a 12 hour shift at the end of which he or she is asked to submit to a urine test. Assuming the person tested positive, what could we be certain that that test established and what could we be certain that it did not establish? Professor White replied that one could say with certainty that sometime in the previous six weeks approximately, the person either consumed or was exposed to a significant amount of cannabis. It would not be possible to say at all whether the person had been under the influence of the drug during the 12 hour shift.
70. Had the person come to work “stoned”, not consumed any cannabis during their shift and at the end of the shift 12 hours later, returned a positive urine test, Professor White said they would not at the time of testing be under the influence of cannabis, regardless of what the urine test might show.
71. Further to this, Professor White was asked to assume that the urine test had not been taken but there was a need to establish as best as possible whether the person concerned was under the influence of cannabis. What steps could be taken to determine this?
72. Professor White replied (140-141) that there were two options. The main one would be to take a blood test and get a concentration of the active component, THC, and then estimate from that whether the person was or was not under the influence. The other option would be what he called “observation testing”, ie to have someone experienced in observing the behaviour of people intoxicated with cannabis, to observe the subject and draw some conclusions. At least one of those two steps would be necessary in order to make any inference about whether or not the subject was under the influence.
73. In re-examination Professor White said (167-168) that there were three factors that influenced the degree to which a person might be impaired for a given amount and pattern of drug consumption, namely:-
 - their tolerance to the drug;
 - the complexity of the task involved (in the case of cannabis the more intellectually complex the task, the greater the likelihood of impairment);

- The degree to which a person had practised the task.

The 'Panel 5' Test

74. Professor White said that the 'Panel 5' test was only capable of establishing exposure to cannabis at some time in the last six weeks or so. He said that tests like the Panel 5 test were designed to maximise the chances of detecting positive results, rather than in anyway determining influence at any given time (142-143).
75. The following points of relevance arose from Professor White's cross-examination (148-149):-
- One can never be "100 per cent sure" whether a particular blood-alcohol reading in a person would or would not have resulted in impairment. It is an indicator of likelihood but one can never be certain because there are other factors to be considered such as tolerance, pattern of consumption and the environment in which consumption took place.
 - If there were traces in the urine of cannabis, amphetamines, benzodiazepines, opiates, barbiturates, cocaine, ethanol or alcohol, then one could say that it was possible that the person concerned may be under its influence, but one could not tell for sure by a urine test alone (150-155).
 - The higher the concentration of THC in blood the more one can say about the "recency" of cannabis use in terms of being more confident about the time of consumption or at least reducing the window of time in which consumption is likely to have occurred (159-160).
 - As with alcohol, people who may be quite tolerant to cannabis might not show any signs of being adversely affected by it in terms of their ability to carry out fine tasks or tasks requiring some fine-tuning (161).
 - A person would need to have some experience at detecting signs of the influence of cannabis so as not to confuse the signs with someone who is perhaps a little more tired than usual. The more experienced the person, the easier it would be to detect signs of intoxication (161). It would only be at "the extremes" that a non-expert observer would notice signs of intoxication with cannabis (169).

- Again, as with alcohol, a person may well be affected in terms of their fine coordination, but because of their tolerance, they may not appear to anybody else to be so affected (161).
- No blood or urine sample can ever tell whether or not a given person might appear to be adversely affected (162).
- While different methods have been proposed to differentiate occasional users of cannabis from heavy users, none are particularly accurate (164).

Background to the Random Drug Testing of 11 May

76. It is apparent³² that employees were generally aware that there could be random drug tests at work. Ben Wigzell said that they spoke about it from time to time.
77. He also said³³ that he attended management meetings and at several of these he referred to occasions when he would get calls from night shift employees about accidents or breakdowns that “didn’t really make sense”. He said sometimes the night shift employees who would telephone him would be giggling or laughing when they reported their problems. He became suspicious about what might be going on.
78. Wigzell gave evidence³⁴ of having seen Brian Griffiths smoking a pipe in the hay shed one night shift in late April 2001 and also of another incident about a week earlier in which he had reason to suspect that a worker by the name of Wes Sigurdssen had been smoking marijuana. He said that a week or so after the incident with Griffiths, the applicant had mentioned it to Wigzell and asked what Wigzell was going to do about it and “where he (the applicant) stood”. In relation to the latter comment, Wigzell replied that he had never seen him (the applicant) smoking and asked the applicant whether in fact he did smoke at work, to which the applicant replied: “I’m not stupid.” Wigzell said he took that to mean that even if he did, he wouldn’t be stupid enough to tell Wigzell about it, although it is of course quite possible – and in my view probable in this case - that it was just the applicant’s way of making an emphatic denial.
79. In his statement, Darren Hosking gave evidence³⁵ of Ben Wigzell having advised him on Sunday 22 April 2001 of certain workers smoking drugs during night shifts. His recollection of events was supported by extracts

³² eg Ben Wigzell’s statement - par 12 of R7

³³ Pars 13,14 of R7

³⁴ Pars 17-29 of R7

³⁵ Pars 20-23 of Hosking’s statement R13

from his diary in which he recorded notes at or about the same time. There was nothing to suggest that the applicant was one of the workers under Wigzell's suspicion. In any event, as a result of Wigzell's report, Hosking raised the issue at a management meeting the next day, Monday 23 April 2001. Management subsequently decided to conduct a random drug test.

80. Stuart Price said that at about this time Barry Price (a Director of Macpri) told him that a decision had been taken by Macpri to do a random drug test of the employees on site. He understood this decision to have been made in the context of reports to the Directors of Macpri from Darren Hosking and Ben Wigzell that there had been drug smoking on site, that there were drugs in the workplace and that "there was a major drug problem"³⁶. He said that he was also involved in the decision making process about the need for a random drug test. It was in fact his decision to get "professionals" (Medvet) involved in the testing. He endorsed the testing because³⁷ he felt that "there may be a drug issue at the GPF site" and that "we would be liable if we didn't do anything about it".
81. While Stuart Price knew that testing was to take place he did not know when it was to be conducted. He happened to be on site on 11 May performing his normal management duties for GPF when the testing took place. Like all the employees, he too was drug tested. He returned a negative result.

The Events of 10-11 May

82. The applicant attended for work at 7.00 pm on Thursday 10 May 2001. He exchanged a greeting with Brian Griffiths who was the Leading Hand/Shift Supervisor. He said he did not notice anything in Griffiths' conversation or demeanour to suggest that his ability to perform work was affected in any way.
83. The applicant performed work during this shift on what he described as the output end of the hay plant machine. This part of the operation produced compacted export hay bales weighing between 50 and 60 kilograms. The applicant operated a forklift with a grab attachment, picking up the bundles of hay and placing them on a table. The bales were then wrapped in plastic before he picked them up again and drove them down to the container loading area where he stacked them on the loading bay next to where the export containers were to be filled the following day.

³⁶ Pars 25 and 31 of R6

³⁷ Refer pars 46 and 47 of his statement at R6.

