

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 443
5448776

BETWEEN AARON BROWN
 Applicant

A N D BALLANCE AGRI-NUTRIENTS
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Warwick Reid, Advocate for the Applicant
 Kylie Dunn, Counsel for the Respondent

Investigation Meeting: 22 October 2014 at Tauranga

Submissions Received: 22 October 2014 from both Applicant and Respondent

Date of Determination: 30 October 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Brown was unjustifiably dismissed by the respondent, Ballance Agri-Nutrients Limited (Ballance).**
- B. There is no order for reinstatement.**
- C. Ballance is to pay Mr Brown compensation in the sum of \$1500 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).**
- D. Ballance is to pay Mr Brown three months' wages lost by him as a result of his unjustified dismissal pursuant to s.128 of the Act.**
- E. All of the above sums are to be paid by Ballance to Mr Brown within 21 days of the date of this determination.**



- F. **Costs are reserved. Mr Brown has 14 days from the date of this determination to file and serve a memorandum as to costs. Ballance has 14 days of receipt in which to reply.**

Mr Brown and Mr O'Connor's grievances

[1] Mr Brown and his workmate Mr O'Connor were both dismissed from their employment by Ballance on 19 and 20 December 2013 respectively. Mr O'Connor brought a claim against Ballance claiming unjustifiable dismissal and remedies of distress compensation and loss of remuneration as a result. Mr O'Connor did not seek reinstatement to his former position at Ballance.

[2] On 6 October 2014, the Authority issued its determination¹ in relation to Mr O'Connor's claim. The Authority determined that Mr O'Connor had been unjustifiably dismissed by Ballance and awarded him distress compensation and lost remuneration pursuant to the Employment Relations Act 2000 (the Act).

[3] The circumstances surrounding Mr Brown's dismissal were similar but not identical to that of Mr O'Connor. Mr Brown seeks reinstatement to his former position at Ballance and loss of remuneration as a result of what he claims to be his unjustifiable dismissal by it.

Mr Brown's employment relationship problem

[4] Mr Brown was dismissed from his employment with Ballance on 19 December 2013. The dismissal was confirmed by Ballance in a letter from it which states:

During the course of our meeting the company reached a preliminary view that returning an excessively high positive result when reasonable cause tested for cannabis on Friday 13 December 2013 was deemed to be unacceptable behaviour of a serious misconduct nature and was specifically in breach of:

- *Failure to comply with any of the Company's fire prevention, site permit requirements and safety rules or procedures.*

¹ [2014] NZERA Auckland 404

- *Being under the influence of alcohol or illegal drugs to the extent that the individual is unable to perform his/her duties properly/safely.*
- *Failure to comply with the Company Policies and Procedures.*

This breach is defined as serious misconduct in the General Terms of Employment and carries a potential outcome of summary (instant) dismissal. You were given full opportunity to put forward your explanation in respect to this serious misconduct. After giving careful consideration to all representations made by you, I reached the view that I had no alternative but to terminate your employment for serious misconduct in relation to being under the influence of illegal drugs and failure to comply with the Company's safety rules and procedures. As a result of your actions I have lost the trust and confidence in you as an employee. Your termination is effective immediately.

[5] The letter was signed by Mr Brown's immediate supervisor, Mr Alex Beck, Ballance's Service Centre Manager at Maru Street, Tauranga.

[6] Mr Brown claims the dismissal to be unjustified. Mr Brown says Ballance did not have "reasonable cause" to drug test him. Mr Brown says a positive drug test does not constitute evidence of impairment at work. Further, Mr Brown says before dismissing him, Ballance should have considered the other options available to it in its Drug and Alcohol policy(the policy). Mr Brown says in the circumstances, his dismissal by Ballance was not the action of a fair and reasonable employer.

[7] Ballance denies the dismissal was unjustified and says Mr Brown had committed serious misconduct and in all the circumstances its decision to dismiss Mr Brown was open to it as a fair and reasonable employer.

Mr Brown's employment at Ballance

[8] Ballance is one of New Zealand's largest fertiliser specialists, with manufacturing plants in Mount Maunganui and Invercargill. Ballance is a national company employing more than 700 employees.²

[9] Prior to Mr Brown's dismissal on 19 December 2013, he was employed by Ballance for about almost three years, as a forklift driver at its Maru Street site in Mount Maunganui. Mr Brown's role included the operation of plant and machinery

²

Ballance website www.ballance.co.nz

for the purposes of screening, blending and bagging of fertiliser as well as the handling of bulk fertiliser products.

