

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 306
3156902

BETWEEN LIAM BRIAN ARMSTRONG
Applicant

AND KONO NZ LP
Respondent

Member of Authority: Philip Cheyne

Representatives: Callum Osborne, counsel for the Applicant
Nick Mason, counsel for the Respondent

Investigation Meeting: 13 September 2022 at Nelson
25 November 2022 by AVL

Submissions and
Information Received: 2 & 21 December 2022 and 6 & 13 April 2023 from the
Applicant
14 December 2022 and 4 April 2023 from the Respondent

Date of Determination: 13 June 2023

DETERMINATION OF THE AUTHORITY

Non-publication

[1] Non-publication is sought to prevent naming a witness. The other party consents to the application. The Authority has power to prohibit publication.¹ I agree that the grounds set out at [102] of counsel's submissions support an order. The name of the person identified at paragraph [102] of the submissions is not to be published.

¹ Employment Relations Act 2000, Schedule 2 cl 10.

[2] It has not been necessary in this determination to set out or make any findings about the evidence that caused the application. I will refer to the person as TOH.

Employment relationship problems

[3] Kono NZ LP (Kono) is a registered limited partnership. Its marine division manages marine farms in various locations.

[4] Kono employed Liam Armstrong as a deckhand in its marine division from May 2021.

[5] Mr Armstrong was at work on 1 September 2021. He was required by Kono to give a urine sample for a drug test. The test was non-negative for THC. Mr Armstrong was suspended and Kono conducted a disciplinary process. Mr Armstrong raised personal grievances (unjustified disadvantages). Eventually, Mr Armstrong resigned on 26 October 2021 and raised a further personal grievance (unjustified dismissal).

[6] Matters were not resolved by mediation.

[7] Mr Armstrong lodged his statement of problem in the Authority. Mr Armstrong says he has an unjustified dismissal personal grievance (constructive dismissal) and four unjustified disadvantage personal grievances. Remedies of reimbursement and compensation are sought.

[8] Mr Armstrong also says that Kono breached its duty of good faith, breached the Wages Protection Act 1983, breached clause 16 of his employment agreement and breached the Holidays Act 2003. Payment of holiday pay was sought. Penalties were not specifically claimed.

[9] Kono says that Mr Armstrong was not constructively dismissed, that he did not suffer any unjustified disadvantage and that it complied with all its contractual and statutory obligations.

Context for the problems

[10] The context is largely apparent from the documentation. It will be helpful to refer to the people involved and summarise what happened.

[11] Dean Higgins is Kono's manager for marine operations. He appointed Mr Armstrong but was not his direct manager.

[12] Mr Higgins wrote to Mr Armstrong on 7 May 2021 with an offer of employment, subject to a clear drug and alcohol screening test and other conditions. The offer included a proposed written employment agreement. Mr Armstrong satisfied all the conditions and started work on 10 May 2021.

[13] Mr Armstrong suffered an injury at work on 27 May 2021. He suffered a further work injury on 24 June 2021. Mr Armstrong was certified fully unfit, partially fit or fully fit for work at different times following these accidents. Mr Armstrong returned to work 30 August 2021.

[14] There was an incident involving Mr Armstrong and two other workers on 31 August 2021. Mr Higgins received an email from the vessel's skipper that evening. Attached to the email were a hand-written statement and a Kono Accident/Incident Form with the workers' accounts of the incident. Mr Higgins called Mr Armstrong, asked him to provide a statement, told him not to contact the other two workers and to go on a different vessel the next day. Mr Armstrong set out his account of the incident with the two others in an email he sent to Mr Higgins on the morning of 1 September 2021.

[15] On 31 August 2021, after his call with Mr Armstrong, there was an email exchange between Mr Higgins and two other managers. From that exchange, Kono decided to require Mr Armstrong to undergo a drug test on his return to port.

[16] Mr Armstrong's drug test at 6.34pm on 1 September 2021 showed "requires further analysis" for THC. Mr Armstrong was told not to come to work the next day, despite it being a rostered work-day. Mr Armstrong remained away from work.

[17] Mr Higgins wrote to Mr Armstrong on 7 September 2021 requesting his attendance at a "formal meeting" on 10 September 2021. The letter did not refer to Mr Armstrong being suspended. The letter included copies of several policies, the screening test results and the laboratory analysis. The analysis recorded "Positive" for "THC-COOH". Mr Higgins stated that it "appeared to be serious misconduct and may be a breach of both our code of conduct

and drug and alcohol policies”. The meeting was an opportunity for Mr Armstrong to provide an explanation. Mr Higgins cautioned that “Formal action” up to dismissal might result.

[18] Mr Armstrong was legally represented at the meeting on 10 September 2021. In summary, Mr Armstrong explained that he had used cannabis outside of work in August, that he had not been at work impaired and that the non-negative drug test did not amount to serious misconduct, under the policies and his employment agreement. Mr Armstrong remained off work, pending Kono’s decision.

[19] On 16 September 2021 Kono wrote to Mr Armstrong. The letter said it served as “written confirmation” of Mr Armstrong’s suspension from 1 September 2021. Kono stated its view that the non-negative test was in breach of its values and health and safety obligation and constitutes “serious misconduct”. Kono proposed an outcome of a final written warning, given its practice to support its employees on condition they provide a negative drug test before returning to work and abide by other proposed conditions. Mr Armstrong was asked for any response by 20 September 2021.

[20] Through solicitors, Mr Armstrong replied by letter on 20 September 2021. Points from the 10 September meeting were set out, to which a response was required. The non-negative test for THC metabolites was said not to be serious misconduct, from a reading of the Code of Conduct and Drug and Alcohol Policies. If that was not correct, specific reference to the code and policy was sought.

[21] Other points were made. Despite the 16 September letter, nothing had been provided to establish that Mr Armstrong had agreed to abide by “Company values and health and safety obligations”, so as to make his non-negative result for THC metabolites amount to serious misconduct. Absent an established breach of applicable policies or terms of employment, an employer was not able to impose conditions for a return to work, without consultation or discussion. As Mr Armstrong considered the investigation was on-going, he was still suspended on pay.

[22] Kono sought an opinion from an occupational medicine specialist. Dr David Payne provided his opinion on 22 September 2021. Kono’s lawyer provided the opinion to Mr Armstrong’s lawyer on 27 September 2021. Kono’s lawyer also summarised Kono’s

position. An answer as to whether Mr Armstrong would consent to the proposed conditions was sought by 30 September 2021.

[23] Mr Armstrong's lawyer replied on 29 September 2021. The letter described Dr Payne's comments and the analysis of them as "unusual". Mr Armstrong intended to obtain an expert report (Dr Noller) which he anticipated receiving by 14 October, so he would respond and provide the report by then. Mr Armstrong sought confirmation that he would continue to be paid during the suspension period.

[24] Kono responded through its lawyer on 1 October 2021. Kono sought Mr Armstrong's return to work immediately under the conditions proposed "particularly the production of a non-negative test". Kono relied on its policy so that Mr Armstrong would be unpaid from "today" until he provided a non-negative test. Kono would have a separate discussion about "impairment" and "any consequences" once Mr Armstrong provided his expert's report. Mr Armstrong was asked to advise urgently as to whether he would return to work on that basis.

