IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 63
5453231

	BETWEEN	JESSE KENMARE Applicant
	A N D	FULTON HOGAN LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Anjela Sharma, Counsel for Applicant Blair Scotland, Counsel for Respondent
Investigation Meeting:	14 April 2014 at Nelson
Submissions Received:	On the day
Date of Determination:	17 April 2014

INTERIM INJUNCTION OF THE AUTHORITY

A **The application for interim reinstatement is declined.**

B **A telephone conference is to be arranged to progress the matter and make arrangements for determining the application for removal to the Employment Court.**

C **Costs are reserved until after the substantive investigation and final determination.**

Employment relationship problem

[1] Jesse Kenmare commenced his employment with Fulton Hogan Limited (Fulton Hogan) in the Nelson region on 29 October 2007 and was at the material time a construction labourer.

[2] Mr Kenmare was dismissed effective from 11 March 2014 for serious misconduct following a positive test for cannabis under the company drug and alcohol policy. The company rules provide that recording a positive result under the company alcohol and drug policy may be serious misconduct.

[3] Mr Kenmare says that his dismissal was unjustified. There are some other claims as well for unjustified disadvantage and breach of the collective agreement. Mr Kenmare has made an application for interim reinstatement under s.127 of the Employment Relations Act 2000 (the Act) so the focus for the Authority is on the claim for unjustified dismissal.

[4] Mr Kenmare has provided the Authority with an undertaking as to damages and eight affidavits in support, including his own, and a further two affidavits in reply.

[5] Interim reinstatement is opposed by Fulton Hogan. It says that Mr Kenmare's dismissal was justified because he was employed in a safety sensitive role and that he misled the company regarding his cannabis use. Fulton Hogan has provided four affidavits in support of its opposition to the application for interim injunction.

[6] The parties attended mediation but the matter was not resolved. I clarified in writing there was a date available on 20 May carrying on if required into 21 May 2014 for a substantive investigation meeting. After talking to counsel at the investigation meeting for the interim matter I pencilled those dates out in my calendar.

[7] There is also an application for removal of this matter to the Court which is yet to be determined.

Issues

[8] An injunction involves the exercise of a discretion. The answer to an interim injunction is not in the rigid application of a formula: *Klissers Farmhouse Bakers Limited v. Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA). There are however

broad inquiries that the Authority should make in the exercise of its discretion. These are as follows:

- Does Mr Kenmare have an arguable case of unjustified dismissal, and if found after substantive investigation to have been unjustifiably dismissed, an arguable case for permanent reinstatement – s.125 of the Act;

- Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Kenmare and Fulton Hogan will incur as a result of the interim injunction being granted or not;

- Is there an alternative adequate remedy available?

- Finally, the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Background

[9] This matter was dealt with on the basis of untested affidavit evidence and submissions. There was therefore no questioning or examining of those who provided the affidavit evidence. In applying the tests the Authority is not required to resolve disputes.

[10] Mr Kenmare is a member of the Nelson Collective Union Inc. (the Union) and his work is covered by the Collective Agreement 2013-2015 between Fulton Hogan and the Union (the collective agreement).

[11] Appendix B to the collective agreement provides for a regional amendment to the Fulton Hogan drug and alcohol policy and implements a random alcohol and drug testing programme throughout the Nelson region. It provides for six random drug tests to be carried out each year with ten people tested on each of the six occasions.

[12] There is a detailed process for both selecting the ten employees to be tested and to how the testing is then carried out. The regional amendment does not replace the company policy on drug and alcohol testing but is a Nelson addition to it.

[13] I did not have a full copy of the national drug and alcohol policy until after the investigation meeting. I was provided at the investigation with the drug and alcohol policy procedure manual but required the actual policy. It is an essential policy for consideration because appendix B to the collective agreement provides amongst other matters:

> *A "non negative" result will be dealt with in accordance with the Fulton Hogan national Drug and Alcohol Policy. This policy includes an opportunity for the parties to enter into a rehabilitation program.*

[14] On 11 February 2014 Mr Kenmare was told that his name had been selected for random drug testing and he provided a urine sample.

[15] He was told that his test was a non-negative test and that the urine sample he provided would be sent away for testing. In the intervening period he was stood down from work without pay in reliance on appendix B.

[16] On 13 February 2014 Mr Kenmare was advised by the Safety, Quality, Training and Employment Relations Manager, Peter Denton, that ESR had confirmed a failed test. Mr Kenmare was asked to attend a disciplinary meeting and told to pick up a letter about this from reception.

[17] On that same day he picked up a letter from Andrew Allen who is the Regional Manager for Nelson which invited him to the meeting on 14 February 2014. The letter provided that it appeared Mr Kenmare may have breached Fulton Hogan's Disciplinary and Dismissal Policy which provides an employee may face disciplinary action, including dismissal, for being under the influence of alcohol or illegal drugs when reporting to work and recording a positive result under the company alcohol and drug policy.