84. Another worker by the name of Barry Morphett worked with the applicant on the same shift. He worked at the other end of the hay-processing machine, known as the “bale drag” end. As with Brian Griffiths, the applicant said he did not notice anything in the conversation or demeanour of Morphett to suggest that his ability to perform work was adversely affected in any way.
85. The shift passed without incident. The applicant said³⁸ he recalled having a “pretty good production run”. He had slept during the day on 10 May prior to attending for the start of the night shift at 7.00 pm. He had been working on night shifts with Griffiths and Morphett since the beginning of that week (Monday 7 May). The applicant said he did not consume any alcohol nor did he take any other substance that could interfere with his ability to perform his duties. He said he felt well and alert throughout the night of Thursday 10 May 2001 right through to the end of the shift. I accept the applicant’s evidence on these matters and also accept that it was a relatively uneventful shift.
86. The applicant insisted that at no time during the whole of his employment at the hay plant did he consume alcohol or any other drug during working hours. He denied having ever smoked or consumed marijuana at the hay plant. There is no evidence to the contrary. I have no reason to doubt the applicant’s evidence on this and I accept it.
87. At the end of the shift, on Friday morning 11 May at 7.00 am, the applicant proceeded to the farmhouse, which served as the administration office on the premises, to leave the hay plant and return home. He was in fact the first employee ‘through the door’ that morning. The applicant stated that he signed off his time book at the time. However he agreed in cross-examination that as was the custom, the time book³⁹ was only signed once. It was suggested to him in cross-examination (48) that he did not sign his time book at the end of the shift; that Eyvonne Price was standing near the time books at that time and that he did not go anywhere near them. In response he said he could not remember whether he signed the time book before the shift or at the end of the shift. Having regard to all the evidence I find it more than likely that the applicant followed his normal practice and filled out and signed his timebook at the **start** of his shift. He had not left the premises before the relevant events occurred.
88. Upon entering the farmhouse the applicant recognised Darren Hosking, Barry Price and Eyvonne Price but also noticed that there were some

³⁸ Par 33 of A23

³⁹ Time books covering the duration of the applicant’s employment were before the Commission as Exhibits R3 and R4.

others there whom he did not know. (These people turned out to be from Medvet.)

89. The Production Manager, Darren Hosking, explained to him that a random drug and alcohol test was being implemented and asked him to take part in the testing.
90. The applicant willingly submitted to a breath test for the presence of alcohol (which proved negative) but said he did not consider that management was entitled to require him to undergo any form of drug test. He told Hosking that he did not want to undergo any such test and asked what would happen if he refused? Hosking explained that he would be given a 'Step B = Final Warning Notice' for the initial refusal in accordance with the GPF Disciplinary Procedure at cl 6 of the AWA. This section of the AWA relevantly reads as follows:-

"6. GPF Disciplinary Procedure

The following steps are aimed at ensuring the fair and equal treatment of all employees of Golden Plains Fodder Australia Pty Ltd.

Categories of discipline procedures and warnings shall be issued by the Plant Manager, the Production Manager, the Maintenance Team Leader or a Director for

- **Attendance:** ...
- **Performance:** ...any failure to comply with safe working instructions ...
- **Misconduct:**

STEP A = First Warning

The Production Manager, the Maintenance Leader, the Plant Manager or a Director reprimands the employee for not performing duties satisfactorily (as per the disciplinary categories previously outlined or any other categories deemed necessary). He then keeps a record of the date and any further (sic) that takes place.

STEP B = Final Warning

The Plant Manager and or a Director reprimands the employee for not performing duties satisfactorily (as per the disciplinary categories previously outlined or any other categories deemed necessary) and confirms this in writing detailing the possible outcome.

STEP C = Notice of Termination

The Plant Manager and or a Director confirms there is no improvement after the previous warnings and the employee's employment is terminated.

STEP D = INSTANT DISMISSAL

Instant dismissal will take place for:-

- (a) ...
- (b) Drinking alcohol or drug taking or drug smoking on the job and or under influence of same
- ...
- (h) A direction in accordance with a Health and Safety misdemeanour
- ..."

91. Hosking and the applicant then went through to the kitchen area. Barry Price was there as well.
92. While moving to the kitchen area the applicant said to Hosking that he wished he had known that there was going to be a drug test that day as then he "would not have had 13 cones" the day before (98). The applicant said he was exaggerating at the time. Hosking on the other hand said that the applicant was not laughing at the time and that he took the comment seriously. While I accept that the applicant was exaggerating, I also find that the comment made it clear that the applicant was genuinely concerned about what the test might detect in his system.
93. Hosking and Price then explained to the applicant that refusal to submit to the urine test could eventuate in his dismissal. He was then issued with a first warning. Hosking gave him the warning notice and said he should think about his decision not to undergo the test.
94. The applicant then gave some thought to it for what turned out to be the next hour or so in the lunchroom. During this period several people spoke with him, including Darren Hosking, Barry Price, Stuart Price and one of the people doing the tests (51).
95. When questioned in cross-examination about what he was thinking about during this time he said that he did not want to be known as a drug user. He agreed that he might have said something to Barry Price to the effect that he would rather quit than be fired for being positive to drugs (57). He said (58) he knew that marijuana remained in the blood and urine for a long time and that is why he did not take the test.
96. The applicant also agreed that he spoke with Stuart Price while he was contemplating his position. He said (91) that he "probably" told Stuart that he did not want to take the test because he knew he would be well

over the limit. Stuart Price stated⁴⁰ that the applicant told him that “he definitely did not want to take the test because he knew he would be well over”. I find that the applicant did indeed fear that he would return a positive result for some form of substance and that this is why he refused to submit to the urine test.

97. Stuart Price told the applicant that it was the applicant’s own choice as to whether or not he took the test but if he did not, he would ultimately be dismissed. The applicant then told Stuart Price⁴¹ something to the effect that he believed it would be better for him to be fired than to be “known as a druggie” or possibly that “it’s better for me to quit now rather than take the test and be dismissed” (93-94).
98. Shortly after the applicant entered the farmhouse, Brian Griffiths and Barry Morphett arrived as well. The applicant said that he “waited around” until about 8.30 am, during which time Griffiths and Morphett and some other workers were being tested. He said that during this period he overheard conversation from the visitors who were carrying out the testing to the effect that Griffiths and Morphett had returned positive test results for cannaboids. The applicant said he recalled Griffiths saying something to the effect that he would be willing to undergo rehabilitation. However Hosking told both Griffiths and Morphett to go home and that “the company” would contact them later about what it proposed to do.
99. Hosking stated⁴² that when asked to take the drug test, the applicant asked Hosking if he could go home for awhile as he had something he could take to hide it and then he would come back to work to be tested. The applicant denied this (99).
100. The applicant did however concede that he had actually tried to leave the premises but that after Darren Hosking told him that if he left the premises he would be fired, he decided to stay around to contemplate his options.
101. In cross-examination (95) the applicant said that while he was considering whether or not to submit to the test, both Darren Hosking and Barry Price made the point to him that he should take the test and that “we can deal with it within the company”. He said that this thought and the thought of rehabilitation was going through his head the whole time.
102. Sometime at or about 8.00 am or possibly even prior to that, Hosking produced a document purporting to be the second and final warning

⁴⁰ Par 39 of R6

⁴¹ Refer also Stuart Price’s statement at par 39 of R6.