[25] Mr Armstrong replied by his lawyer's email on 4 October 2021. The email described events and exchanges to date. It referred to issues about short payment during the suspension. Those, together with the advice that pay would stop, were characterised as breaches of the Wages Protection Act 1983 and would lead to a complaint to the Labour Inspectorate. The pay issues and Kono's actions were described as "bullying" and amounted to unjustified disadvantages. Mr Armstrong proposed either his unconditional reinstatement, payment of arrears and his legal costs or payment of arrears, continued paid suspension and confirmation that Kono would consider Dr Noller's report once available.

[26] The email stated that if either of those options was not complied with, the correspondence can be treated as formal notice of personal grievances including Mr Armstrong being "effectively dismissed". Mr Armstrong proposed mediation.

[27] There was a response by Kono's solicitors on 7 October 2021. Kono accepted that there had been an initial wages shortfall but did not accept that there remained any underpayment. Kono considered that it had acted reasonably, although the situation was not of its making given Mr Armstrong's non-negative drug test. It would reconsider outcomes on

receipt of the expert report, but would not pay Mr Armstrong until he produced a negative test and returned to work. Kono agreed to mediation.

[28] On 12 October 2021, Mr Armstrong's lawyer acknowledged agreement for mediation.

[29] Mr Armstrong by txt message to his manager (Dean Condon) on 18 October 2021 asked to be paid three days of his holiday pay. Mr Condon the next day responded, apologised for the delay while he was waiting for "legal" to get back to him and said that he could not pay holiday pay while Mr Armstrong was suspended.

[30] Mr Armstrong's lawyer took up the matter in an email to Kono's lawyer on 19 October 2021. The letter stated that for Mr Armstrong to meet his basic needs, either he had to resign and find other work or Kono had to pay his holiday pay. Kono was asked to reconsider its position.

[31] On 20 October 2021, Mr Armstrong's lawyer sent Kono's lawyer a copy of Dr Noller's report. The email said that they looked forward to hearing without delay as to the ending of Mr Armstrong's suspension and the reinstatement of his pay.

[32] The next event was Mr Armstrong's resignation conveyed by his lawyer's letter of 26 October 2021. The letter also noted that tentative mediation dates of 3 November 2021 and 4 November 2021 had been offered.

Issues

[33] Mr Armstrong claims four separate personal grievances of unjustified disadvantage: the finding of serious misconduct; the issue of a final warning, the requirement for a negative drug test and to engage in a rehabilitation programme to return to work; bad faith, unfair and unreasonable procedures and tactics during and after the investigation; and suspension without pay and failure to pay wages due.

[34] Mr Armstrong also says his resignation was a constructive dismissal.

[35] Although presented as discrete personal grievances, the claims substantially overlap. For example, a grievance about a final warning would require consideration of alleged bad

faith, unfair and unreasonable procedures and tactics during and after the investigation. The “finding” of serious misconduct also forms part of the consideration of a grievance about a final warning. In my view, the personal grievance aspect of the problem is adequately addressed by considering: whether a personal grievance of unjustified disadvantage arises from Kono’s actions in suspending Mr Armstrong on pay; whether a personal grievance of unjustified disadvantage arises from Kono’s decision to cease paying Mr Armstrong, pending his return to work on conditions; and whether a personal grievance of constructive dismissal arises as a result of the termination of Mr Armstrong’s employment.

[36] The foregoing issues can be considered in light of the statutory test for justification. There are also some relevant disputes about the applicable terms and policies. I will deal with that first, before considering justification issues. If any personal grievance arises, I must assess remedies. I will also consider the claims for arrears.

[37] I am also invited to consider whether penalties should be imposed for claimed breaches of the Employment Relations Act 2000, the Wages Protection Act 1983 and the Holidays Act 2003, if breaches are established.

What terms and policies apply?

[38] Terms and policies generally refer both to drugs and alcohol. I will omit reference to the latter, for convenience.

Employment agreement

[39] It is accepted that the employment agreement that accompanied the letter of offer applied to the employment. I mention only some provisions.

[40] It is common ground that Mr Armstrong worked in a safety sensitive role.

[41] Mr Armstrong was employed as a deckhand. The agreement included a comprehensive position description. It starts by saying that Kono forms part of Wakatū Incorporation’s companies. A line reads “Safety - Health and Safety - Adhere to all Kono Marine Division health and safety policies and procedures”.

[42] Under the agreement, Mr Armstrong was to comply with Kono's policies and procedures, including any Code of Conduct implemented by Kono and as later amended.

[43] Clause 12 is headed "Health and Safety". A sub-clause states:

Employees working under the influence of drugs and alcohol pose a serious health and safety risk. The Employer is committed to maintaining a drug and alcohol free workplace. In order to achieve the objective, the Employer may require the Employee to undergo drug and alcohol testing as outlined in the company policy and in particular the Group Health and Safety System.

[44] The agreement permitted Kono to terminate the employment for serious misconduct as outlined in its "Human Resources Policy Manual". It allowed Kono to suspend Mr Armstrong with pay to investigate alleged serious misconduct. Kono was required to give written notice of the suspension and could include conditions as it thought fit. The suspension had to be on pay, unless for reasons beyond Kono's control it was unable to complete its investigation within two weeks. In that circumstance, the agreement provided that any continuation of the suspension was without pay.

Policies

[45] With the "Formal Meeting Invite" on 7 September 2021, Kono sent Mr Armstrong documents headed "WAKATŪ INCORPORATION – People and Culture – Code of Conduct Policy" (the Code) and "WAKATŪ INCORPORATION – People and Culture – Drug and Alcohol Policy" (the DAP). The revision dates indicate these documents were current. Through his lawyer, Mr Armstrong did not dispute their relevance, but relied on them to raise a number of issues.

[46] I find that the Code and the DAP applied to Mr Armstrong, by effect of clause 12.2 of his employment agreement.

[47] There are examples and a definition of serious misconduct set out in the Code. Examples of misconduct include (but are not limited to) being under the influence of drugs while at work. The Code says that employees may be suspended "without pay", while an investigation is carried out, following consultation with the employee. However, the Code should be read subject to Mr Armstrong's employment agreement.

[48] The DAP's purpose is to ensure that employees do not constitute a safety hazard to themselves or others due to the effects of drugs. The policy is to ensure that employees have a work environment free of drug use or abuse and to provide an opportunity to employees with a substance use problem to "address it", rather than provide grounds for dismissal.

[49] Under the DAP's Guidelines, persons impaired by drugs can have an adverse effect on work, safety and the goal of a drug free work environment. It is prohibited for a person to be impaired by illicit drugs in the workplace. A breach is treated as serious misconduct, subject to disciplinary action. Employees must report fit for duty and be able to work safely without limitations due to use or after-effects of illicit drugs. Serious misconduct includes but is not limited to attending work under the influence of drugs. The last section of the DAP that was provided to Mr Armstrong under the heading "*Procedures ...*" includes a bullet points list of topics, without the content.

[50] There is a further document dated July 2021 now in evidence called "Wakatū Group - People and Culture - Drug and Alcohol Procedures" (the Procedures). It sets out comprehensive operational guidelines, procedures and definitions for drug testing. For the most part it gives content to the bullet point list of topics set out in the DAP. It applied to Mr Armstrong by effect of clause 12.2 of his employment agreement. However, Kono did not provide it to Mr Armstrong during his employment (including the disciplinary investigation).

