



# Employment Court of New Zealand

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## A v N Limited [2019] NZEmpC 129 (17 September 2019)

Last Updated: 24 September 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 129](#)

EMPC 269/2018

IN THE MATTER OF     a challenge to a determination of  
                              the Employment Relations  
                              Authority  
BETWEEN                A  
                              Plaintiff  
AND                      N Limited Defendant

Hearing:               26 March 2019 (Heard at Hamilton)  
Appearances:         S McKenna and S R Fraser, counsel for  
                              plaintiff M Beech and B Shepherd, counsel  
                              for defendant  
Judgment:             17 September 2019

### JUDGMENT OF JUDGE M E PERKINS

#### Introduction

[1] A, the plaintiff, was employed by the defendant N Ltd, on 12 September 2016, as a farm assistant.

[2] The terms and conditions of the employment were contained in an individual employment agreement (the IEA). The agreement is quite an elaborate document using a format provided by Federated Farmers of New Zealand (Federated Farmers). The IEA provided for A to occupy a farm cottage on the farm where she was employed. She was required to pay rent on a subsidised basis. By inference the cottage formed part of the workplace.

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[3] On 5 May 2017, A was summarily dismissed by N Ltd. She was given notice to vacate the cottage by 19 May 2017. The dismissal related to A's refusal to undergo a drug test requested by N Ltd.

[4] A commenced proceedings in the Employment Relations Authority (the Authority) seeking remedies for alleged unjustifiable actions to her disadvantage and unjustifiable dismissal by N Ltd. The Authority, in a determination dated 10 August 2018, held that the dismissal, while it may have been substantively justifiable, was carried out in a procedurally unfair manner. A was awarded compensation of \$10,000. This was reduced by 10 per cent to reflect A's contributing behaviour towards the situation giving rise to the dismissal and grievances. The Authority also held that A was liable to N Ltd for rent arrears of \$1,680. The balance owing by N Ltd to A was then fixed at \$7,320.

[5] On the issue of the remedy claimed for reimbursement for lost remuneration, the Authority made the following findings:

*Mitigation of loss*

[167] Because Ms A's dismissal was substantively justified she is unable to recover lost remuneration so the issue of mitigation does not arise.

### *Lost remuneration*

[168] Ms A cannot recover lost remuneration because N Limited had a good reason for dismissing her. Her remedies are therefore limited to distress compensation to recognise the procedural unfairness that occurred.

The dismissal in this case was, however, held by the Authority to be unjustifiable for quite serious procedural irregularities. A in this case should, therefore, have been entitled to the remedy of reimbursement for wages lost because of the grievance.<sup>2</sup>

1 *A v N Ltd* [2018] NZERA Auckland 248.

2. The Court of Appeal in *Waitakere City Council v Ioane* [2004] NZCA 218; [2004] 2 ERNZ 194 (CA) at [22]- [26] and *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81] suggested a “loss of chance” approach should be used. The implication is that, if the dismissal was inevitable anyway, there was no real loss of wages. If there is a chance that dismissal would have occurred, but it was not inevitable, that should be considered when determining the reimbursement. The position is more nuanced than that stated by the Authority. Just because there was a good reason for dismissal does not mean that lost wages cannot be awarded. The facts of this case show that dismissal was not inevitable.

[6] A filed a non-de novo challenge to the determination. The election pursuant to s 179 of the [Employment Relations Act 2000](#) (the Act) related only to that part of the determination where the Authority found that A's summary dismissal for refusing to consent to a drug test was substantively justified. All other findings of the Authority are not in dispute. Issues that she raised in her pleadings were that the Authority:

- (a) erred in fact and law by finding that the plaintiff's refusal to undertake a drug test amounted to serious misconduct;
- (b) erred in law by finding that the defendant was justified in requiring the plaintiff to undergo a drug test despite its failure to follow its own drug and alcohol policy when requiring that test;
- (c) erred in law by finding that the defendant followed the Resultz testing policy when requiring the plaintiff to undertake a drug test;
- (d) failed to consider relevant evidence by disregarding a meeting on 24 February 2017; and
- (e) breached the principles of natural justice by allowing the defendant to call and present evidence that was not relevant to the matter and amounted to defamatory personal attacks on the plaintiff.

[7] Issues (d) and (e) were withdrawn prior to the hearing of this matter commencing.