[10] Mr Brown was regarded as a good employee and regularly made himself available for extra work and overtime.

[11] In approximately February 2013, Mr Brown was convicted for drinking and driving and lost his driver's licence for 13 months. Upon conviction, Mr Brown informed Ballance. Because he was unable to drive machinery, Mr Brown became a bagging operator until, with Ballance's assistance, he obtained by Court Order a limited licence. Mr Brown's limited licence enabled him to continue operating a forklift at Ballance. The limited licence was restricted to his employment at Ballance.

[12] Mr Brown did not undergo rehabilitation or counselling following his conviction, either externally or through programmes at Ballance. At the time of his dismissal on 19 December 2013, Mr Brown still did not have his full licence and was operating machinery at Ballance on his limited licence.

[13] At the time of losing his licence in February 2013, Mr Brown had already been convicted of drinking and driving on three previous occasions. It was not until he lost his driver's licence for 13 months that Mr Beck became aware of the other drink driving convictions.

[14] At the investigation meeting, Mr Brown says while employed by Ballance, he drank alcohol more heavily than he smoked cannabis. Mr Brown says he did not drink alcohol or smoke cannabis at work, these activities took place outside work. On one occasion Mr Brown admitted being sent home by his work mates for coming to work after drinking too much alcohol.

[15] Mr Brown says he no longer smokes cannabis, he gave up immediately upon dismissal. No drug test results were provided to the Authority to verify this statement.

Events of 12 December 2013

[16] As described in its determination concerning Mr O'Connor³ on Thursday, 12 December 2013, Mr Brown and his workmate, Mr Shaun O'Connor, went to the local shopping centre, Central Parade at lunchtime in Mr O'Connor's car. A member

³ supra para [8] to[13]

of the public observed them and believed they were smoking “pot” in the car. This was reported to Ballance.

Meeting on 13 December 2013 – Suspension

[17] The next day, at about 9.30am, while Mr Brown was cleaning his forklift, a work mate approached him and told him that Mr Beck and Mr Piper, the Mount Maunganui Operations Manager wished to see him and Mr O’Connor in the office. Mr Beck told Mr Brown that there had been a complaint from a member of the public who had taken Mr O’Connor’s car’s registration number and claimed that Mr Brown and Mr O’Connor had been smoking “pot” in the car at Central Parade.

[18] Mr Brown said that at the meeting, both he and Mr O’Connor denied smoking “pot” on 12 December. Mr Brown says he and Mr O’Connor had also smelt cannabis and assumed it had come from the bus shelter near to where their car was parked. Mr Brown said he and Mr O’Connor were told that they were to undergo a reasonable cause drug test. Mr Brown said while he willingly undertook the drug test, he did not feel he had a choice but to take the test. Mr O’Connor and Mr Brown both had urine tests at the offices of the New Zealand Drug Detection Agency (NZDDA) in Tauranga. Mr Brown’s urine test showed a non-negative result for cannabinoids.

[19] Because of the non-negative result, Mr Brown was suspended on pay until the test was verified by Canterbury Health Laboratories. The verified test was that Mr Brown had tested positive for Carboxy - THC. The level was high, and significantly higher than that of Mr O’Connor.

Meeting – 19 December 2013

[20] A further disciplinary meeting was held on Thursday, 19 December at which time Mr O’Connor was represented by Mr Selwyn Russell, an organiser from the Maritime Union of New Zealand. Mr Brown was not represented but was given the opportunity to obtain representation if he wished. Mr Brown chose not to do so.

[21] There was further discussion about the incident on 12 December. Mr Brown acknowledged being a recreational smoker of cannabis and acknowledged that he had smoked cannabis on the evening of 12 December 2013. Mr Brown denied smoking cannabis at work.

[22] Mr Brown was dismissed for serious misconduct and this was confirmed in a letter from Ballance dated 19 December 2013, referred to in para.1 above. Mr O'Connor was also dismissed. In its determination of 6 October, the Authority held Mr O'Connor's dismissal to be unjustified⁴.

Issues

[23] The issues the Authority is to determine are:

- (a) Was Ballance entitled to request Mr Brown to undergo a reasonable cause drug test?
- (b) Did the failure by Mr Brown of the reasonable cause drug test constitute serious misconduct for which dismissal from employment was justified in the circumstances?
- (c) Were there other reasons justifying Mr Brown's dismissal?