⁴² Par 33 of R13

notice, which the applicant signed. Hosking told the applicant that if he changed his mind about being tested while the testing team was still there, then he would rip up the notice.

103. When asked on what basis he gave the applicant the final warning and termination notice, Hosking said that it was for “disobeying orders” (269), i.e. for not submitting to the urine test.
104. By about 8.30 am the applicant decided that he would not undergo the test. The dismissal then took effect and he left the premises. He agreed that he had been given ample time to make his choice (95).
105. The applicant agreed that he told Hosking that he would rather have his employment terminated than test positive to a drug test “as this would reflect on future employment records” (100).
106. After leaving the premises that day, the applicant had no further contact with management. He was not subsequently provided with any reasons for termination, although both respondents later filed documents in relation to his application stating that the reasons for his dismissal were:-
 - refusal to provide a urine sample in accordance with the employer’s Drug and Alcohol Policy, and
 - misconduct as a result of breaching the employer’s Drug and Alcohol Policy.
107. In cross-examination Mr Hosking confirmed that he had carefully followed the disciplinary procedure laid down in the AWA Drug and Alcohol Policy because the respondent was relying on the provisions of the AWA to conduct the test. In addition it is clear that he regarded the request for the applicant to submit to a urine test to be a lawful and reasonable instruction that was unreasonably refused.

The Testing Procedure

108. The team from Medvet arrived at the premises at about 6.30 am on 11 May. The testing began at about 7.00 am. All employees and directors on site at the time (some 23 people in total⁴³) were asked to submit to a breath test for alcohol and then to pass a urine sample into a test container. The Medvet testing officer placed a dipstick into the sample, which gave an immediate result for some drugs. Medvet then took the samples away to perform further testing on them. There was no offer to

⁴³ Par 59 of R12

any of the persons tested to have a blood test on that day. No-one offered and no-one asked (257).

109. Over the course of the next week, those employees who had not been present on the day of the testing were asked to attend the Kadina Medical Centre to undergo a drug screening test. No more positive screenings were detected.
110. All employees who tested positive at the random screening on 11 May were suspended on full pay pending final test results. Medvet provided the final test results⁴⁴ on the following Monday 15 May 2001.
111. In cross-examination (251) Mrs Price was referred to the procedures marked (a), (b) and (c) under section 3 ‘Drug and Alcohol Policy’ in the AWA and asked whether the procedures in those paragraphs had any application when Medvet conducted the random test. Mrs Price replied that they did not.
112. She also said in re-examination (260) that she believed that once an employee tested positive to the urine test it was her belief that they would have been affected in some way by whatever drug had been detected. When asked by way of clarification whether she was saying that was her belief or that was how the policy was implemented, she replied that that was how the policy was implemented.

Earlier Rumours of a Random Test

113. The applicant said that he had heard from Barry Price prior to it actually happening that “there would be a random drug test coming” (90). He said he thought this meant they would all be taken away for blood tests. He denied that there was any talk or rumour circulating among the workers prior to the testing on 11 May 2001 of the need to drink a lot of Ural⁴⁵ to flush marijuana out of their system (90).

The Applicant’s Wages/Earnings

114. As at the date of his dismissal the applicant stated⁴⁶ that his average earnings were \$1,711.51 gross per fortnight, or \$855.75 gross per week.

⁴⁴ Completed forms for 4 employees, colleagues of the applicant were before the Commission as Exhibit R11.

⁴⁵ It was explained during the course of the applicant’s evidence that Ural is a substance widely used to treat urinary tract infections and that it can be used to flush the evidence of drugs out of a person’s system.

⁴⁶ Par 45 of A23

At the time of his dismissal the applicant had been employed for about two years and five months.

Events Post Dismissal

115. After being dismissed, the applicant applied for Job Search Allowance. He was paid the allowance at a reduced rate due to the respondent(s) having stated in the Separation Certificate provided to Centrelink that he had been dismissed for misconduct. After a few weeks the applicant obtained casual labouring work for a couple of days a week with a local builder but because of his relatively low earnings at the time, he continued to receive some Centrelink benefits.
116. In December 2001 the applicant started working in a building supplies yard operated by Nicholas Plumbing Suppliers at Moonta. He began work there as a labourer and received 'take home' pay of about \$300 per week. He continued in that employment and has subsequently been promoted to manager of the building supplies area. His average weekly earnings now vary between \$577 (after tax) and \$615 (after tax) per week, depending on whether he works on Saturday mornings in addition to Monday to Friday.
117. The applicant said that he was not interested in returning to work for the respondent(s) because of the way he was treated. He seeks an award of compensation.

The Applicant's Future Prospects

118. The applicant stated⁴⁷ that had his employment not been terminated he believes he would have continued to work indefinitely performing a mixture of plant operator and forklift driving duties. He believes he had good prospects of working permanently as a Plant Operator on day shift and night shift and that his earnings would have increased as a result.

CONSIDERATION

119. I turn now to address the key issues highlighted in the submissions of the parties and the authorities to which they referred.

The Identity of the Employer

120. The first critical issue for determination is the identity of the employer. If Macpri was the employer then the consequence is that the applicant did not have the benefit of the AWA because the AWA was entered into

⁴⁷ Par 45 of A23

between the applicant and GPF. If Macpri was the employer, then it could be said to have treated the applicant with contempt; to have abdicated its responsibility as an employer in not even bothering to supervise his dismissal. On the other hand, if GPF was the employer, then the provisions of the AWA assume a critical relevance.

121. The applicant argued that GPF was his employer. Mr Rau submitted that the only indicator that Macpri had anything to do with the applicant's employment was the fact that the pay slips had the Macpri name on them. Macpri, he said, was nothing more than a conduit for the delivery of salary to the employees of GPF.
122. Mr Rau argued that an alternative way of looking at the arrangements between Macpri and GPF was to view Macpri as an agent for a disclosed principal (GPF) and at law, a contract made in that way is in effect a contract between the individual - the applicant - and the principal. But the contract here was not even entered into by Macpri; it was entered into quite specifically by GPF. The only time Macpri gets a mention anywhere is when the pay slips are distributed. The applicant's entire interaction on a day to day basis was with GPF.
123. In his evidence, Stuart Price said that from a 'lay' point of view all the indications seemed to point to GPF being the employer. I agree with him.
124. On a reading of all the evidence and a consideration of all the relevant indicia I find that GPF was the applicant's employer and hence the relevant respondent in this matter.