[18] The letter asked Mr Kenmare to attend at a meeting on 14 February 2014 at 10am. He was advised that if a reasonable explanation to the drug test result was not provided disciplinary action including dismissal may be taken. Further he was encouraged to have a representative present at the meeting and advised who would be present from the Fulton Hogan management team.

[19] On 14 February Mr Kenmare attended the disciplinary meeting without a representative or support person. Mr Allen and Mr Denton were present at the meeting together with Nick Hill, who is the Construction Divisional Manager and

Mr Kenmare's direct manager Mary Falconer, the Civil Division Manager. Mr Allen was the decision maker.

[20] A number of matters were discussed at the meeting. From the notes provided it appeared Mr Kenmare was asked whether he wanted a support person. The notes record he indicated he was fine without one. According to the notes Mr Kenmare was shown his test results but a copy not provided to him. The result showed that the result was positive on 13 February 2014 with the THC acid level >300 ng/ml.

[21] Mr Kenmare explained that he had gone to a party the weekend before the test on Saturday 8 February 2014 and consumed quite a lot of alcohol. As he was leaving in the early morning of 9 February 2014 he took two cup-cakes from a table and ate them but was unaware that they contained cannabis. The notes record that he said the last time he smoked cannabis was New Year or perhaps the Christmas/New Year period although he elaborated in his affidavit evidence that this was only *two puffs – pretty much a non-event*. He said he did not notice any impairment on the Sunday or Monday before the urine test on Tuesday 11 February 2014 aside from the consequence of too much alcohol consumption on the Sunday.

[22] Mr Kenmare referred to a friend of his, who I shall call J, consuming the cup-cakes and that he had also failed a random drug test conducted by his employer. Mr Kenmare gave the name of that employer.

[23] Mr Allen says in his affidavit that towards the end of the meeting he explained to Mr Kenmare that they needed to go and gather more information as part of the disciplinary investigation. He says that Mr Kenmare agreed he could contact J's employer about J's failed random test. Mr Allen made enquiries with J's employer but was informed that the employer had not conducted any random tests. A letter confirming the call was made on that day was attached to the affidavit of Mr Allen as annexure A.

[24] Mr Denton made inquiries with ESR, Nelson Nursing and two other drug specialists seeking information about whether the level of THC in Mr Kenmare's test sample was consistent with his explanation. The information received was to the effect that given the amount of THC present in the urine sample it was not consistent.

[25] Mr Kenmare then instructed Ms Sharma who corresponded with the company and a further disciplinary meeting was held on 26 February 2014.

Ms Sharma raised a number of additional issues at that meeting, including the fairness of selection for random testing and that there was no evidence to show that Mr Kenmare was under the influence of drugs at the time of providing a urine sample or in any other way impaired. She elaborated on the explanation given by Mr Kenmare and the fact it was received with some reservation about its believability. There was reference to the unpaid stand-down period and whether it was in accordance with the Alcohol Drug Policy and/or the Collective Agreement.

[26] Whilst both parties intended to record that meeting neither of the recordings worked.

[27] Following the meeting Mr Allen wrote to Ms Sharma on 28 February 2014. He confirmed there would be no further disciplinary action taken in respect of the allegation Mr Kenmare was under the influence of alcohol or illegal drugs when reporting for work as there was no evidence of impairment. Mr Allen said that professional advice received suggested Mr Kenmare had consumed greater quantities and/or more recent consumption of cannabis than he had stated. Mr Allen advised of a preliminary decision that Mr Kenmare be dismissed for serious misconduct due to recording a non-negative result under the *Company Drug and Alcohol standard.*

[28] Ms Sharma responded to the preliminary decision on 7 March 2014 and stated amongst other matters that the grounds for justification were not made out.

[29] On 5 March 2014 Mr Kenmare independently provided another urine sample for drug testing to Nelson Nursing Services. The results were provided on 14 March from ESR and it was a positive test with the THC acid level at 47 ng/ml.

[30] On 17 March Mr Kenmare provided a further urine sample for drug testing and there was a negative result.

[31] By letters dated 10 March 2014 Mr Allen wrote to Ms Sharma and Mr Kenmare and advised that Mr Kenmare was formally dismissed from his employment with Fulton Hogan effective Tuesday 11 March 2014. The provisions of the Health and Safety in Employment Act 1992 were also relied on in relation to ensuring safety of all employees while at work and it was written in the letter that there had been careful consideration of all the information relating to the matter.

[32] Mr Allen says in his affidavit that the reference to *post incident* testing in the letter to Mr Kenmare of 10 March 2014 was simply an error and it should have been referred to as random testing. That is a likely explanation as the testing was random and not undertaken post incident.