[51] Under the heading "Drug Testing Overview", the Procedures document includes reasonable cause testing provisions. Where there is a concern that behaviour could be hazardous due to possible effects of drugs, the manager is to arrange drug testing as soon as possible. No person required to undergo a test shall be permitted to return to work until a negative test is received. Under a further heading "Assessment of Impairment", there is a note about impairment assessment being "complex" and a list of indicators of impairment, followed by procedures to be followed if impairment is suspected. The procedures provide for Oral Fluid Test. If "considered appropriate" a supervisor is to facilitate a drug test in accordance with the AS/NZS standard. Under the heading "Drug and Alcohol Testing Procedure – Oral Fluid Testing", the process for "Probable Cause" testing is Oral Fluid Testing when it can be performed within 4 hours of an incident. Under the heading "Results for Drug and Alcohol Tests", a person who returns a non-negative result is stood down

immediately on full pay until the confirmation test is completed. A confirmed positive test is considered serious misconduct and the person is subject to disciplinary procedures. Under the heading “Definitions”, under the influence of drugs is defined as being at a level higher than prescribed in AS/NZS 4308.

Vessel Manual

[52] After the first investigation meeting, a document titled “Revised Vessel Manual March 18 – Arista Cat.docx” was produced. Mr Higgins had given evidence that there was a “vessel manual” on board each vessel. Mr Armstrong told me that he “vaguely” recalled seeing policies on the vessel and in cross examination said that he had seen the vessel manuals but could not recall what they said about drug tests. As a result, I asked Kono to produce the vessel manual. Kono was also asked to produce an induction checklist for Mr Armstrong. An induction checklist has not been provided.

[53] There is a submission that the vessel manual document as produced was not binding. Several grounds were advanced. An editor’s note indicates it might be an unfinalised draft. Mr Higgins had not confirmed it as an applicable document. Mr Armstrong’s induction checklist has not been produced. The submission is that Mr Armstrong said in evidence that he saw “SOPs” on board. A section of the vessel manual sets out SOPs (Safe Operating Procedures), but that section does not deal with alcohol and drug policy or testing. Kono provided a word document, not a scan of a printed document. A number of the sections involve checklists, none of which have been completed. Some of the embedded certificates are out of date. I am asked to conclude that the vessel manual document as produced was not binding on Mr Armstrong.

[54] Despite Mr Armstrong’s objection, I gave Kono the opportunity to adduce further evidence about the vessel manual that was available on the vessel where Mr Armstrong worked. The affidavit of Mr Higgins was provided on 6 April 2023. Mr Higgins says that the “Revised Vessel Manual March 18 – Arista Cat” provided on 27 October 2022 was on board the vessel during Mr Armstrong’s employment. Mr Higgins also says that it is annexed as “A” to his affidavit.

[55] Annexure “A” and “Revised Vessel Manual March 18 – Arista Cat.docx” are not identical. Counsel for Mr Armstrong draws my attention to additions to the table of contents. The submission is that Annexure “A” and “Revised Vessel Manual March 18 – Arista Cat.docx” have no probative value in determining what was onboard and available to Mr Armstrong.

[56] Both versions include clause 2.8 “Smoking, Alcohol and Drug Policy” in identical form. They both include clause 2.9 “Alcohol and Drug Testing Procedure” in identical form.

[57] The differences between the two documents have not been explained in evidence, but it is not likely to be because a version of the document had not been published and placed on the vessel. The version that was on board was likely to have included clauses 2.8 and 2.9 in identical form to the documents now in evidence. I find that the “policies” or “vessel manuals” that Mr Armstrong said in evidence he had seen on board, incorporated the provisions set out in clauses 2.8 and 2.9 of the two documents in evidence.

[58] The provisions set out in clauses 2.8 and 2.9 of the vessel manual applied to Mr Armstrong, by effect of 12.2 of his employment agreement. However, a copy of the vessel manual was not specifically provided to Mr Armstrong during Kono’s disciplinary process.

[59] Clause 2.8 says that Kono is committed to a drug-free work environment. No employee is to work while under the influence of illicit drugs. An employee found to be under the influence of illicit drugs shall be dealt with in a disciplinary manner, and may be dismissed. Kono is committed to a safe workplace and drug testing includes reasonable cause testing.

[60] Clause 2.9 says that reasonable cause is where there is sufficient reason to believe that an employee’s unsafe or erratic behaviour may be due to the influence of drugs. Reasonable cause testing may be conducted in circumstances such as where the manager believes there is reasonable evidence that an employee is affected by drugs at work. Positive drug tests lead to investigation and disciplinary action. The amount of illicit drugs in urine shall not exceed accepted international standards as defined by an Australian Standard.

[61] To summarise, Mr Armstrong through his employment agreed to comply with Kono's policies and procedures with respect to drugs and alcohol. These policies were set out in the DAP, the vessel manual and the Procedures.

Does Mr Armstrong have a personal grievance arising from the suspension on pay?

[62] Mr Armstrong would have a personal grievance if his employment or a condition of his employment was affected to his disadvantage by an unjustifiable action by Kono. It is well established that suspending an employee (paid or unpaid) is an action by an employer that might affect the employee's employment to their disadvantage.

[63] I should set out more detail about the circumstances of the suspension on pay.

[64] The vessel manual refers to Kono conducting pre-employment, reasonable cause, post-incident and random testing for drugs and alcohol. It states that "reasonable cause" is where there is sufficient reason to believe an employee's unsafe behaviour or erratic performance may be due to the influence of drugs or alcohol.

[65] The Procedures document also refers to Kono conducting pre-employment, reasonable cause, post-incident and random testing (in safety sensitive roles) for drugs and alcohol. Reasonable cause testing is where the employer has concerns that behaviour could be hazardous due to possible effects of drugs. A person who returns a non-negative result is stood down on full pay pending the confirmation test. A confirmed positive result is considered serious misconduct, with the employee subject to disciplinary procedures and possible dismissal. "Under the influence of drugs" is defined as at a level higher than prescribed in the New Zealand standard (AS/NZS 4308).

[66] During his employment, Mr Armstrong had a reasonable opportunity to review the vessel manual. The Procedures document was not available to him.

[67] Mr Higgins along with his general manager and an HR advisor decided that there was reasonable cause to require Mr Armstrong to undergo a drug test, following receipt of the incident form and statement. The decision is documented in an email exchange on the evening of 31 August 2021.

[68] I find, based on the incident form and the statement provided by the other workers, that there was reasonable cause to require Mr Armstrong to undergo a drug test, in accordance with the vessel manual. The incident form and the statement gave sufficient reason to believe that Mr Armstrong’s “unsafe behaviour” or “erratic performance” might have been due to the influence of drugs or alcohol. The vessel manual did not require Kono to first consult with Mr Armstrong, so this case differs from the circumstances in *Concrete Structures (NZ) Ltd v Rottier*.²

[69] The Procedures provide that testing will occur with the person’s informed consent. Informed consent includes information about the policy, its purpose and the consequences that might follow a refusal to provide a test. The test was undertaken by The Drug Detection Agency (TDDA). Its standard form listed “Reasonable Cause” as the reason for the test. Mr Armstrong signed the form to indicate his informed consent. However, Mr Armstrong’s evidence is that he was unaware of and had not been provided with specific policies that required him to take the test, although he understood that he should not come to work “impaired”. Mr Armstrong says that “rather than argue”, he took the test voluntarily.