The Statutory Duties of the Parties

125. Before turning to the substantive facts of the matter, it is to be noted that they are to be read and understood in the context of responsibilities imposed on the applicant as an employee and GPF as the applicant's employer by the Occupational Health, Safety and Welfare Act 1986 ("the OHSW Act").
126. S 170VR of the *Federal Workplace Relations Act 1996* ("the Federal Act") states that provisions in an AWA that deal (amongst other things) with occupational health and safety, are subject to the provisions of any relevant State law on the matter.
127. Under s 19 of the OHSW Act employers have an obligation *inter alia* to ensure that so far as is reasonably practicable, their employees are, while at work, safe from injury and risks to health. In particular they must

provide and maintain so far as is reasonably practicable, a safe working environment and safe systems of work.

128. For their part, under s 21 of the OHSW Act, employees are generally required *inter alia*, to take reasonable care to protect their own health and safety while at work and to avoid adversely affecting the health or safety of any other person. Specifically they must obey reasonable instructions that the employer may give in relation to health or safety at work and ensure that they are not, by consumption of alcohol or a drug, in such a state as to endanger their own safety at work or the safety of any other person at work.
129. In referring to the duties of employers in the OHSW Act, Mrs Shaw submitted (and I agree) that the effect of the expert evidence in this matter was that a non-expert observer would not necessarily be able to tell whether another person was ‘on drugs’ or otherwise adversely affected by drugs. She asked how else, in the light of this evidence, could an employer be expected to adequately protect the health and safety of its employees, except by having a ‘zero tolerance’ policy that had been explained to the workforce?
130. I shall return to this important issue later, but for now I simply want to highlight the employer’s dilemma in this matter, namely: how does it fulfill its legal responsibilities to ensure that workers do not come to work affected by drugs and/or alcohol when the employer itself is unable to determine whether or not the workers are so affected?
131. This is an issue not just for GPF in this case. It is an issue for every employer. Does a ‘zero tolerance’ policy provide an answer? Would a ‘zero tolerance’ policy be appropriate for any and every employer or only some employers and how would one draw the distinction? I realise that if a ‘zero tolerance’ policy in these matters were applied right ‘across the board’ in industry and commerce, the impact on the workforce, and indeed on society as a whole, would be nothing short of revolutionary. Nevertheless, the whole issue remains a major dilemma for employers.

The AWA

132. Since GPF is the employer in this matter, the AWA and its proper application to the facts becomes critical in determining this application.
133. Mr Rau argued that the AWA was essentially an “employer’s document” in the sense that the employer had drafted it and it was grounded entirely in the employer’s ideas and requirements. Like many or probably most AWAs, while it had been explained to the workers, it had not really been

‘negotiated’ in the traditional sense. Given its essential character, he submitted that the maxim *contra proferentem* should apply, namely the doctrine that⁴⁸ the construction least favourable to the party putting forward an instrument should be adopted against that party.

134. I agree with this submission. In this case the AWA is verbose. It is poorly set out. It is presented in small print. It is ambiguous in parts. It is internally inconsistent. It is not that I don’t have sympathy for a relatively small employer trying to grapple with a huge issue, but frankly, the ‘Drug and Alcohol Policy’ in the AWA here is, with respect, a ‘homespun’ effort to deal with a very complex matter. It imposes potentially devastating consequences for employees who might fall foul of it. If an employer seeks to rely on the provisions of an AWA of its own drafting that has simply been provided to its employees for signature, then the application of the *contra proferentem* doctrine seems to me to be appropriate.
135. In addition, Mr Rau submitted that the first and second ‘informal’ drug and alcohol statements or policies that were in operation prior to the AWA Policy⁴⁹ provided a useful context for the Commission’s consideration of the matter because they demonstrated at least to some extent how the applicant and his co-workers were “conditioned” to believe that the AWA Policy was going to be administered. I agree that these documents made it clear that the focus of management’s concern, at least at that early stage, was on performance in the workplace, not exposure *per se*. In particular, the second statement emanating from TAFE referred to a counselling approach rather than a disciplinary approach with the likelihood of dismissal right up front.
136. Mrs Shaw however drew to the Commission’s attention s.170VPA (1) (c) of the Federal Act which requires employers as an “additional approval requirement for an AWA” to explain “the effect of the AWA”. Mrs Shaw said it was therefore incumbent on the employer in this instance to explain the effect of the drug and alcohol policy to its employees and that is what Eyvonne Price and Darren Hosking did. Whereas the applicant had indicated that the evidence of Mrs Price and Mr Hosking could not or should not affect the interpretation of the AWA, the respondent claimed quite the opposite. Mrs Shaw said that in one sense their explanation to the workforce could be regarded as ‘part and parcel’ of the policy.
137. This would be a good argument if I could be confident that the explanations provided by the authorised GPF management were clear, consistent and unambiguous. The evidence however is not particularly

⁴⁸ Refer Osborn’s Concise Law Dictionary, Eighth Edition.

⁴⁹ Refer pars X and Y above.

supportive of the respondent in this respect. Mr Rau argued that it had to be remembered that at the meeting at which the employees, including the applicant, had had the AWA explained to them, it was the whole document that had been explained, not just the drug and alcohol procedures. The evidence was unclear as to whether the term ‘zero tolerance’ was used at all at the meeting and even if it was, there was confusion over what it meant. For example, in his evidence Ben Wigzell understood that ‘zero tolerance’ meant that one could not be under the **influence** of alcohol or drugs. And Eyvonne Price thought similarly herself.

138. On my reading of the evidence, there is no cause for confidence that a clear, consistent and coherent explanation of what the Policy was meant to convey, was ever provided to the workers. And how could there be? The Policy itself was neither clear, consistent nor coherent. While I accept that an employer’s explanation under s.170VPA (1) (c) of the Federal Act could be relevant to the interpretation of an AWA, the employer’s explanation must at least be clear and consistent and not contradict the terms of the AWA itself. In my view the evidence demonstrates that the employer never was particularly clear on the application of the policy. Confusion still reigns to this day.
139. Alternatively, and in any event, Mrs Shaw submitted that the applicant’s actions on the day of his dismissal made it clear that he understood very well the terms of the policy in the AWA. He understood the obligatory nature of the random testing and that dismissal would follow in the event of him testing positive. He also seemed to be well-acquainted with the characteristics of marijuana and urine and blood tests for its detection. In these circumstances she argued, the applicant’s decision to disobey the instruction given to him was deliberate and carefully considered.
140. I agree with Mrs Shaw on this submission. On the day of the testing – 11 May 2001 - it is clear from the evidence that the applicant was sure in his mind that if there was any trace of an illicit drug in the urine test he was requested to take, he would be dismissed for being a “druggie”. That it what he believed. Regardless of the nature of any explanations given to him previously, that was certainly his understanding of what was going to happen to him on 11 May 2001.
141. Of course that still leaves the issue of whether or not this was a correct interpretation of the Policy and in particular, whether a policy of this nature and hence the instruction given and actions taken in accordance with the Policy were fair and reasonable in the circumstances. I turn then to consider the format and drafting of the drug and alcohol provisions of the AWA.