First Issue

Was Ballance entitled to request Mr Brown to undergo a reasonable cause drug test?

[24] After receiving the non-negative drug test result on 13 December, Mr Brown was suspended on pay until the result was verified by the laboratory. Mr Brown says he acknowledged that he smoked cannabis outside of work but not at work.

[25] Mr Piper took handwritten notes of the meeting with Mr Brown and Mr O'Connor which recorded that:

Returned to work, advised both that due to not neg result would suspend them on pay pending lab verification results and if required a investigation/disciplinary process. Advised my view is facts are known and would not require a investigation unless there was something they wanted to add once they had a support person present. Both Aaron Brown and Shaun O'Connor admitted smoking pot outside of work but not at work. All agreed no need for full investigation with representation and would advise AB & SP of any further facts as they saw them.

[26] Both Mr Beck and Mr Piper say that during the meeting of 13 December Mr Brown displayed unusual behaviour. Mr Beck says Mr Brown "developed a staunch and slightly aggressive approach to the questioning". Mr Piper confirmed

⁴ Supra



this. Because Mr Brown had admitted smoking cannabis outside work, Mr Beck and Mr Piper believed that reasonable cause testing was both justified and necessary. A request was made of Mr Brown for a reasonable cause drug test (the test) under the provisions of Ballance's drug and alcohol policy (the policy).

[27] Mr Piper's handwritten notes of the meeting do not mention any "*unusual*" behaviour by Mr Brown. Mr Brown was never told that it was his "*unusual*" behaviour that Mr Beck and Mr Piper considered justified a test. The "*unusual*" behaviour was not raised at the time. Both Mr Beck and Mr Piper said that in previous meetings with Mr Brown, he was usually relaxed and laid back. It was his aggressive manner that they both believed was unusual.

[28] An incident investigation report completed after the incident records that Mr Piper's handwritten notes of the discussion were accurate. However, there is no mention in that report of any unusual behaviour by Mr Brown. The first mention of unusual behaviour by Mr Brown at the meeting on 13 December was in the witness statements filed by Mr Beck and Mr Piper for the purposes of the Authority's investigation meeting.

[29] I do not accept that Mr Brown displayed unusual behaviour at the meeting which justified requesting the test. As I found in the case involving Mr O'Connor, the incident investigation report stated that Mr O'Connor agreed that it was his car and that both Mr O'Connor and Mr Brown admitted that they were in the car at the time and at the location described by the member of the public. In my view this was the reason for Mr Beck and Mr Piper deciding to request a drug test.

[30] Mr Brown's urine test was subsequently verified by Canterbury Health Laboratories as being positive for cannabis.

[31] A complaint from a member of the public did not entitle Ballance to require a reasonable cause test. The fact that Mr Brown and Mr O'Connor were in Mr O'Connor's car at Central Parade during lunch time also did not entitle a request for a test by Ballance. I do not accept the evidence of Mr Beck and Mr Piper that they also observed Mr Brown acting in an unusual manner on 13 December which entitled the request for the test. It does not make sense that this important evidence was not referred to in any of the notes of the meeting. In my view, Mr Beck and Mr Piper did not have grounds to request that Mr Brown undergo the test.

Ballance's Policies and Procedures

[32] Mr Brown was employed pursuant to an individual employment agreement. There is no dispute that Mr Brown was subject to Ballance's policies, procedures and the code of conduct. There is no dispute that Ballance's Maru Street site is a safety sensitive site.

[33] Ballance has a Group Policy Manual which includes a drug and alcohol policy (the Policy) which applies to Ballance employees throughout the country. The covering letter of the Policy signed by the Chief Executive emphasises the need for a safe workplace free from those individuals adversely affected by alcohol or drugs. The letter also sets out the various levels of assistance provided by Ballance for individuals who test positive for drugs or alcohol. Assistance includes education, training and rehabilitation under Ballance's drug and alcohol rehabilitation programme.

[34] The letter records the types of drug and alcohol testing Ballance may undertake including testing before an offer of employment is made, testing following an incident or an accident, reasonable cause testing if an employee appears to be acting in a manner suggesting alcohol or drugs "*may be impacting on their ability to work effectively and safely*" and random testing for alcohol or drugs to ensure continued compliance by employees with the Policy.