[8] The remedies originally sought in the pleadings by A were:

- (a) actual lost wages;
- (b) compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act; and
- (c) costs in relation to the matter.

[9] The claim for compensation was withdrawn prior to the hearing commencing. The claim for reimbursement of wages and costs remained. The plaintiff also wishes to have the reduction for contributing behaviour revisited.

[10] N Ltd denies that A is entitled to the remedies she seeks. In addition, it claims that if any remedies are awarded there be a reduction to take account of A's contributing behaviour.

### **Factual background**

[11] When A first commenced employment on the farm, she was employed in the role of a farm assistant – her duties included milking the cows. She signed an individual employment agreement which made it plain that, for health and safety reasons, there was zero tolerance of drug use at work on the farm, including in her cottage.

[12] According to the proprietors of the farm (Mr and Mrs C), initially, A was excellent at her job, and a good relationship developed between them. A had a child of similar age to Mr and Mrs C's children.

[13] On or about 26 October 2016, the proprietors of the farm employed another farm assistant, a male, J, who was significantly younger than A. He formed a relationship with her. He resided in another farm cottage on the farm.

[14] While the proprietors of N Ltd endeavoured to be supportive of the relationship, it created problems for them. In the end, it had an impact on the running of the farm business because of the appalling behaviour of both the farm assistants towards each other and A's behaviour towards Mr and Mrs C.

[15] Shortly after the relationship between A and J began, A became pregnant. Initially, J appears to have accepted paternity

of the child but then later denied paternity. The relationship then became dysfunctional to the point where J had to take out a trespass order against A to restrain her from coming to his cottage. These matters are traversed at length in the determination of the Authority. They are only collaterally

relevant to the matter which has been put in issue in this non-de novo challenge. The deterioration in A's behaviour, however, precipitated the issue, leading to final termination of her employment.

[16] The significant deterioration in the relationship between A and J had a deleterious impact on the farm management. When Mr and Mrs C were away from the farm for periods, they relied upon A and J to run the farm and milk the cows. On one and possibly two occasions, serious arguments developed between A and J during milking, which resulted in A storming out of the cow shed. This was significant because of the nature of the milking operation, which required two people present throughout the entire period of the milking.

[17] This action by A was one of the things the proprietors noticed about her behaviour. It, along with other factors, they say, led them to believe the behaviour occurred while she was under the influence of drugs. There is no suggestion that the drug taking involved anything other than marijuana. A's behaviour and an allegation by J led Mr and Mrs C to believe that she was taking drugs during periods when she was carrying out work on the farm and while residing in the cottage.

### **Investigation into drug taking**

[18] The proprietors of N Ltd endeavoured to mediate between A and J following the breakdown in their relationship. During a discussion between Mr C and J, J made the allegations to Mr C that A was taking drugs. As part of investigations which followed, the proprietors arranged for J to prepare and sign a written statement setting out his allegations. While it was not unreasonable in the circumstances facing them, including the statement by J, for the proprietors to form the view that A was taking drugs, the way they dealt with the allegations and the view they had formed from A's behaviour was then mishandled by them.

[19] A does not dispute the deterioration in the relationship with J. She accepts that some of her behaviour was unacceptable. This includes her walking out of the cowshed during milking following an argument with J. She maintains, however, that

this occurred only once and denies the assertion that it occurred twice. She does not deal in her evidence with other allegations regarding her behaviour.

[20] Mr and Mrs C noticed A's behavioural changes after she formed the relationship with J and before she became pregnant, which was about January 2017. Leading up to that time, the matters they refer to include:

- (a) Erratic behaviour towards J – being fine one moment and the next refusing to speak to him and locking him out of her cottage;
- (b) controlling behaviour towards J – who was at the time significantly younger than her – still a teenager;
- (c) lack of memory and short attention span – this extended to an inability to properly record her working hours;
- (d) erratic and aggressive behaviour – storming out of the cowshed during milking being one example; and
- (e) antagonistic behaviour towards Mr and Mrs C without reason.

[21] It was in February 2017 that J made the allegations against A of drug taking. This was during his outpouring to Mr C of the upsetting way A was treating him and behaving towards him. Some of this appears to be because of his denial of paternity, accompanied by allegations of infidelity, which he made against A. This may also explain some of A's behaviour described by Mr and Mrs C. In her evidence, A describes the hurt she felt at these allegations by J.