Analysis of the Drug and Alcohol Policy in the AWA

142. Mr Rau analysed the terms of the Drug and Alcohol Policy in the AWA along the following lines:-

- The general misconduct provisions of the AWA state that a worker will be dismissed if found to be under the influence at work, or discovered taking drugs etc at work. The first sentence of the Drug and Alcohol Policy in the AWA is a simple reflection of the misconduct provisions elsewhere in the AWA. The second sentence of the Policy is consistent with that as well.
- The second paragraph and the first sentence of the third paragraph introduce the concept of random testing.

The Purpose for which the Policy was intended

- There is then, from the third paragraph, an explanation about **why** the policy is being introduced, beginning with the sentence “Random drug and alcohol testing is being introduced ...”. The balance of that paragraph makes it clear that the reason for its introduction was because GPF was trying to deal with the occupational health and safety consequences of illegal drug and alcohol use by employees (potential loss of life, serious injury or major disruption). That, said Mr Rau, was plainly the purpose of the policy.

143. Mrs Shaw was critical of this argument about **impairment** being the fundamental purpose of the policy. She said it was inconsistent with the reference in the policy to the distinction between casual, recreational and regular drug and alcohol users and inconsistent with the consequences of a positive result which, impliedly, constituted a **deeming** provision.

144. Mrs Shaw submitted that by focusing on the issue of impairment as the fundamental objective of the Policy, Mr Rau was effectively ignoring the terms of the Policy which clearly stated that the applicant’s continued employment would depend upon whether or not he tested positive, **not** on whether he was found to be impaired.

145. In my view, while the reference to random testing ‘muddies the waters’ to some extent, **a plain and ordinary reading of the Policy supports Mr Rau’s view of its fundamental purpose**. I find that it was an occupational health and safety measure aimed at preventing or at least

reducing incidents within the business that could result in serious injury or loss of life and all the associated disruption.

- The fourth paragraph of the Policy states that it is difficult to distinguish between casual and recreational use and makes it clear that it does not matter why a person might be drunk or under the influence because whatever the reason, being under the influence of liquor or drugs at work will result in loss of employment.
- Mr Rau then submitted that the policy went ‘off the rails’ near the end of the fourth paragraph with the mention of “loss of employment” being the consequence of an employee failing “a requested drug or alcohol test” by “returning a positive result”. In its proper context, Mr Rau argued that the words “positive test result” could ONLY mean a test establishing that the employee was ‘under the influence of liquor or drugs’. This, he said, was the only way the provision could be sensibly read and understood.
- The policy then goes on to outline how testing is to be conducted. The “rigorous set procedure” referred to in the first line of the fifth paragraph is then outlined from subparagraph (a) “When an employee attends for work ... “ (He rejected Mrs Price’s view that “rigorous set procedure” simply meant that tests would be undertaken in a laboratory.)

146. I pause here to state that I find the analysis thus far, including the purpose for which the Policy was designed, is not only reasonable but also in line with the plain and ordinary meaning of the words.

Paragraph (a)

147. Mr Rau continued that in the case of the applicant, the requirement of paragraph (a) was never discharged. It had never been suggested and there was never any reason to suspect that the applicant had been “under the influence” on the shift in question or indeed at any other time. Mr Rau noted however that paragraph (a) empowered the Plant Manager and the Directors to request a drug and/or alcohol **blood test** within the hour at the Kadina Medical Clinic in the event that they suspected someone of being “under the influence”. However paragraph (a) then totally confuses the notion of a **blood test** with a “**Panel 5 Drug test**”. The latter is a **urine test**, not a blood test and yet the clear and false implication of (a) is that a Panel 5 Drug test is a blood test.

148. Against this, Mrs Shaw argued that the drug and alcohol policy in the AWA referred to two types of testing – (1) random testing and (2) testing via the accompanied visit to Kadina. She said that there was nothing prescriptive about paragraph (a) except to indicate that if someone at work was suspected of being under the influence and random testing was not available, then the person could be taken to Kadina and requested to undergo a drug and/or alcohol blood test AND a panel 5 urine test. She said that on Mr Rau’s interpretation, there were not two testing procedures; there was only one, namely the visit to Kadina for a blood test. That would mean either ignoring the expression “random drug and alcohol testing” in the first sentence of the first paragraph or taking it to mean only an employee being taken to Kadina.

149. I pause here to say that I am not persuaded by Mrs Shaw’s arguments on this. In my view Mr Rau’s analysis of paragraph (a) is the far more natural and logical and far more likely to be the view taken by an ordinary employee or any ordinary person in reading the policy and I so find.

Paragraph (b)

150. Mr Rau continued his analysis by noting that paragraph (b) then contemplates the possibility of an employee refusing to undergo “**such** a requested drug and/or alcohol test” (my highlighting) - in other words, refusing to undergo a **blood test**. The fact that a blood test is intended is reinforced by the specific reference to a “failure to comply with a second requested drug and or alcohol **blood test**⁵⁰ shall result in loss of employment” in the last two lines of paragraph (b). With respect, I agree that paragraph (b) only has application where there is a failure to comply with a second requested drug and/or alcohol **blood test**.

151. In the circumstances of this matter it is clear that there was never a request for the applicant to submit to a drug and/or alcohol **blood test**. He was only asked to submit to a **urine test**. Save and except for the fact that the wrong test - a urine test - was offered and refused twice, the respondent nevertheless purported to implement paragraph (b).

Paragraph (c)

152. Then we come to paragraph (c). Again Mr Rau argued that this paragraph confuses the concepts of a Panel 5 **urine test** and a drug and/or alcohol **blood test** because while a Panel 5 drug test can tell a number of things, it cannot tell whether a person is “under the influence of an illegal drug and or alcohol”, which is the express aim of paragraph (c). It can tell whether there has been **exposure** (in the case of cannabis for anything up to about

⁵⁰ The emphasis is added.

6 weeks) but he submitted that is not what the testing in this context is supposed to ascertain. It is supposed to ascertain whether a person is under the **influence** such as to render him or her an occupational safety hazard to themselves or others, thus warranting their summary dismissal.

153. Mr Rau asked the Commission to bear in mind when interpreting the Policy that paragraph (c) potentially carried with it the most serious sanction of depriving an employee of their livelihood.

154. The AWA Drug and Alcohol Policy, he submitted, was not even understood by its authors, who had attempted to elevate it to a purpose it was never able or intended to achieve. He said the proof of that assertion came in the evidence of Professor White which made it clear that a urine test was absolutely useless for determining whether someone was or was not under the influence of cannabis. It could only tell whether someone has been exposed to cannabis. White's evidence was also that there was roughly a four hour window from the moment of exposure during which a person could be under the influence, meaning that **at the time the test was requested of the applicant in this case, he could not have been under the influence of cannabis.** (Since I have found that the applicant did not smoke or consume cannabis during the shift he had just completed, I have to agree with Mr Rau on this point.)