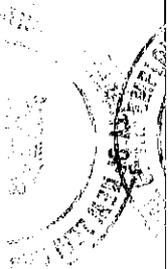
Reasonable Cause Drug Testing

[35] Reasonable cause drug testing is referred to in the letter as follows:

Reasonable cause testing. Employees and contractors may be tested for the presence of drugs and/or alcohol where their actions, appearance, behaviour or conduct suggests drugs or alcohol may be impacting on their ability to work effectively and safely.

[36] The Policy itself reiterates Ballance's commitment to a safe and healthy workforce free from the effects of drugs and alcohol. The Policy emphasises education, training and assistance programmes to eliminate the risks of alcohol and drug related harm to employees as well as testing where required.

[37] Clause 2.0 of the Policy states as its purpose:



... Ballance is committed to a drug and alcohol free work environment where all employees will feel safe from the dangers that people affected by such substances may bring into the workplace.

...

***Reasonable cause testing:** Employees are tested where there is reasonable cause to suspect alcohol or drug use.*

[38] At clause 8.0 of the Policy, there are testing procedures for drug and alcohol use. Clause 8.2 lists the consequences of a non-negative and positive drug or alcohol test. In the case of a non-negative test the employee may be stood down on pay until the result is confirmed. On the first occasion in which a positive test is returned there are a number of possible consequences including suspension from employment without pay, opportunities for counselling or rehabilitation, a written warning, advice of random testing and/ or dismissal.

[39] The second time a positive result is returned may be treated by Ballance under the Policy as serious misconduct for which dismissal is appropriate.

[40] There is reference in the Policy to reasonable cause drug testing when an employee refuses to consent to a drug or alcohol test. The Policy states:

Ballance seeks the cooperation of all employees in agreeing to undergo drug or alcohol testing where there is reasonable cause, following an accident/incident and/or clear evidence of impairment. Where the employee refuses to provide consent to undergo a drug or alcohol test, the company will have no option but to rely on the evidence of the employee's impairment, when making a decision about what action to take.

[41] Schedule 3 sets out the procedure for reasonable cause testing. It states:

***Circumstances.** An employee may be tested for drugs/alcohol where a manager/supervisor determines that the employee's appearance, actions, or behaviour suggests they may be affected by drugs/alcohol. Normally there will be more than one indicator present. The manager/supervisor (where possible) must obtain a second opinion to support their reasonable-cause observation(s).*

***Procedure.** The manager or the employee's supervisor must:*

- (a) Determine whether there is sufficient cause to test for drugs/alcohol (Appendix G);*
- (b) Obtain informed written consent for this testing from the employee (Appendix F).*

If sufficient cause and consent are present the manager or supervisor should follow the same procedures detailed as in Post-accident Post-incident procedures.

Refusal to consent. Where an employee refuses to undergo a test the refusal shall be treated under the serious misconduct disciplinary procedures contained in the Ballance Code of Conduct.

[42] Appendix G sets out reasonable cause indicators which include “*unusual physical symptoms or behaviours*” such as:

- *Excessive lateness;*
- *Absences often on Monday, Friday or in conjunction with holidays;*
...
- *Changes in personality;*
- *Changes in alertness – difficulty with attention span;*
- *Changes in appearance – clothing, hair, personal hygiene;*
...
- *Going to the bathroom more than normal;*
...
- *Dizziness;*
- *Slurred speech;*
- *Hangovers;*
- *Violent behaviour;*
...
- *Irritability;*
- *Depression;*
- *Suspected use of drugs/alcohol observed or reported;*
- *Found in possession of drugs or alcohol or drug paraphernalia at the workplace.*

[43] Appendix G includes check lists to be completed by the Supervisor of an employee under observation. Physical symptoms or behaviours observed by the Supervisor are to be provided. A check box for determining reasonable cause is set out as follows:

- *Has some form of impairment been shown in the employee's appearance, actions or work performance?*
- *Are you satisfied that it is reasonably possible that the risk as a result of the possible use of drugs or alcohol?*
- *Is the impairment current, today, now?*
- *Are you comfortable that the person(s) is likely to be impaired beyond a reasonable doubt?*

[44] It is clearly correct that Ballance has a statutory responsibility to ensure the safety of all its employees. The Policy makes clear that Ballance is committed to a



workplace free from drugs and alcohol. That policy is comprehensive and details steps to be followed before reasonable cause testing can be carried out.

[45] There are various references to reasonable cause testing in the Policy. It is my view that a prerequisite for reasonable cause testing by Ballance of one of its employees is an incident/accident, behaviour suggesting drugs or alcohol may be impacting on his/her ability to work effectively and safely or impairment as a result of drugs or alcohol.

[46] In this case, if Mr Beck and Mr Piper were concerned that Mr Brown may be acting in a manner suggesting his use of drugs or alcohol were impacting on his ability to work effectively or safely or that he was impaired as a result of drug use or under the influence of drugs, there was a clear procedure to be followed before a decision could be made to undertake the reasonable cause testing. The procedure was not followed.

[47] Mr Beck and Mr Piper both agreed that neither looked at Appendices G and H before making the decision to request reasonable cause testing. Mr Beck said that because of his experience, he was of the view that the behaviour that he was witnessing at the meeting by Mr Brown was sufficient. I do not agree. The procedure was clear and in my view required more than an observation for a few minutes at a meeting which, in the circumstances, was a stressful one for Mr Brown. The “*reasonable cause indicators*” are behaviours usually observed over days or weeks and include “*Excessive lateness...Absences often on Monday, Friday or in conjunction with holidays...Changes in personality...*”

[48] Mr Piper and Mr Beck acknowledged that neither had been spoken to in the week leading up to 13 December about Mr Brown’s work. No manager had reported to Mr Piper that Mr Brown was not able to do his work. There was no reason for Mr Brown to be tested; he was not acting in a manner which allowed for a request to undertake a test under Ballance’s Policy.

[49] In the Employment Court case of *Hooper v. Coca Cola Amatil (New Zealand) Ltd*⁵, Judge Ford agreed with counsel’s submission that:

It is a “reasonable cause” testing scheme. This means that before a test occurs, the defendant must have reasonable cause to test. There

⁵ [2012] NZEmpC 11

must be some nexus between the reasonable cause and the test, as the test is seen as corroborative of the reasonable cause.

[50] Judge Ford went on to say:

The company's managerial prerogative in relation to drug testing ... was subject to ... the collective agreement. The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.

[51] Reasonable cause testing in Ballance's Policy requires evidence to suspect an individual employee is affected by drugs before deciding to test. There must be signs of impairment observed by a supervisor.

[52] Having received a positive test in breach of its own Policy, Ballance was not able to retrospectively validate the testing process. The result therefore could not be relied on by Ballance in my view.

[53] I conclude that Ballance breached its own policies and procedures in requiring Mr Brown to undertake the reasonable cause test without the requisite reasonable cause. The answer to the first issue is "No".

Second Issue

Did the failure by Mr Brown of the reasonable cause drug test constitute serious misconduct for which dismissal from employment was justified in the circumstances?

[54] One of the grounds relied on by Ballance to dismiss Mr Brown and which is set out in the letter of dismissal of 19 December, was that he had returned a positive drug test which it "*deemed to be unacceptable behaviour of a serious misconduct nature*".

[55] As I have found, Ballance was not able, in my view, to rely on the positive drug test invalidly obtained in breach of its own Policy. The answer to the second issue is "No".

[56] Even if I am incorrect in making this finding, Ballance's Code of Conduct (the Code) includes a definition of "*serious misconduct*" which makes no reference to the return of a positive drug test alone as constituting serious misconduct. In relation to drug use, serious misconduct is limited to:

- *The possession or consumption of illegal drugs on Company premises or whilst on Company business.*
- *Being under the influence of alcohol or illegal drugs to the extent that the individual is unable to perform his/her duties properly/safely.*
- *Serious breaches of the Company's Motor Vehicle policy and/or driving under the influence of alcohol or drugs.*

[57] However, the Policy in Clause 8.2 does confer a discretion on Ballance to treat a positive drug test as serious misconduct which may result in termination of employment. I do not accept in Mr Brown's case such a finding was open to Ballance as a fair and reasonable employer. The Policy recognises that employees may have consumed alcohol or drugs, but not to the extent that their ability to work effectively and safely is impacted. Neither Mr Beck nor Mr Piper took this into account during their disciplinary investigation of Mr Brown.