Arguable case for unjustified dismissal

[33] Ms Sharma submits that there is an arguable case for unjustified dismissal on the basis that the decision to dismiss Mr Kenmare for serious misconduct was not one that a fair and reasonable employer could have made in all the circumstances under s.103A of the Employment Relations Act 2000 and was both substantively and procedurally unfair.

[34] Mr Scotland submits that there was no arguable case that Mr Kenmare was unjustifiably dismissed.

[35] The threshold for establishing an arguable case of unjustified dismissal is not high. There must be *a case with some serious or arguable, but not necessarily certain, prospects of success – X v Y Ltd* [1992] 1 ERNZ 863 at 872.

[36] Mr Kenmare returned a non-negative or positive test for cannabis. It had a high reading. He had not previously had a non-negative test. The work rules at Fulton Hogan provide that recording a positive result under the company's alcohol and drug policy may be serious misconduct.

[37] The Fulton Hogan national alcohol and drug policy is referred to in appendix B to the collective agreement that deals with random testing. The document I was provided with after the investigation meeting was called the Drug and Alcohol Standard (the policy). Mr Scotland advised that was the current policy. Appendix B to the Collective Agreement provides that a non-negative result *will* be dealt with in accordance with that national policy. Until the policy was provided to me it was unclear from appendix B, the procedure manual and the one page of the policy provided to the Authority for the purpose of the interim application whether the opportunity for rehabilitation had to be offered if there was a positive result.

[38] Clause 7.4 of the policy provides that if the test result is positive for drugs then as one of four options Fulton Hogan may offer the opportunity to be referred to the rehabilitation programme. This offer is referred to as *at the discretion of* the

employer. If it is not offered then the serious misconduct procedures will apply. Although there is reference in clause 10.2 of the policy to compulsory rehabilitation the same clause provides *NB: Fulton Hogan reserves the right not to offer rehabilitation.*

[39] I do not find a strong arguable case on the basis of the national policy read together with appendix B that Fulton Hogan was required to offer the opportunity of rehabilitation in the event of a first non-negative test for cannabis. The policy supported that this was at the discretion of Fulton Hogan and there was a right not to offer rehabilitation. Arguably there has to be a reasonable basis for not offering rehabilitation.

[40] Mr Kenmare's explanation did not change. It was that he unknowingly consumed cannabis in cupcakes. Mr Allen says in his affidavit that if this was a credible explanation for an employee then it is unlikely further action, disciplinary or rehabilitative would be taken because it was a one off incident not indicative of an ongoing problem with drugs.

[41] It is apparent from the untested affidavit evidence that Fulton Hogan formed a preliminary, and then a concluded view that Mr Kenmare was not telling the truth about the consumption of cannabis and about his friend having been dismissed following a drug test after also consuming the cakes. There was discussion with drug testing professionals about whether the level of THC was consistent with the consumption of cupcakes. There was a conclusion reached it wasn't. Mr Denton and Mr Allen in their respective affidavits say that Mr Kenmare's explanation was not to admit a drug problem and request help. Mr Denton said in his affidavit that if an employee does not admit a drug problem then the chances of rehabilitation are poor.

[42] There is an arguable case that Ms Sharma was not provided with all the information relied on to reach the conclusion Mr Kenmare's explanation was not credible before the second disciplinary meeting.

[43] Ms Sharma asked for information including names of professionals contacted. It is strongly arguable that the names of those spoken to were not provided before Mr Kenmare's employment was terminated. There is an argument on the untested affidavit evidence that there was no mention at the second disciplinary meeting that J's employer had been contacted.

[44] These matters were relevant to the continuation of Mr Kenmare's employment. It is arguable he could not provide a full explanation therefore to the further investigations carried out by Fulton Hogan.

[45] There appeared from the untested affidavit evidence to be no mention of rehabilitation at the first or second disciplinary meeting by either party although that probably reflected Mr Kenmare's explanation that he unknowingly ingested cannabis which if accepted would not have supported a need for rehabilitation.

[46] There is an arguable case about whether there was proper selection of names for random testing.

[47] In conclusion I am satisfied that there is an arguable case for unjustified dismissal.

Arguable case for permanent reinstatement

[48] Mr Scotland submits that there is no arguable case for permanent reinstatement. In doing so he relies on the fact that THC remained in Mr Kenmare's system as at 5 March 2014 at a level of 47 nanograms which is above the 15 nanogram threshold for Fulton Hogan some three weeks after the first positive test. He also relies on an affidavit from Dr Paul Fitzmaurice who is employed by ESR as a Manager in the Forensic Business Group. Dr Fitzmaurice concluded in his affidavit that the level of the first positive test did not support Mr Kenmare's explanation (unknowing ingestion of cannabis via cupcakes) and that an analysis of the two positive tests suggest that Mr Kenmare is either a habitual user of cannabis who abstained for a period of 3 weeks or he may use small quantities of cannabis regularly.