### **The drug testing requests**

[22] Following the statement being given to Mr and Mrs C by J concerning A's alleged drug taking, Mr and Mrs C asked A to attend a meeting with them on 24 February 2017. A took her mother to the meeting as a support person. Mrs C maintains that, amongst other things that were discussed concerning A's performance, they raised their suspicion with her that she may be using drugs. This allegation is

denied by A, who maintains that drugs or drug use was not mentioned during the meeting at all.

[23] On 9 March 2017, A's lawyers wrote to N Ltd, requesting wage and time records for A and any other information held about her. This letter was written in the context of the meeting held on 24 February 2017. It was a reasonable request to

make following that meeting, and yet Mrs C appeared to react adversely to A consulting her lawyers.

[24] It was following this meeting, and the letter requesting time and wage records, that Mr and Mrs C appear to have formed an intention to require A to undertake drug testing. The testing of A was to be specific to her and not to be part of any random testing. It was at this point that things began to unravel. While the individual employment agreement did not contain a specific drug and alcohol testing policy, it did contain a section dealing with drug and alcohol testing as follows:

### Testing

Testing for the presence of drugs and/or alcohol may be conducted:

1. as part of pre-employment screening,
2. if there is reasonable cause to suspect an employee's fitness for work is affected by the consumption of alcohol or drugs,
3. following an accident, or following an incident where there was a potential for major harm or loss,
4. periodically on a randomly selected cross-section of employees as a deterrent to drug/alcohol misuse, and
5. at random intervals on individuals who have previously tested positive, whether or not they have been required to enter a substance abuse counselling programme.

When we initiate testing it shall be in accordance with a Drug and Alcohol Testing Policy (which may be introduced by us at any time) or according to the testing policy of an independent agency engaged to carry out the testing.

[25] The agreement which is contained in the bundle of documents is preceded by explanatory notes clearly prepared by Federated Farmers for the assistance of its employer members in preparing the employment agreement. The explanatory notes,

which are not contractually binding, contain the following information on drug and alcohol policies:

The policy also reserves the Employer's right to test the Employee for the presence of drugs and/or alcohol. However, if Employers wish to exercise this right, they **must have a testing policy in place** (a testing policy can be purchased separately from Federated Farmers), or engage an independent testing agency to conduct the test(s).

Employers who wish to exercise this right are also strongly advised to seek legal advice first. Federated Farmers members can receive free advice by calling **0800 FARMING (0800 327 646)**.

(emphasis in original)

[26] The wording of these explanatory notes so far as drug testing is concerned is subtly different from the wording in the individual employment agreement as it relates to an independent testing agency. The wording in the agreement must prevail.

[27] Mr and Mrs C must have realised that they had not introduced a drug and alcohol testing policy. As indicated in the provision in the agreement, it might be introduced at any time, but having not introduced it and suddenly being faced with allegations against A, Mr and Mrs C endeavoured retrospectively to introduce a testing policy. This was carried out in a ham-fisted way. Because of the way that they endeavoured to impose a drug testing policy upon A as a precursor to then requiring her to undergo testing, fair procedural requirements went by the wayside. Obligations of good faith were not adhered to.

[28] As the original individual employment agreement had followed the format supplied to Mr and Mrs C by Federated Farmers, Mrs C contacted Federated Farmers to obtain a copy of its workplace drug and alcohol testing policy. Clearly, Mrs C intended to introduce this as a way of then imposing a requirement on A to undergo drug testing. The way that Mr and Mrs C endeavoured to handle the matter once they got the policy from Federated Farmers leads me to the view they were doing so without having first obtained sensible legal advice.

[29] Federated Farmers charged Mrs C about \$100 for providing the policy. It imposed on her a condition that she was not to photocopy it because this would breach copyright and if she wanted another copy she had to pay approximately another \$100.

This posed a dilemma for Mr and Mrs C, who needed to provide a copy to A, give her time to read it and take appropriate legal advice, and then set up the testing itself. Time would have been running short because, once A realised that she was to be tested for drugs, the longer the matter was delayed, the more opportunity A would have to ensure, if she was indeed using marijuana, to remove traces from her system. That Mr and Mrs C were concerned in this way was virtually admitted by them, and, for similar reasons, they later refused to agree to A being tested by her own medical practitioner claiming she might manipulate the results.