[70] I do not accept Mr Armstrong’s evidence that he was not aware of the specific policy. The vessel manual was available to him on board, he had looked through it, the employment agreement alerted Mr Armstrong to the existence of drug and alcohol policies and procedures and to the reasons for them. Mr Armstrong was aware of the specific policy, its purpose and the potential consequences of refusing to provide a test.

[71] The test result was “THC Requires further analysis”. There is a submission that the reported result was misleading, as the test does not identify THC. The submission is not on point. Mr Armstrong tested non-negative on the drug screen, indicating his use of cannabis.³ Further analysis was authorised under Mr Armstrong’s informed consent and standard testing procedures, including Kono’s policy and the Procedures.

[72] Mr Armstrong’s evidence is that he was told not to come to work the next day (2 September 2021). In the email exchange, Mr Higgins advised his manager that he had spoken to Mr Armstrong and stood him down with full pay pending laboratory confirmation of the

² *Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95.

³ Bundle of documents page 068.

result. The Procedures provided for that, following a non-negative result. There is no reason to think that Mr Higgins departed from that procedure. I accept that Mr Higgins told Mr Armstrong that he was stood down on full pay, pending the laboratory report.

[73] The laboratory report on 7 September 2021 confirmed a positive test for “Cannabis THC-COOH”. The form mistakenly lists the reason as “Pre-Employment”. No point of substance arises from that mistake.

[74] Mr Higgins sent the laboratory report to Mr Armstrong on the same date. In the accompanying letter, Mr Higgins did not comment on the basis for Mr Armstrong remaining off work, pending the 10 September 2021 meeting.

[75] Mr Armstrong was represented at the 10 September 2021 meeting. There was no discussion directly about the stand-down or suspension. Addressing the substantive issue for Mr Armstrong, it was said that he used cannabis outside of work to manage pain and he denied using cannabis at work or being impaired at work. Other points were advanced. The laboratory report did not prove impairment, as it only showed the presence of the inactive residue of THC. The positive test for THC-COOH was not serious misconduct in terms of the conditions of employment and the policies. Mr Armstrong’s lawyers also raised some pay discrepancies. The meeting was adjourned to consider points made on Mr Armstrong’s behalf.

[76] In the next communication on 15 September 2021, Mr Armstrong’s lawyer described him as being on “full suspension”, set out pay issues (including non-payment) and advised that Mr Armstrong had not received any written notice of the “start” of the suspension. However, when he had queried his pay, Mr Armstrong had been told that the suspension started on the evening of 2 September 2021.

[77] Kono replied on 16 September 2021. The letter was “written confirmation” of Mr Armstrong’s suspension from 1 September 2021. A response was given to some points raised about pay in the 15 September 2021 email. In the letter, Kono said it considered that Mr Armstrong’s non-negative test constituted serious misconduct and it proposed a return to work on conditions and to issue a final written warning. Kono sought a response by 20 September 2021.

[78] Mr Armstrong replied through his lawyer on 20 September 2021. Mr Armstrong repeated and enlarged on his explanation in response to the allegation of serious misconduct. Mr Armstrong considered that the investigation remained ongoing pending further response and expected that he remained suspended on full pay meantime.

[79] Kono replied through its lawyer on 27 September 2021. Some information was provided to support the conditions proposed in the 16 September 2021 letter. Nothing further was said about the suspension.

[80] Mr Armstrong replied through his lawyer. Mr Armstrong intended to obtain an expert report by 14 October 2021. Mr Armstrong again sought confirmation that he would continue to be paid during the suspension. He continued to be ready, willing and able to return to work.

[81] The paid suspension continued unchanged until 1 October 2021.

[82] I am satisfied that Mr Armstrong's employment was affected to his disadvantage by him being stood down and suspended on pay, as Mr Armstrong was excluded from performing work. I need to consider whether Kono's actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time.

Sufficiency of investigation, with regard to the resources available to Kono

[83] Kono is a well-resourced employer.

[84] There is no immutable rule that an employee must be told of a proposed suspension and given an opportunity to persuade the employer not to suspend them.⁴ Any requirement for and the extent of any investigation prior to the suspension on 1 September 2021 must have regard to the safety sensitive nature of Mr Armstrong's work, his non-negative drug test and the provisions of the DAP, the vessel manual and the Procedures. It is most clearly stated in the Procedures that a person who returns a non-negative test result is stood down immediately on full pay pending the confirmation test.

⁴ *Graham v Airways Corp of NZ* [2005] ERNZ 587.

[85] The issue initially was that Mr Armstrong, at work and having been required to undergo a drug test, had produced a non-negative drug test. Further analysis was required under the Procedures. Before the further analysis was returned, Mr Armstrong sent Mr Higgins his account of the incident with the other two workers. However, following receipt of the further analysis, the allegation became one of alleged serious misconduct based on the confirmed positive drug test, rather than about the incident. Mr Armstrong raised no objection to but sought confirmation of the paid suspension.

[86] Suspension on pay in these circumstances was consistent with the applicable conditions of employment in the employment agreement, the DAP and the Procedures.

[87] I find that Kono sufficiently investigated the reasons for the suspension on pay before it was implemented.

Raising concerns before the suspension

[88] For the foregoing reasons, I find that Kono's concerns that led to its decision to suspend Mr Armstrong were raised with Mr Armstrong beforehand, to the extent necessary.

[89] The express requirement in the Code for consultation prior to suspension without pay has no present application.

Opportunity to respond

[90] Mr Armstrong had an opportunity to respond to the non-negative drug test as the basis for him being stood down on pay when it was first raised with him by Mr Higgins.

[91] Mr Armstrong instructed lawyers who represented him at the 10 September 2021 meeting. In their subsequent letter, Mr Armstrong's lawyers confirmed Mr Armstrong's suspension on pay from 1 September 2021, despite Mr Armstrong not having been advised in writing of his suspension. No issue about the absence of an opportunity to respond was raised.

[92] I find that Kono gave Mr Armstrong a reasonable opportunity to respond to the paid suspension. Mr Armstrong only queried whether he had been paid correctly, not whether it

was appropriate that he be suspended following the non-negative test and during the disciplinary investigation.

Genuine consideration of any explanation

[93] Mr Armstrong did not challenge the basis for the paid suspension following his non-negative test. His comments during the disciplinary investigation were directed at the substance of the allegation, not the suspension. Rather, he requested and later obtained confirmation of his paid suspension from 1 September 2021.

[94] To the extent Mr Armstrong gave an explanation about being suspended on pay, Kono gave it genuine consideration.

Other factors

[95] The signatory of the 16 September 2021 letter had not been involved in the 10 September 2021 meeting. A natural justice point potentially arises, but it adds nothing of substance. The content of the 16 September 2021 letter reflected Kono's position arrived at by Mr Higgins, TOH and the signatory.

[96] A fair and reasonable employer would comply with contractual obligations when suspending an employee.

[97] Even if the initial period from 1 September to 7 September 2021 was characterised as "stood down immediately on full pay" in accordance with the Procedures, rather than part of the suspension, Kono did not comply with its contractual obligations. The agreement permitted suspension "in the event that the [Kono] decides to instigate an investigation". It then says "[t]he Employer must give the Employee written notice of any suspension". Mr Armstrong remained off work after Kono's letter of 7 September 2021 because of its disciplinary investigation. However, Kono did not give Mr Armstrong "written notice" of suspension until 16 September 2021. It then confirmed that he had been suspended from 1 September 2021.