[49] Mr Scotland also refers to some of the content of Mr Kenmare's publicly available information on Facebook which is attached to the affidavit of Mr Andrews and he submits this supports some involvement in drug culture.

[50] Ms Sharma submits that the Facebook images can and will be explained by Mr Kenmare at a substantive hearing.

[51] Ms Sharma submits that Mr Kenmare's own manager provided a reference as part of the disciplinary process in glowing terms and that his application is supported by a number of individuals including management.

[52] The affidavit evidence supports Mr Kenmare was well regarded as an employee both in the way he related to others in the team and in his performance. He was, it was written, a very pleasant and hardworking employee. His colleagues who provided affidavits stated that they did not consider that he showed any signs of being impaired in his day to day work and that he is honest. Mr Kenmare has undertaken many courses whilst at Fulton Hogan including some in safety.

[53] I take into account and do balance, as Ms Sharma submits, in considering the arguable case for reinstatement, the fact that Dr Fitzmaurice did not consult directly with Mr Kenmare and that this scientific information was not available before dismissal. Nevertheless the conclusion of Dr Fitzmaurice is consistent with the view Mr Allen had reached during the disciplinary process about the credibility of the explanation provided by Mr Kenmare. That could impact on whether reinstatement is practical and reasonable in the event Mr Kenmare's dismissal is found to be unjustified.

[54] Mr Allen says in his affidavit that the Facebook images indicated that Mr Kenmare was publicly admitting involvement in a drug culture and communicating this to his peer group. This information was not considered at the time of the disciplinary meetings or dismissal. Whilst noting that some of the images could be seen to be drug related any firm conclusion about what they do or do not suggest is appropriately left until the substantive investigation meeting.

[55] I conclude that there is an arguable case, in the sense of there being a tenable arguable case for permanent reinstatement in the event that Mr Kenmare is found to have been unjustifiably dismissed.

Balance of Convenience

[56] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not.

[57] Mr Kenmare is clearly from the affidavit evidence in a very difficult financial position and is suffering financial hardship. He has been without pay since he was first stood down from 11 February 2014 and then throughout the disciplinary process as Fulton Hogan deemed his stand down to be under the provisions of Appendix B. There is a claim about this matter.

[58] Mr Kenmare wants to return to work and there will be inconvenience to him if he is not reinstated on an interim basis and then found to have been unjustifiably dismissed. I accept that an alternative remedy for damages even though Fulton Hogan is in a position to make good any award would not be adequate.

[59] The untested affidavit evidence in my view supported that Mr Kenmare's arguable case for unjustified dismissal was stronger than his arguable case for permanent reinstatement. If Fulton Hogan could reasonably have come to the conclusion that the result of the urine test was inconsistent with unknowingly ingesting cannabis laced cupcakes permanent reinstatement may not be practicable and reasonable. I have not found it strongly arguable that rehabilitation had to be offered.

[60] Fulton Hogan operates in a safety sensitive environment. Mr Allen says in his affidavit that the respondent does not operate a business with a lot of roles that do not have significant safety aspects to them. Whilst Mr Kenmare could be removed from operating vehicles and working at height and in other areas with safety aspects he would still present as a health and safety hazard. Mr Allen said in his affidavit that because of the high THC readings there would be a need to assume Mr Kenmare was a potential hazard to himself and other employees in the workplace and he would need to be supervised very closely.

[61] I accept that there would be considerable inconvenience to Fulton Hogan if they had to accommodate Mr Kenmare in a return to work until the substantive matter could be dealt with and they would have to take additional measures to accommodate him to overcome health and safety concerns.

[62] The matter is able to be dealt with at a substantive investigation meeting within the next four weeks.

[63] I have weighed the inconvenience to both parties. I find that the balance of convenience in this case tips in favour of Fulton Hogan.

Overall Justice

[64] I now stand back and consider the overall justice of the case.

[65] I have found an arguable case for unjustified dismissal which I have concluded is stronger on the face of the untested affidavit evidence than the arguable case for permanent reinstatement. I have found that the balance of convenience favours Fulton Hogan.

[66] A substantive investigation meeting date is available on 20 and if required 21 May 2014.

[67] I am satisfied that the overall justice of the case requires that interim relief is declined.

Further steps

[68] I shall ask a support offer to arrange a telephone conference with Ms Sharma and Mr Scotland to discuss the application for removal to the Employment Court and make arrangements for any submission to be lodged in that regard so that the application can be dealt with as soon as possible given the possibility of a date in the Authority for a substantive investigation on 20 May 2014.

Costs

[69] I reserve the issue of costs and these can be dealt with following investigation and final determination of the matter.

Helen Doyle
Member of the Employment Relations Authority