[30] On 13 March 2017, Mr and Mrs C then gave the Federated Farmers drug testing policy to A, insisting that she read it overnight. They would not give her a copy of her own, and so A was left in the position of not only having to read and understand the policy within an unreasonable timeframe, but also have no realistic opportunity of taking legal advice on it. She was indeed unable to obtain legal advice, and Mr and Mrs C then requested that she return the drug testing policy.

[31] On 14 March 2017, the defendant wrote to A as follows:

...

Please read this letter with understanding.

When you signed your Individual Employment Agreement with us on the 12/9/2016 you have agreed and are happy with the drug and alcohol clauses. This means that at any time we are able to perform a random drug and/or [alcohol] test at any time.

We have given you the policy on the testing for this on the 13/3/[2017] and allowed you to read the testing policy overnight.

With the signing of the employment agreement before starting work, we are of the understanding that you understand the drug and [alcohol] section so we are unsure why you are needing to seek legal advice as you signed happy with this procedure to take place at [any time]. We have given you enough time to seek legal advice as you asked.

We will meet at 10am Wednesday the 15/3/2017 to sign the policy given, if this does not happen this is a serious misconduct of your employment and further action will be taken place (sic).

If you need to make any phone calls for any advice please let us know and we will do our best to allow time for you to make the calls needed.

...

[32] When A indicated that she had not had time to read the policy or take legal advice, Mr and Mrs C agreed to an extension of time. It was at that point that A's legal advisors intervened further.

[33] In the letter which A's lawyers then wrote to N Ltd on A's behalf, A requested further time but also offered to have a test done by her own medical practitioner. Mr and Mrs C's response to this was to set out the grounds they claimed led them to believe that A was working under the influence of drugs. They withheld the information they had received from J. They apparently abandoned the attempt to impose their own testing policy. They indicated that they would then instruct an independent testing firm to carry out the test if A continued to refuse to sign the Federated Farmers testing policy. They were prepared to agree that A be tested by a medical practitioner nominated by them but not agree to her being tested by her own medical practitioner.

[34] Only a day later, on 16 March 2017, the operations manager of a firm known as Resultz Group New Zealand (Resultz) was invited on site by Mr and Mrs C to carry out tests on A without prior notice to her. There are some concerning features about the attempt to use Resultz. In requiring A to agree to, and sign, the Federated Farmers drug testing policy, Mr and Mrs C were obviously aware that any policy introduced under the individual employment agreement, as a matter of fairness, had to be notified to A in advance so that she could obtain legal advice. Because of the chaotic nature of the way they endeavoured to retrospectively introduce that drug testing policy, and then abandoning it, they should have been aware that the same procedure needed to be adopted in respect of the testing policy of an independent agency. This was the subject of some dispute in the submissions of counsel at the hearing, but I prefer the interpretation of the clause in the agreement as submitted by Mr McKenna, counsel for A. When the elaborate nature of the Federated Farmers drug testing policy and the safeguards contained in it are considered, it could be anticipated that Resultz would have a similar testing policy. That, in turn, would reasonably need to be given to the employee to consider along with the opportunity of taking legal advice.

[35] No attempt was made to have the testing policy of Resultz given to A so that she could take proper legal advice before agreeing to it. Indeed, and somewhat

surprisingly, it appears that Resultz may not even have had a drug testing policy of its own, and it is therefore arguable that the procedure which was being proposed to test A on 16 March 2017 was without validity. In any event, A refused to agree to undergo a test with Resultz. She was asked to sign a consent form. She did sign the form but endorsed on it that she was refusing to undergo the test following legal advice. That was after she had had the opportunity of speaking with her legal adviser at the time.

[36] Another concerning feature of the attempt by Resultz to carry out the test was the interference in the employment relationship by the operations manager of Resultz in advising A that, if she refused to take the test, disciplinary procedures would be actioned. The operations manager in fact confirms she gave this advice to A in her report to N Ltd dated 3 April 2017. Any warning as to consequences of failure to undergo the test was the prerogative of the employer, and certainly not the operations manager of the drug testing operator who, one would have thought, was required to adopt an independent stance in the matter.