155. Mr Rau submitted (311) that the Commission was effectively being asked by the respondent to conclude that the applicant - whom no one asserted had appeared to be under the influence of alcohol or drugs at work or had ever taken drugs or alcohol at work - should be sacked for refusing to take a urine test, which could not possibly tell whether he was under the influence of alcohol or drugs and was quite possibly the wrong test under the AWA anyway because the AWA refers to a **blood test.**

156. In summary, Mr Rau submitted that the policy was internally inconsistent. The respondent had been led astray by its assumption that a Panel 5 Drug Test was going to deliver what it wanted. The whole policy was no better than the test and the test was not a test for influence, only for exposure. This made it useless for the purpose it was intended. With respect, I agree and I adopt this analysis of the Policy.

A Higher Standard than the AWA?

157. Mr Rau then addressed the possible argument that there might be some additional, 'higher policy' or standard or obligation overlaying the AWA by virtue of management having addressed the workforce collectively and "incanting" (to use his expression) the words 'zero tolerance' on different occasions.

158. He submitted that it would be a very odd outcome if the standard required in a random test, where an employee was not suspected of anything, were to be more adverse to an employee than the standard required when an employee was actually suspected of being under the influence at work and hence taken off to Kadina for a blood test! It would be odd indeed if the completely random test were, by implication, amenable to a lower standard! One would have thought if there was going to be a higher standard at all, it would be for the random test. I agree.
159. For the respondent's part, Mrs Shaw submitted that the policy in the AWA spoke for itself and should be given its plain and ordinary meaning (*Harker v Naval, Military and Air Force Club* [2002] SAIRComm 29). She said it should also be construed in such a manner as to make it workable.
160. On behalf of the respondent she submitted that the AWA essentially **deems** a worker to be **impaired** (or "under the influence" to use the expression in the AWA) if the worker returns a positive reading. The reasonableness of this approach, she submitted, was clear from the evidence of the applicant himself where he said that had he known that one of his co-workers (Griffiths) used marijuana cakes, he would not have felt safe at work.
161. She insisted that there were two types of testing contemplated in the policy. In the case of random testing, the second line of the third paragraph stated that "testing is considered obligatory at Golden Plains Fodder". Since there was no choice about it and since the provision was, in her submission, reasonable, and the direction given by Mr Hosking pursuant to the provision both lawful and reasonable, it followed that the applicant's failure to comply with such an obligation constituted disobedience to a lawful and reasonable instruction, thus entitling Mr Hosking to take the action he did in dismissing the applicant. Whether Hosking took action under paragraph (b) of the policy (or at least in a manner consistent with paragraph (b)) OR whether he gave the warnings pursuant to his inherent managerial authority to issue lawful and reasonable directions and to take appropriate disciplinary action in the case of refusal to obey, was beside the point. The fact was that all the workers, including the applicant, had had the AWA explained to them; they knew about random testing; they knew what it meant and they knew the testing was obligatory. They also knew that the consequence of failing the test was dismissal. In the case of the applicant, the only reason he refused to take the test was because he feared he would test positive.

162. Mrs Shaw submitted that the applicant, knowing he was a marijuana smoker and knowing that he could be tested randomly in circumstances where it might have been in his system for something like up to 6 weeks, had a choice. He could EITHER:-

- risk his job by continuing to smoke an illicit drug, OR
- stop smoking marijuana altogether, OR
- look for another job.

Summary of Conclusions on the AWA Policy

163. Any personal views I might have about the private use of illicit drugs must of course be put to one side in my consideration. It is not my role to ‘moralise’ about the matter. What I can say though is that the choices presented in Mrs Shaw’s submission are ones that I consider the community at large would find to be harsh, especially if applied across the board to **any** employee in **any** job in **any** industry. The job the applicant performed here and the industry in which he performed it were not what I would consider sufficiently ‘exceptional’ (in the sense that major public safety considerations come into play) to warrant a ‘zero tolerance’ policy.

164. Having carefully considered the respective submissions I find that the policy in the AWA **was** badly flawed in the manner contended by the applicant. It was unsuited to the purpose for which it was intended. It was internally inconsistent. The applicant was not offered a blood test as he should have been on what I have found to be the proper construction of the policy. Even though the applicant’s understanding was consistent with that of the respondent, namely that a positive urine test would have resulted in his dismissal, a common employer-employee understanding of a harsh and oppressive policy frankly does not advance matters for the respondent.

165. I find that the AWA Policy was harsh and unreasonable in terms of the stark choices that it presented the applicant in terms of how he would have to conduct his private life if he were not to fall foul of the Policy. I conclude therefore that, of itself, the AWA Policy could not provide a sound foundation for his dismissal.

Was there a Valid Reason for Dismissal?

166. We therefore go back to the fundamental question: was there nevertheless a valid reason for dismissal in all the circumstances of this case? If the AWA policy itself is not a suitable basis for the applicant’s dismissal, is

there some other basis for arguing that he was validly and fairly dismissed?

Is Zero Tolerance Reasonable?

167. In considering whether there was a valid reason I go back to the real problem that the respondent faced in this case: how can an employer enforce an entirely reasonable policy that workers NOT come to work **under the influence** of drugs or be at work **under their influence** when the employer itself is unable to determine whether or not the workers are so affected?
168. The respondent effectively argues that the only way to deal with this is to have a 'zero tolerance' policy and whether or not the policy can be construed in that way, and whether or not those words were used in explaining the AWA, the applicant intuitively understood what 'zero tolerance' was all about. He understood that if a urine test returned a positive result, dismissal would follow as a consequence.
169. Mrs Shaw submitted a 'zero tolerance' approach was a reasonable policy for the respondent, taking into account all the circumstances of the business, the type of machinery being used, serious accidents that had occurred elsewhere in the industry and so on. The policy in question was all about coming up with the best approach to ensure the safety of the workers overall. In the light of Professor White's evidence, if one cannot tell impairment from either a urine test or even a blood test and a non-expert cannot tell just by observing someone, then a zero tolerance policy must be acceptable and appropriate. It is implemented in the greater good of the workforce as a whole.
170. Is then a 'zero tolerance' policy in the circumstances of the respondent in this case, a reasonable and fair option? I accept that 'zero tolerance' may be appropriate for some employers in some industries. One such example was provided by the respondent in the case of *Debono v TransAdelaide* 1031/99 S Print R8699 (7 September 1999).
171. In that case the employer purported to implement a 'Drug Free Workplace Policy' that among other things deemed any positive drug test to constitute evidence of impairment. The applicant succeeded in that case only because the employer had not ensured that the applicant had signed for a copy of the agreement containing the relevant policy. However, Mrs Shaw referred me to the comments of Rafaelli C at par 36 of his decision in *Debono* as formal Commission support for a 'zero tolerance' approach by employers:-

“[36] It is not desirable for the Commission to interfere with policies developed by an employer unless of course they are oppressive or unreasonable. Given the evidence of Dr White, it is apparent that marijuana defies accurate testing for impairment. In that light, TransAdelaide’s policy prohibiting not only the use of marijuana but its detected presence in a urine test is neither oppressive nor unreasonable. In the light of scientific evidence and procedures to date it is being cautious and I pass no adverse judgment in regard to its position ...”