[98] There is a submission that the agreement does not specify a timeframe for the "written notice". I disagree. Understood in context, the requirement to give written notice arises at the

time that the employer decides to suspend to instigate a disciplinary investigation. The directive “must” would be undermined if it was open to the employer to defer giving written notice. The provision that the written notice may include conditions binding on the employee, supports the view that the written notice must be provided at the time of the suspension. Retrospectivity problems might arise otherwise. The purpose of written notice of suspension is to avoid uncertainty. The purpose would be undermined if written notice did not have to be given at the time of the suspension.

[99] How Kono acted, not giving written notice of the suspension until 16 September 2021, was not what a fair and reasonable employer could have done in the circumstances.

[100] However, I am satisfied that the delay in giving written notice of the suspension was a minor defect and did not result in Mr Armstrong being treated unfairly. Mr Armstrong always understood that he was stood down then suspended on pay, first for the confirmation test results and then for the disciplinary investigation.

[101] In his evidence, Mr Armstrong characterised Kono’s letter of 16 September 2021 as “The First Ultimatum”. I do not accept that is an accurate characterisation. In the letter, Kono confirmed its view that Mr Armstrong’s non-negative test constituted serious misconduct. Kono then proposed a conditional return to work, including a final warning. Mr Armstrong was asked for any response. It was not an “Ultimatum”.

[102] There are submissions about alleged breaches of good faith and unfair tactics. With respect to the paid suspension, the submissions lack a factual foundation. Kono’s action followed Mr Armstrong’s non-negative drug test. Kono’s actions were consistent with good faith and fairness.

Conclusion - suspension on pay

[103] For the foregoing reasons, Mr Armstrong does not have a personal grievance regarding his suspension on pay.

Does Mr Armstrong have a personal grievance arising from Kono's 1 October 2021 decision to continue the suspension without pay, pending his return to work on conditions?

[104] In its 16 September 2021 letter, Kono advised its view that the non-negative test was a breach of company values, health and safety obligations and constituted serious misconduct. Kono proposed a rehabilitation agreement which included the requirement for Mr Armstrong to pay for drug tests until he provided a negative test and returned to work; to fully participate in a rehabilitation plan in his own time or using his leave if necessary; to take up to 6 random workplace drug tests in the 12 months during his treatment; and to accept that default on the agreement may result in his dismissal without notice.

[105] On 20 September 2021, Mr Armstrong's lawyer repeated and enlarged on his explanation: the non-negative test for THC-COOH did not establish impairment; the Code and DAP prohibited being impaired by or under the influence of drugs at work; and Mr Armstrong's recreational use of cannabis outside of work that resulted in the non-negative test was not serious misconduct or a breach of any employment obligation.

[106] In its lawyer's reply on 27 September, Kono said it did not accept that Mr Armstrong was not impaired, based only on his assertion to that effect. The letter enclosed and referred to several points in the specialist's report, in support of its view that Mr Armstrong could not return to work before he provided a negative test and should be subject to regular monitoring. Mr Armstrong was asked to advise if he was prepared to provide a negative test and agree to the terms. The letter foreshadowed that Kono might otherwise consider dismissal.

[107] Mr Armstrong's lawyer responded on 29 September 2021. Kono was told that Mr Armstrong would obtain a specialist's report by 14 October 2021 and repeated the request for confirmation that Mr Armstrong would continue to be paid through the suspension period, which Mr Armstrong had earlier noted he considered was on-going.

[108] On 1 October 2021, Kono through its lawyers advised:

[Kono] would like Liam to return to work immediately under the conditions proposed, particularly the production of a non-negative⁵ test. As per our [Kono's] policy, from today Liam will be unpaid until the non-negative test is produced.

[109] Kono ceased Mr Armstrong's paid suspension on 1 October 2021.

[110] Clause 16.6 of the employment agreement provided that the continuation of a suspension shall be without pay, if for reasons beyond its control Kono was unable to complete its disciplinary investigation within two weeks of the suspension being effected.

[111] To summarise, by 1 October 2021 Kono had decided that Mr Armstrong was in breach of its values and health and safety obligations by his non-negative drug test comprising serious misconduct, was required to provide a negative drug test and agree other conditions before returning to work and would be unpaid meantime.

[112] These actions affected Mr Armstrong's employment to his disadvantage.

[113] I need to consider whether Kono's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

Whether Kono sufficiently investigated, raised its concerns and gave a reasonable opportunity to respond before this action

[114] Kono is a well-resourced employer.

[115] Kono's conclusion that Mr Armstrong's non-negative drug test was serious misconduct, was influenced by the Code definition of serious misconduct as including "being under the influence of drugs while at work" and the DAP guidelines prohibiting any person being impaired by illicit drugs in the workplace. The provisions in the Code and the DAP were binding on Mr Armstrong, by effect of the employment agreement. This concern was raised with Mr Armstrong and the documents were provided.

[116] The conclusion that the non-negative test amounted to serious misconduct was also influenced by the description of alcohol and drug testing procedures in the vessel manual.

⁵ The email read "non-negative test", but should have read and was understood to mean "negative test".

The manual says that employees found to be under the influence of drugs at work will be dealt with in a disciplinary manner and may be dismissed. It says that positive drug tests will lead to investigation and possible disciplinary procedures. It also states:⁶

Positive Test Results

...

The amount of illicit drugs in the urine shall not exceed the accepted international standard as defined by the Australian Standard AS4309-1195.

[117] The provisions in the vessel manual indicate that the detection of illicit drugs in excess of the standard amounted to being under the influence of drugs at work. While the vessel manual was binding on Mr Armstrong, it was not expressly referred to until after the termination of Mr Armstrong's employment.

[118] The point is clearly set out in the Procedures. It states:

We define "under the influence" of drugs as at a level higher than prescribed in AS/NZS 4308 *Procedure for specimen collection and the detection and quantification of drugs of abuse in urine*. ...

[119] The Procedures also say that a confirmed positive result is considered serious misconduct.

[120] Kono did not refer to or provide the Procedures to Mr Armstrong during the disciplinary process or while his employment remained on foot. There is no reason to doubt Mr Armstrong's evidence that the Procedures were never drawn to his attention during the employment. Kono was entitled under the employment agreement to require Mr Armstrong to comply with the Procedures, but needed to alert him to the definition in the Procedures first. By not doing so, I find that Kono did not properly raise its concerns with Mr Armstrong.

[121] Treating Mr Armstrong's non-negative drug test as amounting to him being impaired or under the influence at work was also influenced by the reports from the other two workers. One stated that Mr Armstrong became aggressive, challenged them to a fight, when they refused said threateningly that he would see them after work and then stormed off. The other form set out a similar but brief description of the incident and attributed it to "paranoia".

⁶ The certificate of analysis refers to AS/NZS 4308:2008 as the method description used.

These reports were not disclosed to Mr Armstrong until after his employment ended. Although Mr Armstrong had set out his different account of the incident in an email to Mr Higgins on 1 September 2021, the workers' reports were not disclosed to him until after his employment ended.

[122] The vessel manual, the Procedures and the workers' reports were information relevant to the continuation of Mr Armstrong's employment, given the 27 September 2021 reference to possible consideration of dismissal. Equally, the decision that Mr Armstrong had committed serious misconduct by reason of the non-negative test, the proffered agreement and the proposed final warning were decisions or proposed decisions that were likely to have an adverse effect on the continuation of Mr Armstrong's employment. Kono had a good faith duty to provide them to Mr Armstrong and give him an opportunity to comment.