## **The disciplinary process**

[37] A's refusal to undergo the drug test on 16 March 2017 was then followed by attempts by N Ltd to discipline A for what Mr and Mrs C regarded as serious misconduct. The following day, 17 March 2017, A obtained a certificate from a medical practitioner following that practitioner's drug test of her. This showed that she was clear of drugs. It was forwarded to Mr and Mrs C but apparently was not acceptable to them.

[38] Another factor which had intervened in this process was that A had suffered an injury to her forearm while working in the milking shed. A pipe had become detached and fallen onto her forearm. As a result of the injury she received, she was unable to work and was in receipt of accident compensation. Medical certificates confirming she was unfit to work were forwarded to Mr and Mrs C.

[39] At this point, and in the face of Mr and Mrs C indicating that A was to be disciplined for refusing to undertake the Resultz test on 16 March 2017, legal advisers for both sides intervened so that the disciplinary process was delayed.

Correspondence between the solicitors resulted in an impasse. By that stage, Mr and Mrs C had indicated that, in addition to becoming suspicious as to A's drug-taking by her behaviour, they had information from a third person. This was clearly the document they had procured from J, although for some time in the process they refused to reveal his identity or provide the document to A and her legal adviser. As a matter of good faith, Mr and Mrs C were at that point required to disclose any information they had before taking disciplinary action so that A had the opportunity to properly respond to it. It is clear from the contemporary correspondence that Mr and Mrs C were refusing to provide A and her lawyer with the information on advice from their own legal advisers. What should have happened at this stage was that the parties should have met. There were faults on both sides. Mr and Mrs C, who wished to continue with the disciplinary process, should have provided all the information to A and her lawyers so that she had the opportunity to present her position. On the other hand, A was using the injury and the fact that she was unfit for work, to not meet Mr and Mrs C and their legal advisers. This was an unreasonable stand for her to take. She resided in a cottage a short distance from the farmhouse occupied by Mr and Mrs C. She was seen driving her motor vehicle away from her cottage, and it was obvious that she had no excuse not to be meeting them, even if she was unfit for work.

[40] Mediation may have assisted at this stage but does not appear to have been contemplated. The impasse was finally resolved by the lawyers adopting a procedure whereby Mr and Mrs C would pose written questions to A which she would then answer. The answers given nevertheless did not satisfy Mr and Mrs C or her legal advisers, and eventually A was requested to provide any further submission before Mr and Mrs C considered whether to dismiss A. She declined to do so. Accordingly, her employment was terminated. A termination letter was written by the lawyers for N Ltd and was sent to A's lawyer. No termination letter appears to have been specifically forwarded to A herself, although, clearly, she would have received the letter from her own legal advisers. The letter dated 5 May 2017 reads as follows:

...

1. We refer to our letter of today's date.
2. We note your advice that your client has no comments to make in relation to the proposed outcome.
3. Accordingly, our client has instructed us to confirm the outcome, and [A's] employment is terminated with immediate effect.
4. Our client requires your client to vacate the property she leases by Friday 19 May 2017 and to pay any arrears. Arrears are at \$1,680 as at today's date.
5. Our client also intends to inspect the property at 11am on Monday 8 May 2017.

...

## Conclusions

[41] Having regard to the nature of the business operated by the defendant, zero tolerance to consumption of drugs and alcohol in the workplace on health and safety grounds is a desirable objective. However, the introduction of a drug and alcohol testing policy into the employment agreement must be balanced against the rights of the employee to be properly consulted and protected from abuse. Mr McKenna referred in his oral submissions to the following passage from *Parker v Silver Fern Farms Ltd (No1)*,<sup>3</sup> which encapsulated these principles:

[26] My assessment at this point is that Mr Parker's challenge has merit. Whether he was dismissed justifiably will turn on whether the employer's condition for him to return to work, that is to undergo a drugs test, was a lawful and reasonable instruction. It will not be, as the Authority appears to have found in its determination, whether the Authority considered it was fair and reasonable for the employer to demand a negative drugs test as a condition of a return to work. Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and

applied strictly. A fair and reasonable employer in all the particular circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or unreasonable direction to an employee.