172. Mr Rau on the other hand, cautioned against any reliance on *DeBono*, which he said could be distinguished in several respects, including the fact that there was no random test in that case, but rather a test initiated as a result of a fatality. He also pointed out other comments of the Commissioner later on in the decision that tended to balance the passage referred to by the respondent. For example, at par 45 the Commission comments:-

“[45] Given my findings above, I do not consider that TransAdelaide had a valid reason to dismiss Mr Debono on the basis of his breach of the Drug Free Workplace Policy. Such policy was not known to him nor is it reasonable to accept that it should have been known to him. **Absent any policy, it might nonetheless be a valid exercise of an employer’s right to dismiss a train driver who takes drugs at work, or who is in possession of drugs or who is impaired by drugs. That might just be commonsense. However it is not apparent that commonsense would extend to a prohibition that essentially went to lifestyle rather than conduct at work ...** “ (My highlighting)

173. Given my findings about the AWA policy, this matter presently before me is, effectively, “absent any policy” to use the words in this extract from *Debono*. Like *Rafaelli C* I agree that it would be a valid exercise of an employer’s right to dismiss (in this case) a forklift driver and plant operator who takes drugs at work or who is in possession of drugs or who is impaired by drugs. But none of those charges are made against the applicant here. And like *Rafaelli C*, I cannot see how, for the great majority of workers at least, fairness and reason (“commonsense”) would allow a prohibition extending to what a worker does in his or her own time well away from the workplace.
174. I am prepared to accept that there may be some limited exceptions to this, especially where important issues of public safety are involved. But instances of where a ‘zero tolerance’ policy (in the sense in which that term has been used in this case) could be considered appropriate, would in

my view be few and far between. The respondent's operation is not, in my view, one of the exceptional instances.

175. Mr Rau submitted that what, in effect, the respondent was asking the Commission to do in this case was to sanction a situation where an ordinary worker in a fairly common sort of job, should have to exchange a relatively simple and understandable duty to turn up for work and remain sober or "unimpaired" during the course of his duties, for a new duty altogether of not being able to do what pleases him and live the lifestyle of his choosing in his own private time (348). And, he argued, I was being asked to sanction that very considerable social burden with the most serious consequence of instant dismissal if the employee ever stepped out of line.
176. Mr Rau said the respondent was effectively relying on (1) its **inferred**⁵¹ 'zero tolerance' policy and (2) the reasonableness of having such a policy, when even its witnesses such as Darren Hosking and Eyvonne Price seemed to confuse the notion of 'zero tolerance' with actually being under the influence.

What if the test had been taken?

177. Mr Rau asked the Commission to assume for one moment that the applicant **had** taken the test and that it **had** produced a positive result for cannabis. He submitted that it would be ludicrous for the applicant to have been worse off for having refused a test than for taking the test and having failed. So, on the assumption that he had taken the test and failed it, and been dismissed as a result, the applicant would have defended himself with the evidence of Professor White who would have said that in the absence of a blood test or actual observations of the applicant by someone appropriately experienced in such matters, the result of the urine test could not have shown anything about whether the applicant was under the influence. It would disclose something about exposure, but not influence. The test could have shown someone positive for opiates when they had simply been taking codeine. It could have shown the applicant positive for cannabis when he had only been exposed to passive smoke or had eaten food that, unbeknown to him, had been laced with marijuana.
178. But (and I agree) **the rationale for the AWA policy was not exposure; it was influence**. So had the applicant taken the test and tested positive, we would still have been left with a situation in which the respondent had not complied with its own procedures and where the random urine test

⁵¹ I say "inferred" policy because the words 'zero tolerance' do not appear in the policy. As Mr Rau said: one is left "*to divine an inspirational sense of that somewhere*" (347).

could not have delivered what the respondent thought or hoped or assumed it would deliver. The combination of the test methodology and the AWA policy would therefore have been to create an injustice, because anybody sacked on the basis of the test alone would be unfairly sacked, given that the test cannot establish whether they were under the influence. It is proof of nothing more than exposure.

179. Mr Rau argued that even if I were to make every assumption against the applicant, on the worst case scenario for the applicant, what we have here is an employee asked to perform a test which was meaningless; refusing to do the test and being summarily dismissed as a consequence - all in the context of there being no evidence of him having possibly been under the influence or of ever having consumed drugs or alcohol at work; no warning; no offer of a blood test.
180. Against this, Mrs Shaw submitted that if the applicant had taken the test and if it had been positive there was nothing to suggest that he would not have had the opportunity to offer an innocent explanation (such as suggesting that someone must have slipped him some marijuana in some food etc). The applicant however never allowed the situation to get to that stage. He refused to obey a direction from his employer simply because – only because – he believed he would test positive, contrary to what she maintained was a reasonable ‘zero tolerance’ policy in the AWA.

Conclusions

181. In assessing these submissions I have come to the view that the request for the applicant to take the urine test cannot be considered to have been reasonable. The respondent therefore cannot argue here that the applicant was dismissed for his failure to obey a lawful and reasonable instruction and if the respondent cannot argue that then there is little else it can put forward as a valid reason for the dismissal.
182. If there was no valid reason for dismissal, as required by Article 4 of the ILO Termination of Employment Convention at Sch 7 of the Act, then that alone would be sufficient to render the dismissal unfair for the purposes of ch 3 Pt 6 of the Act.
183. However, for the sake of completeness it is also worth mentioning the requirement in Article 7 of the ILO Convention at Sch 7 of the Act and cl 2 of Sch 8 of the Act that an employee be given the opportunity to defend himself or herself against any allegations giving rise to his or her dismissal.

Opportunity to Explain/Defend

184. In the context of this requirement Mr Rau said that there was nothing in the AWA Policy about a worker with a positive urine test being given the opportunity to provide an explanation. He said it was wrong of the respondent to read it as though there was obviously some implied provision for questions to be asked as to why a test was positive. He said paragraph (c) of the Policy provided starkly: "... instant dismissal **will** take place".
185. On the other hand Mrs Shaw argued that the applicant was given and took plenty of time to consider his position before finally rejecting the test. In terms of being given the opportunity to provide an explanation for refusing to take the test, his explanation was simply that he knew he would test positive and he would rather be dismissed than be "labelled a druggie". She submitted that it was clear from this that he had no innocent explanation; there would have been nothing he could have said about having had his food laced with marijuana or anything like that.
186. As it turns out, given my finding about there not being a valid reason for dismissal, the issue of the applicant having been given an opportunity to explain or defend himself does not really arise, but for what it is worth, I accept Mrs Shaw's submission that the applicant did, as a matter of fact, have an opportunity to provide a valid excuse. While a reasonable policy would have quite specifically provided for an employee to be given an opportunity to explain or defend a positive test result(s), the reality here is that, apart from the fact that what was being asked of him was, in context, unfair, he had no other valid explanation for his conduct. The only thing on which he can rely - and yet the only thing on which he needs to rely - is that what was being asked of him and the manner in which he was about to be dealt with, was in all the circumstances, harsh, unjust or unreasonable.