[123] For the foregoing reasons, I find that Kono did not properly raise its concerns and did not give Mr Armstrong a reasonable opportunity to respond prior to its decision to place him on unpaid suspension starting on 1 October 2021.

[124] These defects were not minor. They resulted in Mr Armstrong being treated unfairly. Mr Armstrong never had an opportunity to answer the claim about "paranoia" or respond to the details in the workers' reports. More significantly, he had no opportunity to act on the understanding that he had contractually bound himself to being treated as "under the influence" of drugs as a result of the non-negative workplace drug test, amounting to serious misconduct.

[125] It follows that Mr Armstrong has a personal grievance as defined by s 103(1)(b) by reason of Kono's decision to place him on unpaid suspension on 1 October 2021.

[126] I later consider remedies.

Was Mr Armstrong unjustifiably dismissed?

[127] In response to the 1 October 2021 advice that Mr Armstrong would be unpaid until he provided a negative drug test, Mr Armstrong on 4 October 2021 through his lawyers sought either his unconditional return to work and payment of his legal fees, or the continuation of his paid suspension (plus payment of arrears) and deferring the outcome of the investigation

to consider Mr Armstrong's pending specialist report. If either of these options was not complied with, Kono could treat the correspondence as notice of personal grievances including Mr Armstrong being "effectively dismissed".

[128] Kono through its lawyer on 7 October 2021 repeated its conditional return to work offer, said it would not pay Mr Armstrong until he provided a negative drug test and returned to work and agreed it would reconsider the "outcomes" upon receipt of a specialist report.

[129] These exchanges included proposals about mediation. Meantime, Mr Armstrong on 18 October 2021 requested payment of three annual leave days. Mr Higgins replied on 19 October 2021 that he was not able to "do the annuals" while Mr Armstrong was on unpaid suspension.

[130] The reply was followed by correspondence from Mr Armstrong's lawyers on 19 October 2021. Mr Armstrong considered that the disciplinary investigation was ongoing and that he should be paid. He considered that Kono was in breach of clause 16.6 as his suspension without pay indicated that Kono had ended its investigation and was refusing to consider Mr Armstrong's expert report. Kono was asked to reconsider its refusal to pay holiday pay, as Mr Armstrong required the holiday pay to meet his needs while unpaid. The alternative was that he would have to resign and seek work elsewhere.

[131] Before any response from Kono, Mr Armstrong's lawyers forwarded his specialist's report to Kono's lawyer with a request for Kono to reconsider its position and end his suspension and reinstate his pay.

[132] The specialist report is Dr Noller's letter dated 18 October 2021. It sets out some background and states that the positive test for THC-COOH on its own cannot indicate that a person was impaired at the time of the test. THC-COOH is not psychoactive in itself, but only establishes that the person had used cannabis previously. It comments that the test result suggests that Mr Armstrong is a long-term user of cannabis, which the writer understood Mr Armstrong had acknowledged. Dr Noller took issue with Dr Payne's opinion that no-one working in Mr Armstrong's role should do so until they produce a negative drug test. Dr Noller considered that Mr Armstrong "could have" consumed cannabis while not at work. In

his opinion, it appeared “problematic” to assert that Mr Armstrong had engaged in serious misconduct.

[133] On 26 October 2021, through his lawyer’s correspondence, Mr Armstrong resigned and required immediate payment of his final pay and holiday pay. The resignation was explained as follows:

Mr Armstrong’s view is that Kono’s unjustified actions have irreparably destroyed the employment relationship. Mr Armstrong has no choice but to resign as he has been unjustifiably cut off from his income and as Kono has failed to consider his feedback with an open mind and in good faith, especially as he has not breached any of Kono’s policies or his employment agreement.

[134] At the time, there were tentative mediation dates for the following week.

[135] I note that on 14 October 2021, Mr Armstrong had created a “givealittle” fund raising page. He sought support to “set a good legal precedent” as employers should not be able to “bully” their employees for what they do in their own time outside of work “unless the employee agrees to that”. The page advised that donations would be used towards legal costs at mediation or if necessary in litigation in the Employment Relations Authority. Donations might also be used to help pay for Mr Armstrong’s “reasonable living expenses”.

[136] Mr Armstrong’s employment ended by his resignation on 26 October 2021. A dismissal is a sending away at the employer’s initiative. It can include a resignation in certain circumstances. Commonly, there are three types of constructive dismissal cases. Where the employer gives the employee a choice of resigning or being fired, where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee’s resignation, or where a breach of duty causes the employee to resign. In a breach of duty constructive dismissal case, the resignation must be caused by a breach of duty by the employer and the breach must be sufficiently serious to make it reasonably foreseeable by an employer that there was a substantial risk of the resignation.

[137] Kono did not give Mr Armstrong a choice between him resigning or being fired.

[138] There is a submission that Kono must have had the purpose of coercing Mr Armstrong’s resignation as there was no basis on which it could find he had committed

serious misconduct. I do not accept the submission. The Code, the DAP, the vessel manual and the Procedures were the basis for Kono's view.

[139] Further consideration is required regarding the breach of duty argument.

[140] Kono was entitled to require Mr Armstrong to provide a drug test because it had reasonable cause for that, in accordance with the terms and conditions of his employment. Those actions were not a breach of duty.

[141] Kono was entitled to stand-down Mr Armstrong on pay from his work, pending confirmation of the non-negative drug test, in accordance with the terms and conditions of employment. Those actions were not a breach of duty.

[142] Kono was entitled to suspend Mr Armstrong on pay to investigate the allegation of serious misconduct based on his confirmed non-negative drug test. For the most part, its actions were not a breach of duty. Kono breached its obligation to give written notice of the suspension. However, the breach was not sufficiently serious to make a substantial risk of resignation reasonably foreseeable. Nor did the breach cause Mr Armstrong to resign.

[143] Under the terms and conditions of employment, Kono was entitled to treat Mr Armstrong's positive drug test as him being impaired by or under the influence of illicit drugs at work, amounting to serious misconduct. However, Kono breached a duty owed to Mr Armstrong by not disclosing during the disciplinary investigation the vessel manual and the Procedures. Those documents expressly established Mr Armstrong's obligation not to attend work while he tested non-negative for an illicit drug.

[144] The general descriptions of serious misconduct in the Code and the DAP and the general statements about the purpose of Kono's drug and alcohol policy, left open the argument for Mr Armstrong that he was not "impaired" or "under the influence". However, I am mindful that Mr Armstrong worked in a safety sensitive role. The employment agreement permitted drug testing and expressed Kono's commitment to a drug and alcohol-free workplace. That was the context in which Mr Armstrong had provided a negative drug test prior to starting work. Understood in that context, I find that the non-disclosure breach of

duty was not sufficiently serious to make a substantial risk of resignation reasonably foreseeable.

[145] Under the terms and conditions of employment, Kono was entitled to continue Mr Armstrong's suspension without pay, if for reasons beyond its control it was not able to complete its disciplinary investigation. On 29 September 2021 Mr Armstrong asked Kono to defer the conclusion of its disciplinary investigation, pending consideration of Mr Armstrong's specialist report. On 1 October 2021 Kono agreed to consider the report, but at that point decided that the reasons for its investigation not being completed were beyond its control. Those actions were not a breach of duty.