[42] In the present case, the standards which the employer set for itself involved a regime of either electing discrete screening for an individual employee based on proper grounds or random screening of a cross-section of employees. It elected the former for A. The employer reserved the right to introduce testing policies after the commencement of the employment. When screening occurred, however, it was to be in accordance with its own policy or a policy of an independent agency. The individual

3 *Parker v Silver Fern Farms Ltd (No 1)* [2009] ERNZ 301 (EmpC).

employment agreement clearly contemplated, and it would be a matter of fairness or good faith anyway, that either policy, once introduced, would be notified to the employee and, if necessary, followed by proper consultation. Time would have to be allowed to the employee for proper consideration and legal advice if required. In correspondence between the lawyers referred to earlier in this judgment, the lawyer for N Ltd indicated that, based on *Maritime Union of New Zealand Inc v TLNZ Ltd*,<sup>4</sup> employers can introduce a drug and alcohol policy into the workplace without the need for consultation if it is in accordance with the relevant agreements. I do not agree that proposition, if it is correct, would apply in the present case. The *Maritime Union of New Zealand Inc* case involved a factual situation totally different from the present and one where substantial consultation and negotiation had occurred prior to the introduction of drug and alcohol testing into contractual documents.

[43] As indicated earlier, this is a non-de novo challenge where the election relates to the one finding of the Authority that the dismissal for refusing to consent to the drug test on 16 March 2017 was substantively justified. The test to be applied to the actions of the employer is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.<sup>5</sup> In applying the test which is contained in s 103A of the Act, the Court must also consider whether the employer has complied with procedural requirements as specified in s 103A(3) of the Act.

[44] The reasonableness of the actions of the employer must be weighed against these circumstances as known to it at the time of the decision giving rise to the grievance or in this case the dismissal. In this case, the dismissal was both substantively and procedurally unjustifiable. Having decided that, however, there are aspects of A's behaviour which justify the finding of contributing conduct on her part. Neither party in this case acted throughout with good faith towards the other. This required them to be open with each other by not misleading or deceiving and to be responsive and communicative.<sup>6</sup>

4 *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] NZEmpC 168; (2007) 5 NZELR 87 (EmpC).

5 [Employment Relations Act 2000, s 103A](#).

6 [Employment Relations Act 2000, ss 4\(1\) and 4\(1A\)](#).

[45] In accordance with the principles enunciated in *Parker v Silver Fern Farms Ltd (No 1)*, the contractual provisions must be interpreted strictly against N Ltd in this case. The problem which N Ltd faced in this matter is that, having introduced into the original individual employment agreement with A a section dealing with drug and alcohol testing, it then failed to have the agreement completed by introducing the drug and alcohol testing policy of its own if it had wished to be in a position to use that, or introduce a testing policy of any independent agency, which it may have engaged to carry out the testing if the need arose. The provision in the agreement followed the precedent supplied by Federated Farmers. It is a difficult provision, and it is hard to understand why the introduction of a testing policy needed to be inserted later rather than being included in the agreement from the outset, so it could be considered by a prospective employee and agreed to at that time. Leaving it to the employer to carry out the testing or, as occurred in this case, endeavouring to use an independent agency at the last minute and without proper and fair procedures being available to the employee, was always going to be fraught with difficulty.

[46] Mr and Mrs C clearly became fixated with the idea of dealing with A based on what they believed to be her drug taking when they could just have easily have dealt with her by way of normal disciplinary procedures for her undisputed behaviour which was unacceptable to them as her employer. It is surprising they did not adopt this course. Mrs C, in her evidence, fairly concedes that, even if A had agreed to drug testing and that had been carried out with a positive result, that would not necessarily have led to dismissal. In fact, in the trying circumstances which clearly prevailed, Mr and Mrs C were surprisingly tolerant.

[47] Considering the matter in its entirety, the actions of N Ltd in this case were not those which a fair and reasonable employer could have done in all the circumstances at the time that the dismissal occurred. It is understandable, having formed the view that A was using marijuana at the workplace and in her cottage, that they wished to ensure that there was no delay in the testing which may have enabled A to manipulate the results. Attempts to rectify the contractual provision were never going to succeed in that timeframe. Having taken legal advice, as she was entitled to do, A refused to agree to the testing. That, in turn, was an entitlement which she had in all the circumstances. To then summarily dismiss her for

refusing to undertake the testing

was clearly unjustifiable. The procedural process which then followed became further fraught with difficulties because of the decision, which appears to have been made on legal advice, not to provide A with details of the allegations which J had made against her. She was, as a result, given no opportunity to respond. It might have been different if Mr and Mrs C had chosen to abandon the fixation with the drug testing and headed down a path of disciplining A for her unacceptable behaviour. That may not have led N Ltd to dismiss A summarily for serious misconduct. Mr and Mrs C, with their benevolent outlook, however, may have been prepared to accept a compromise whereby A remained in employment under conditions which may have been necessary to accommodate her pregnancy, but nevertheless where she could see that she needed to improve her performance and behaviour.

## Disposition

[48] Having found that the summary dismissal was unjustifiable, the issue then arises as to appropriate remedies. A seeks reimbursement of wages lost as a result of her grievance. She also seeks a revisiting of the issue of contributory conduct. As already indicated, she does not seek any variation to the compensation already awarded by the Authority.

[49] The claim for reimbursement poses problems in this case because of A's pregnancy thereby giving rise to causative issues. By the time of her dismissal on 5 May 2017, A was approximately three months pregnant. She did not commence parental leave, however, until 17 September 2017. While her pregnancy did not affect her ability to work in May 2017, it affected her ability to mitigate her loss of income by obtaining alternative employment, although she obtained casual work in July 2017. She was without income and in receipt of a benefit from 7 May 2017 until 23 July 2017 and on substantially reduced income from then until the commencement of her parental leave. It is likely that, if she had not been disciplined and dismissed for her behaviour, she would have continued in employment with N Ltd on full duties for another three months at least. Mr and Mrs C indicated, prior to the problems leading to her dismissal arising, that they would be prepared to enter into arrangements for her continued employment to accommodate her pregnancy. However, if she had not been pregnant when she was dismissed, she may have been able to obtain new employment

within a reasonably short timeframe. This could have considerably mitigated her loss of income.

[50] [Section 128\(2\)](#) of the Act provides:

(2) If this section applies then, subject to subsection (3) and [section 124](#), the Authority must, whether or not it provides for any of the other remedies provided for in [section 123](#), order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[51] Under the individual employment agreement, A was entitled to two weeks' notice. Having regard to the requirements of [s 128\(2\)](#) of the Act, and the special difficulties associated with causation and mitigation in this case, I consider that six weeks' wages is appropriate recognition of the remedy of reimbursement to which A is entitled. That is a reasonable period in which she could have been expected to obtain alternative employment if without difficulties associated with her pregnancy. The reimbursement of wages for that period is to be without deduction for the accommodation.

[52] As I have indicated earlier in this judgment, I am not unsympathetic to the position which Mr and Mrs C, as proprietors of N Ltd, faced in trying to run their farm business. All the players in this unfortunate episode lived in close proximity to each other, and Mr and Mrs C should not have had to tolerate the behaviour that both A and J exhibited, and which had an impact on the running of the farm. A's contributing behaviour, in the circumstances which gave rise to her grievances, was reasonably substantial. The Authority assessed this at 10 per cent and reduced the remedies it awarded to that extent. That is not challenged by A. In my view, that percentage assessment was unusually generous to A. Since I have been asked to revisit the contributing behaviour in this judgment, increasing the percentage assessed by the Authority could be contemplated. However, A has elected not to challenge the compensation awarded to her in the Authority, which I regard as being at the lower end of the scale. Accordingly, I choose not to review the percentage of contributing behaviour as it relates to the remedy of reimbursement I have now granted.

[53] In conclusion, therefore, the remedies awarded by the Authority stand, as they have not been the subject of challenge. In view of the finding in this judgment, A is

awarded reimbursement of six weeks' income, which is to be reduced by 10 per cent to take account of her contributing behaviour.

[54] A is entitled to an award of costs. Mr McKenna indicated at the outset of the hearing that A is in receipt of legal aid for these proceedings. I will reserve the issue of costs so that the parties have the opportunity of making submissions. Such submissions will need to deal with the effect of a grant of legal aid on costs. A's submissions on costs by memorandum are to

be filed and served within 14 days of the date of this judgment. The defendant will then have a further 14 days within which to file and serve submissions in answer. Any reply by A must be filed and served within a further 7 days. The Court will then consider costs based on those submissions.

M E Perkins Judge

Judgment signed at 10.30 am on 17 September 2019

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