What Should the Employer Have Done?

187. It seems to me that had the applicant chosen to take the test, and had he tested positive as anticipated, then the reasonable thing for the respondent to have done would have been to take him to Kadina for a blood test. Had the blood test cleared him from being under the influence (as it probably would have) the respondent could have at least warned him that he had a reading that indicated exposure to cannabis; that as a result, he may be taking unnecessary risks with his employment, and in that context, reminded him of the seriousness of potential impairment at work due to the use of drugs. The respondent could have made it clear to the applicant that his conduct in and around the workplace was going to be closely monitored for any signs of impairment. The respondent could then

perhaps have provided him with some counselling, or at least have suggested that he get some counselling, and told him that there would be another random test at some point in the near future. In this way, and in particular by issuing a warning or caution rather than moving straight to dismissal, the respondent could have made it perfectly clear that it was prepared to take all reasonable steps to ensure a workplace free from the harmful influence of alcohol and drugs.

188. Of course the applicant refused the test. In these circumstances, he should have been similarly offered counselling etc, advised of the respondent's intention to closely monitor him for any signs of impairment in the future and that if the respondent was of the view that he may be impaired, he would be taken immediately for a blood test.
189. As opposed to these respective courses of action, the 'sudden-death' dismissal scenario that occurred here was inappropriate. **In all the circumstances I find that the dismissal was harsh, unjust or unreasonable.**

Remedy

190. The applicant has never sought re-employment. His application seeks compensation pursuant to s 109(1)(c). Given this, I am satisfied that in the terms of that sub-section, re-employment "... would not be an appropriate remedy" and accordingly I turn to consider the remedy of compensation.
191. It is trite to observe that the task of the Commission in determining compensation is essentially to endeavour, from an economic perspective, to place the applicant back in the position he would have been in had he not been unfairly dismissed (*Musicians Union of Australia v Warner* (1985) 52 SAIR 202).
192. The facts in this regard are:-
- At the time of his dismissal the applicant had worked for two years and five months and was receiving average gross weekly earnings of \$855.75.
 - Following his termination the applicant was paid Job Search Allowance at a reduced rate (due to his Separation Certificate stating that he had been summarily dismissed for misconduct).
 - A "few weeks" after his termination the applicant obtained casual labouring work for "a couple of days a week" but

continued to receive Centrelink benefits because of his relatively low earnings at the time.

- In December 2001, some seven months after his dismissal, he began work as a labourer in a building supplies yard operated by Nicholas Plumbing Supplies of Moonta and received wages of about \$300 a week.
- He has continued with that work and is now manager of the building supplies area of the business receiving average **net after tax** weekly earnings ranging between \$577 and \$615.

193. Given this relatively scant and approximate information about his earnings since the date of dismissal, I consider it reasonable, indeed necessary, to adopt a ‘broadaxe’ approach to compensation, based nevertheless on these broad factual elements.

194. Sympathy - either for or against an applicant or respondent - can never come into the business of compensation, neither can any considerations of what anyone might think is “deserved” or not deserved. Even the determination of compensation by way of a ‘broadaxe’ approach has to be the subject of cold, hard, objective analysis and be as reasonably accurate as the facts permit.

195. In assessing compensation Mr Rau submitted that the Commission should take into account firstly, that employment opportunities in the country region around the applicant’s home in Kadina were not what they were in most of the metropolitan region of Adelaide and secondly, that the applicant liked his job and got along well with his work colleagues. Despite two warnings, the first of which was well and truly stale by the time of the dismissal, there was nothing in the evidence to suggest that he could not have continued to work indefinitely.

196. On this latter point I accept that the evidence is such that I cannot infer this to be one of those situations where the applicant’s employment was inevitably going to come to an end sooner rather than later. I appreciate that he received a final warning in March 2000 but that was well and truly ‘stale’ at the time of his dismissal almost 14 months later. I also have to consider that he received a “first warning” about a fortnight before his dismissal for an unrelated incident of “preventable fork lift damage”. I say “unrelated” because there is nothing to suggest that the applicant was “under the influence” at the time.

197. I am satisfied that the applicant did what was reasonable to mitigate his losses by finding suitable alternative employment. The fact that he lived

in a regional area as opposed to metropolitan Adelaide may largely explain why it took him until December 2001, some seven months after his dismissal, to find employment that, while it initially paid considerably less than his employment with the respondent (only \$300 per week), now provides him with a consistent income, broadly comparable with what he was receiving from the respondent some two and a half years earlier at the time of dismissal. There is no evidence before me as to how his income in this new job increased over time or when it increased.

198. I do know that between 11 May 2001 and December 2001 the applicant's losses were ameliorated to some extent by his receipt of Job Search Allowance and the small amount of income he had from his casual labouring job. Taking into account income from these two sources I estimate that the applicant's losses between 11 May 2001 and December 2001 would have been somewhere in the range of say, \$18,000 - \$22,000.
199. His losses continued after that time but at a lower rate and presumably, decreasing over time. I simply do not know for how long he has been receiving his current average weekly earnings (net after tax) of between \$577 and \$615 per week. There was clearly however, substantial additional loss well beyond December 2001.
200. In my view, taking into account all of the facts and circumstances before me, I consider that fair compensation would probably exceed the statutory indexed limit in s 109 (3) of the Act. The indexed figure in s 109(3) "immediately before the dismissal took effect" was, on my calculation, \$36,687.50. Compensation of that amount will therefore be awarded.
201. In arriving at this award of compensation I confirm that have endeavoured to ensure that there is no 'double dipping' by taking into account the factor of the applicant's receipt of Centrelink payments (Job Search Allowance). The figure to be awarded however, is a "gross" amount for the purposes of taxation.

DECISION AND ORDERS

202. For the reasons outlined I determine firstly that respondent GPF was the applicant's employer. As a consequence the application against the other respondent Macpri is dismissed.
203. Secondly, pursuant to s 108 (1) of the Act I determine that the dismissal of the applicant by the respondent GPF on 11 May 2001 was harsh, unjust or unreasonable.

204. Finally, pursuant to s 109 of the Act I ORDER THAT the respondent GPF pays to the applicant within 28 days an amount of compensation in the sum of \$36,687.50, less any amount required to be deducted for the purposes of taxation.
205. In the event that Centrelink seeks repayment of any amounts that it paid to the applicant as a result of his dismissal, liberty is granted to the applicant to seek an appropriate variation of these orders to recover any such sum repaid to Centrelink.