[146] There is a submission that Kono breached duties owed to Mr Armstrong by him being "subjected" to the "unjustified Drug Rehab Program". I am referred to *Lloyd v Healthy Business Investments Limited* in support.⁷ The case is not analogous. Here, Mr Armstrong was employed in a safety sensitive role on terms and conditions that prohibited him from testing positive for illicit drugs while at work. Notwithstanding Mr Armstrong's breach of that requirement amounting to serious misconduct, Kono offered to continue his employment on the proffered terms. Mr Armstrong was expressly asked for a response, so had an opportunity to discuss terms that would be acceptable. Kono's actions were not a breach of duty.

[147] There is a submission that Kono breached a duty by declining to pay Mr Armstrong his annual leave. Mr Armstrong had not completed 12 months of continuous employment, so he was not entitled to paid annual leave. Kono had a discretion to allow Mr Armstrong to take an agreed portion of his annual holidays entitlement in advance, but it breached no duty it owed to Mr Armstrong when it denied his request for payment of holiday pay.

[148] Mr Armstrong gave evidence about further "bad faith" by Kono, following his resignation. However, the statutory good faith duty ended on 26 October 2021 with Mr Armstrong's resignation and the termination of the employment relationship. The post-employment allegations add nothing to the present issue.

⁷ *Lloyd v Healthy Business Investments Limited* [2017] NZERA Christchurch 188.

[149] For the foregoing reasons, I find that Mr Armstrong was not constructively dismissed. His employment ended by his resignation, not a sending away by Kono. The personal grievance claim regarding the termination of employment must be dismissed.

[150] I turn to remedies for the established personal grievance.

Remedies – personal grievance

[151] Mr Armstrong was unjustifiably disadvantaged by Kono's 1 October 2021 decision to place him on unpaid suspension and has a personal grievance as defined by s 103(1)(b) of the Employment Relations Act 2000.

Assessing reimbursement

[152] There is a claim for reimbursement of lost remuneration. In settling a personal grievance, the Authority has power to order the reimbursement of a sum equal to the whole or any part of the wages lost as a result of the grievance.⁸ If I determine that the employee has lost remuneration as a result of the personal grievance, whether or not other remedies are awarded, I must order the employer to pay the lesser of the sum equal to that lost remuneration or 3 months' ordinary time remuneration.⁹

[153] Mr Armstrong lost remuneration from 1 October until his resignation on 26 October 2021 as a result of this personal grievance. Thereafter, the loss resulted from his resignation. The sum lost is less than three months' ordinary time remuneration.

[154] While Kono might have been entitled to suspend Mr Armstrong without pay, I am mindful that he might also have agreed to terms for a return to work, if Kono had provided a copy of the applicable Procedures document. The full loss in the period from 1 – 26 October 2021 is attributable to the personal grievance.

[155] I accept counsel's submission that Mr Armstrong lost 12 days' rostered work at 12 hours per day in the period starting 1 October to 26 October 2021. That totals \$3,312.00 (gross).

⁸ Employment Relations Act 2000 s 123(1)(b).

⁹ Employment Relations Act 2000 s 128(2).

[156] The claim extends to compensation for the lost benefit of the holiday entitlement that would otherwise have accrued on the wages. I accept that 8% should be added to the loss as compensation for the lost benefit.

[157] The compensatory sum required as reimbursement of the lost wages and the lost benefit of holiday pay comes to \$3,576.96 (gross).

Assessing compensation

[158] There is a claim for compensation of \$50,000.00 on a global basis for all of Mr Armstrong's grievances. The submission is that Mr Armstrong suffered a high level of loss.¹⁰ I was also referred to several other cases, but it is not necessary to canvass them in any detail. Here, Mr Armstrong has only established one part of the series of grievances he claimed caused the alleged high level of loss to support his global claim.

[159] Mr Armstrong experienced being unpaid from 1 October 2021 as a "threat" and "bullying tactics". I accept that Mr Armstrong suffered a measure of humiliation, loss of dignity and injury to his feelings as a result of this personal grievance with respect to the cessation of paid suspension.

[160] Only Mr Armstrong gave evidence of the loss he claimed. For the most part, Mr Armstrong partly or significantly attributes his sense of loss to elements of his claims that have not succeeded. However, Mr Armstrong also said that being able to financially support himself is very important to him, he was embarrassed as a result of needing to seek family financial assistance and that the suspension without pay was the "most financially crippling" experience. It "added" to his anxiety.

[161] Mr Armstrong's evidence is tempered somewhat by his October 2021 give-a-little message explaining why he was crowd-funding. Mr Armstrong said that "Secondarily" donations may be used to help pay his reasonable living expenses, having been "unreasonably" suspended without pay. He principally sought support to establish a good legal present. Mr Armstrong's public message in October 2021 that living expenses were the

¹⁰ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

secondary consideration causes me to be cautious about his evidence now about the effects of the end of the paid suspension.

[162] I assess that Mr Armstrong suffered a low level of loss as a result of his proven grievance. I assess compensation at \$7,500.00 as the amount required to remedy that loss.

Additional compensation

[163] I am referred to *Waugh v Commissioner of Police* and *Hall v Dionex Pty Ltd*.¹¹ There is a claim to recover compensation for the legal fees incurred by Mr Armstrong, for representation after he was stood down but apparently not directly attributable to the present proceedings. An additional amount is sought to compensate Mr Armstrong for his expert's report.

[164] The facts in *Waugh* find no parallel in the present case.

[165] In *Hall*, the Court considered that the employer's investigation was baseless. In the present case, Kono had proper grounds to investigate its concerns, given Mr Armstrong's positive drug test.

[166] The claim for additional compensation fails.

Contribution by Mr Armstrong

[167] In deciding both the nature and extent of remedies, I am required to assess the extent to which Mr Armstrong contributed in a blameworthy manner to the situation that gave rise to the personal grievance and reduce remedies according.

[168] Mr Armstrong contributed to the situation giving rise to his grievance. Mr Armstrong tested at work above the AS/NZS 4308 cut-off level for THC-COOH. He worked in a safety-sensitive position and was contractually obliged to comply with Kono's policies and procedures. The Procedures defined "under the influence" as at a level higher than prescribed by AS/NZS 4308. The policy defined serious misconduct to include attending work under the

¹¹ *Waugh v Commissioner of Police* [2004] 1 ERNZ 450; *Hall v Dionex Pty Ltd* [2015] NZEmpC 29.

influence of drugs. In that context, Kono considered that a final warning and a drug and rehabilitation agreement were appropriate and consistent with its practice.

[169] The following elements did not amount to a blameworthy contribution on Mr Armstrong's part. The drug and rehabilitation agreement included a requirement for a negative drug test before Mr Armstrong could return to work. Mr Armstrong objected to the proposed agreement, substantially on the basis that Kono was not entitled to treat his positive test for THC-COOH as him being impaired by or under the influence of drugs at work, amounting to serious misconduct, based on the documents Kono had provided. Mr Armstrong had been on paid suspension, but Kono in response to Mr Armstrong's continued objection decided that Mr Armstrong's absence from 1 October 2021 would be unpaid, pending his return to work after a negative drug test. However, Kono had not provided Mr Armstrong with a copy of the Procedures which underpinned its position that Mr Armstrong was deemed to be "under the influence" of drugs at work because of the positive test for THC-COOH.