[58] Mr Brown's advocate referred me to the Employment Court decision in *Hallyar & Anor v The Good Time Food Company Ltd*⁶. In that decision the Employment Court recognises that the actions of an employee in their own time, is a matter for them. It is only a matter legitimately for the employer, when it impacts on the employer. Judge Ford cites with approval the Full Bench of Fair Work Australia decision in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*⁷ and at para.[68] states:

Although one needs to approach judgments from other jurisdictions with some degree of caution, given the way in which urine testing for drugs in Australia and New Zealand is conducted under a common standard, the decision no doubt has more relevance than might otherwise be the case. To that extent, the conclusion of the Senior Deputy President, noted in the Full Bench decision, would in my view have equal application in this country and go some way toward explaining in part the rationale behind the requirement for drug policies to be interpreted and applied strictly.⁸

... The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed, it would be unjust and unreasonable to do so.

⁶ [2012] NZEmpC 153)

⁷ [2012] FWAFB 4998

⁸ [2012] FWA 1809 at [36]



[59] As I have found, there were no grounds for reasonable cause drug testing of Mr Brown.

Third Issue

Were there other reasons justifying Mr Brown's dismissal?

[60] The letter of 19 December 2013 terminating Mr Brown's employment identifies two other grounds for dismissal namely:

- *Failure to comply with any of the Company's fire prevention, site permit requirements and safety rules or procedures.*
- *Failure to comply with the Company Policies and Procedures.*

[61] Ballance did not produce any Fire Prevention Site Permit requirements at the Authority's investigation meeting. Mr Beck conceded at the Authority's investigation meeting that this wording was provided by Ballance's HR representative. Similarly, there was no evidence of a failure by Mr Brown to comply with Ballance's Policies and Procedures. The answer to the third issue is "No".

[62] Upon receipt of the positive drug test, there was no consideration by Mr Beck or Mr Piper of any of the other provisions available under the Policy. Mr Beck and Mr Piper could have considered offering Mr Brown education, training, counselling or to participate in rehabilitation. None of these measures were considered, despite being available to Ballance on the first occasion a positive drug test is returned by an employee.

[63] The Authority must apply the test of justification set out in s.103A of the Employment Relations Act 2000 in determining whether a dismissal is justifiable or not. The test is an objective one as to 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 occurred.

[64] There were a number of reasons as to why, in terms of the s.103A test for justification, the dismissal of Mr Brown was unjustified. The principal reason is that Ballance acted in breach of its own drug policy, there was no reasonable cause to test Mr Brown. I find Mr Brown's dismissal was unjustified.



Remedies

Reinstatement

[65] The primary remedy sought by Mr Brown is reinstatement to his former position. Ballance strongly opposes Mr Brown's reinstatement. Reinstatement is no longer the primary remedy under the Act, but it is an important remedy for an employee⁹.

[66] Section 125 of the Act provides:

125 Remedy of reinstatement

- (1) *The section applies if-*
- (a) *It is determined that the employee has a personal grievance and*
 - (b) *The remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in s123(1)(a)).*
- (2) *The Authority may, whether or not it provides for any of the other remedies specified in s123, provide for reinstatement if it is practicable and reasonable to do so.*

[67] In *Lewis v Howick College Board of Trustees*, the Court of Appeal affirmed the view that¹⁰:

Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

[68] The Employment Court in *Angus v Ports of Auckland Limited*¹¹ stated in respect of "reasonableness" that:

the requirement for reasonableness invokes a broad enquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[69] This approach has been adopted by the Employment Court in the recent decision of Judge Ford in *H v A Ltd*.¹²

⁹ *H v A Ltd* [2014] NZEmpC 189 at para 108

¹⁰ [2010] NZCA 320

¹¹ [2011] NZEmpC160

¹² *H v A Ltd* supra para 112

[70] Mr Brown says he no longer smokes cannabis and has not been able to obtain a job as well remunerated as at Ballance. Mr Brown wishes to be reinstated as a forklift driver.

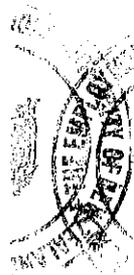
[71] Ballance says it does not have trust and confidence in Mr Brown. Ballance says it is a safety sensitive site and the safety of its other employees is paramount. Ballance says Mr Brown has admitted recreational cannabis use over a 30 year period. Mr Brown's cannabis use while at Ballance was frequent and it does not accept he has stopped smoking cannabis. No objective evidence was provided to Ballance or to the Authority that Mr Brown has stopped smoking cannabis.

[72] Simply put, Ballance does not trust Mr Brown to return to the workforce and drive its vehicles. Ballance says to allow him to do so would impose a risk to the safety of others and it does not believe this is reasonable. Further, Ballance says Mr Brown had no insight into his actions during the disciplinary process.

[73] Mr Brown was employed at Ballance for less than three years. Mr Brown has been able to obtain alternative work but not at the level of remuneration at Ballance. Mr Brown had no insight during Ballance's disciplinary investigation into his drug and alcohol use, in my view. Ballance is rightly concerned by the potential dangers to safety posed by Mr Brown if he was to return. Mr Brown has four drink driving convictions and the positive drug test was at a high level, these factors have influenced Ballance's trust and confidence in Mr Brown.

[74] Mr Brown offered to undergo regular random drug testing if reinstated. I do not consider this to be reasonable in the circumstances. Drug testing is a time consuming and costly procedure which in my view would impact on Ballance's working environment and probably staff morale.

[75] Mr Brown produced no objective evidence to the Authority regarding his current drug and alcohol use and no evidence of any counselling or rehabilitation undertaken in support of his request for reinstatement.



[76] Balancing the equities of the parties' cases in this instance, I am not persuaded reinstatement is appropriate. There is no order for reinstatement.

Loss of remuneration

[77] Mr Brown claims three months' loss of wages. An employee who has been dismissed must take steps to mitigate their losses. Mr Brown says following his dismissal, he went to a number of employment agencies to obtain work. At the Authority's investigation meeting Mr Brown was only able to recall the name of one agency. No details of the jobs Mr Brown applied for was provided to the Authority, nor was any information of rejections by prospective employers.

[78] I am not convinced Mr Brown made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment.

[79] I award Mr Brown three months loss of wages pursuant to s128(2) of the Act. I expect the parties can resolve the actual amount. If there are any issues leave is granted for either party to seek directions from the Authority.

Compensation for distress

[80] Mr Brown also claims compensation for humiliation, loss of dignity and injury to feelings. Mr Brown produced little evidence in support of this claim.

[81] In the Employment Court decision in *Hallyar* referred to above, the Court observed that Mr Hallyar was aware the employer company had introduced a drugs policy but he continued to carry on as an "*habitual smoker*" of cannabis. In that case, Judge Ford observed that:

An employee who continues his or her heavy recreational use of drugs in the knowledge that the employer has a drugs policy in place can scarcely purport to feign any significant humiliation, loss of dignity or injury to feelings if they are subsequently dismissed for failing a workplace drugs test. The principle is the same even when, as in this case, the dismissal proves to be unjustified.



[82] Accordingly, Mr Hallyer was awarded the sum of \$3,000. In *Hooper*¹³ Judge Ford stated when considering the actual consequences the dismissal had on the plaintiff that:

At the same time, the reality is that he was aware that if the company ever had genuine cause to require him to undergo a drug test then he was likely to fail the test because of what he referred to as his "recreational use" of cannabis outside of work. He admitted as much at the time the test was carried out. In other words, he knew that he was taking a risk and so the impact on him of the dismissal would not have been as serious as it might otherwise have been.

[83] Mr Brown admitted to smoking cannabis for some 30 years. Mr Brown was aware of Ballance's drug and alcohol policy and that testing took place in certain circumstances. Mr Brown admitted smoking cannabis on the evening of 12 December 2013. During Ballance's investigation process Mr Brown appeared not to have insight into how his frequent recreational drug use may be a cause of concern to Ballance as his employer. Mr Brown's positive cannabis test was at a high level.

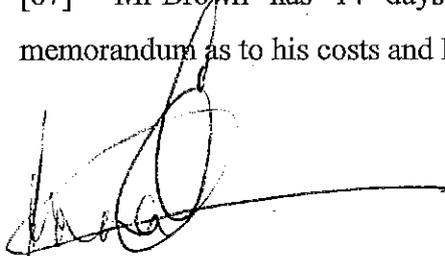
[84] I take the approach taken by Judge Ford in *Hallyer* and in *Hooper*. In Mr Brown's circumstances I make an award of \$1500 pursuant to s.123(1)(c)(i) of the Act.

[85] On the issue of contribution pursuant to s.124 of the Act, Ballance was not entitled to request that Mr Brown undertake a drugs test. Without the resulting positive drug test, Mr Brown would not have been dismissed.

Costs

[86] Mr Brown is entitled to costs.

[87] Mr Brown has 14 days from the date of this determination to file a memorandum as to his costs and Ballance has 14 days upon receipt in which to reply.



Anna Fitzgibbon
Member of the Employment Relations Authority