[170] A reduction in remedies of 25% is one of particular significance.¹² The statement has been affirmed recently.¹³ The Employment Court there confirmed that reductions of 50% should be reserved for exceptional cases and that care should be taken before imposing a reduction of 25%. The conduct in that case was neither exceptional nor significant blameworthy conduct and the Court fixed 20% as the appropriate level of reduction. I assess Mr Armstrong's level of contribution as at a level similar to the employee in that case. There will be a reduction in awards of reimbursement and compensation of 20%, as there is no reason to distinguish between the two remedies.

[171] Applying the reduction of 20%, Kono will be required to pay compensation of \$6,000.00 (without deduction) and reimbursement of \$2,861.57 (gross).

¹² *Paykel Ltd v Morton* [1994] 1 ERNZ 875.

¹³ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

No arrears are established

[172] The statement of problem includes a claim for compensation pursuant to s 123(1)(b) of the Employment Relations Act 2000, to remedy alleged defaults in wages payable to Mr Armstrong for time worked between 10 May 2021 and 1 September 2021, wages payable from 1 September 2021 to 30 September 2021 and wages lost from 1 October 2021 until 26 October 2021. However, in submissions, counsel for Mr Armstrong advanced these claims by reference to s 131(1) of the Act. In my view, the problem with respect to the period from 1 October 2021 is covered by the personal grievance claim. The earlier two periods fall for consideration under s 131(1) of the Act.

[173] To the extent that there was a claim for arrears with respect to time worked before 30 August 2021, it is now withdrawn. Nothing further is required. What remains for investigation and determination is whether there was a default in payment of wages due under the employment agreement from Monday 30 August 2021 to 30 September 2021.

[174] Mr Armstrong was employed fulltime. Hours of work were set in Appendix B. Ordinary hours were a minimum of 42 per week over an 8-week rotational roster of 4 on 4 off with 12-hour days. Wages were paid weekly, with the pay week starting on Sunday each week.¹⁴ The roster cycle meant that four weeks of the pay cycle required four working days (48 hours) while the other four weeks required three working days (36 hours), to get to a total of 28 working days (336 hours) across the 8-week roster cycle. In that way the roster gave 42 ordinary hours per week on average over the cycle.

[175] Mr Armstrong was on ACC but returned to work on Monday 30 August. He also worked Tuesday 31 August and Wednesday 1 September and was stood-down on pay starting Wednesday 2 September. For the pay week ending Saturday 4 September Mr Armstrong was paid for two days but marked as on leave without pay for two days. That shortfall has now been corrected. I find that there is no default in payment of wages due for time worked and time on paid suspension for the week ending 4 September 2021.

¹⁴ Mr Armstrong's payslips all show pay periods ending on Saturdays.

[176] Mr Armstrong was then paid for 48 hours “Suspension” for the weeks ending 11 and 18 September, 36 hours “Suspension” for the week ending 25 September and 42 hours “Suspension” for the week ending 2 October 2021.

[177] The timesheets demonstrate that Kono applied the roster pattern. Four 12-hour work days fell in the weeks ending 11 and 18 September 2021, but only three 12-hour work days fell in the week ending Saturday 25 September 2021. That explains the variance in payment. I find that there was no default in payment of wages due under the employment agreement for these three weeks.

[178] Although there are no timesheets, continuing the roster pattern in the week ending Saturday 2 October would have resulted in Mr Armstrong rostered on Sunday, rostered off for the next four days, then rostered on Friday and Saturday. But for the suspension, he would have worked three days in that week. The payment to him for the week was “Ordinary Hours – Suspension (Qty) 42 (Rate) 23 (Amount) 966.00”. Mr Armstrong cannot show that there was a default in payment due to him for the week ending Saturday 2 October 2021.

[179] It follows that Mr Armstrong’s claim for arrears of wages must be dismissed.

Penalties do not apply

[180] The statement of problem included allegations of breach of good faith, breach of the Wages Protection Act 1983, breach of the employment agreement and breach of the Holidays Act 2003. Penalties were not specifically claimed for these breaches, but there was a claim for such other relief as the Authority may deem just. By counsel’s submissions, I am now invited to exercise my discretion as seen fit regarding whether penalties are appropriate.

[181] Mr Armstrong’s employment relationship problem centres on his grievance claims about Kono’s handling of his positive workplace drug test. The problem is resolved by the foregoing findings and appropriate orders have been identified.

[182] The statement of problem may not properly have commenced an action for the recovery of a penalty. Nonetheless, I express the following views on the assumption that Mr Armstrong has.

[183] Kono breached good faith with respect to its decision to cease paying Mr Armstrong, but not otherwise. Kono's breach was not deliberate, serious and sustained. Kono did not intend to undermine the employment relationship. The proven breach does not meet the standard required before Kono could be liable for a penalty under s 4A of the Employment Relations Act 2000.

[184] Kono initially paid Mr Armstrong at a rate lower than was due under the employment agreement when it first suspended him. The default was raised and Kono promptly remedied the problem. As explained, it decided to cease payment to him from 1 October 2021 until he returned to work having provided a negative drug test. The first issue could have been an arrears problem, but it was resolved. The second issue was a personal grievance. Neither issue was an unlawful deduction in breach of the Wages Protection Act 1983 so as to engage s 13 of that Act and liability for a statutory penalty. Even if the issues could have been characterised in that way, circumstances would not have merited the imposition of a penalty, whether payable to the Crown alone or in part to Mr Armstrong.

[185] Clause 16.6 of the employment agreement permitted Kono to suspend Mr Armstrong on pay for a disciplinary investigation. It was required to give written notice of the suspension. Kono could continue the suspension without pay, if the investigation was not completed within two weeks for reasons beyond its control.

[186] Alongside that, Kono's Procedures specified that no person who is required to undergo a drug test shall be permitted to return to work until a negative test is received.

[187] Kono did not give written notice of suspension to Mr Armstrong in a timely manner. Nothing about that circumstance merits the imposition of a penalty, whether payable only to the Crown or partly to Mr Armstrong. While unjustified, Kono's decision to cease paying Mr Armstrong was not a breach of the employment agreement. No penalty liability arises.

No arrears of holiday pay are established

[188] In submissions for Mr Armstrong, counsel says it appears that Kono paid Mr Armstrong his correct holiday pay, having regard to holidays taken in advance by Mr Armstrong. Counsel also notes that if arrears of wages are owed, that would generate an

entitlement under s 23 of the Holidays Act 2003 to a further payment of 8% on the gross arrears.

[189] As no arrears are owed, the claim for arrears of holiday pay must fail.

Summary and orders

[190] Mr Armstrong has a personal grievance in that his employment was affected to his disadvantage by Kono's unjustified action ending his paid suspension on 1 October 2021.

[191] All Mr Armstrong's other personal grievances and his other claims are dismissed.

[192] To settle the personal grievance, Kono NZ LP is to pay Liam Brian Armstrong the following sums within 28 days of this determination:

- (a) Compensation of \$6,000.00 (without deduction); and
- (b) Reimbursement of \$2,861.57 (gross).

[193] Costs are reserved. If costs are not resolved by discussion, a party may claim costs by lodging and serving a memorandum setting out the basis for the claim within 21 days of the determination. The other party may lodge and serve a memorandum in reply within a further 7 days. I will then determine costs by reference to those submissions, having regard to the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority