

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 138  
5453231

BETWEEN                      JESSE ADAM 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:        29, 30 and 31 July 2014  
  
Submissions Received:        On 31 July 2014  
  
Date of Determination:        5 September 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.     Jesse Kenmare was not unjustifiably disadvantaged in his employment and there was no breach by Fulton Hogan in the selection of names for random alcohol and drug testing.**
- B.     Jesse Kenmare was unjustifiably disadvantaged when he was suspended without pay for three weeks and three days.**
- C.     Fulton Hogan is ordered to pay Jesse Kenmare the sum of \$3472.20 being reimbursement of wages for the period of suspension together with interest at the rate of 5% and \$4000 compensation. No penalty has been awarded.**
- D.     Jesse Kenmare was unjustifiably dismissed.**
- E.     There is no order for reinstatement.**

**F. There is to be reimbursement of lost wages for a period of three months less 50% contribution and earnings if any for that period. Counsel may return to the Authority if there is difficulty in calculating the amount of lost wages. Leave used for the suspension period from 13 February 2014 is to be reinstated and paid out.**

**G. Fulton Hogan is to pay to Jess Kenmare taking contribution into account the sum of \$1000 compensation.**

**H. Costs are reserved. Failing agreement I have set a timetable for an exchange of submissions.**

### **Employment relationship problem**

[1] Jesse Kenmare commenced his employment with Fulton Hogan Limited (Fulton Hogan) in Nelson on 27 October 2007 when he was 17 years of age. He was a member of the Nelson Collective Union Incorporated (the Collective) and he was covered at the material time by the collective agreement 2013-2015 between Fulton Hogan and the Collective (the collective agreement). Mr Kenmare worked in the construction team at the time he was summarily dismissed from his employment on 10 March 2014 for recording a positive result under the company drug and alcohol policy for cannabinoids.

[2] Mr Kenmare says that he was unjustifiably dismissed from his employment. He says additionally he was unjustifiably disadvantaged in his employment when Fulton Hogan breached obligations to pay him during his suspension, or find him alternative workplace duties. He also alleges a breach of the contractual obligations to undertake the random drug testing name selection in accordance with the provisions in the collective agreement at the time his name was selected.

[3] Any issue as to whether Mr Kenmare worked in a safety sensitive role was confined to whether there was work which was not safety sensitive that could have been undertaken by Mr Kenmare until he returned a negative test. I am satisfied that Mr Kenmare's role was a safety sensitive role.

[4] Mr Kenmare had earlier unsuccessfully sought interim reinstatement – [2014] NZERA Christchurch 63 and [2014] NZEmpC 96. The substantive investigation meeting was the opportunity to fully test the evidence previously only before the Authority and Court in affidavit form. At the substantive investigation the Authority heard from 15 witnesses including 3 expert witnesses. Under s 174 of the Act the Authority in delivering speedy, informal and practical justice to the parties does not have to set out a record of all of the evidence received. I have nevertheless carefully considered all of the evidence at the time of writing this determination.

[5] Mr Kenmare seeks the following:

- Reimbursement of income for the period 11 February 2014 to 10 March 2014 being the period of unpaid stand down/suspension;
- Compensation for hurt, humiliation and distress under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) arising from the claims for unjustified action causing disadvantage of \$15,000;
- Penalties of \$20,000 payable to the applicant for the respondent's breach of contract under appendix B and s 20 of the collective agreement;
- An order for reinstatement to his employment with Fulton Hogan;
- Compensation for loss of income to the date of hearing;
- Compensation for hurt and humiliation arising from the applicant's unjustified dismissal in the sum of \$20,000;
- Interest; and
- Costs.

[6] Fulton Hogan does not accept that Mr Kenmare was unjustifiably disadvantaged in his employment or that his dismissal was unjustified. It does not accept that it breached the terms of the collective agreement.

### **The issues**

[7] The issues for the Authority to determine are as follows:

- (a) Did Fulton Hogan breach the collective agreement obligations in selecting the names of those required to undertake the random drug test at which Mr Kenmare returned a non-negative test?
- (b) Was Fulton Hogan required in terms of the collective agreement to pay Mr Kenmare for the period he was away from the workplace between 11 February 2014 when he returned a non-negative result and the date of dismissal?
- (c) If there was a breach of the collective agreement, then was Mr Kenmare unjustifiably disadvantaged and should he be awarded remedies?
- (d) If there is found to have been a breach should a penalty be awarded?
- (e) Was there a full and fair investigation undertaken by Fulton Hogan at the conclusion of which it could be found that serious misconduct was disclosed;
- (f) Was the decision of Fulton Hogan to summarily dismiss Mr Kenmare what a fair and reasonable employer could have done in all the circumstances;
- (g) If the dismissal was not justified, then what remedies is Mr Kenmare entitled to and are there issues of contribution, mitigation, after discovered misconduct, and is reinstatement practicable and reasonable?

**Did Fulton Hogan breach the collective agreement in selecting the names of those required to undertake the random drug test resulting in a non-negative result from Mr Kenmare?**

[8] The collective agreement provides in clause 44 for drug and alcohol testing as follows:

**44. DRUG AND ALCOHOL TESTING**

*Employees who are party to this agreement are required to comply with the company's Alcohol and Drug policies. This includes, post incident, and reasonable cause and random testing. Acceptance of this agreement includes acceptance of this policy and gives the*

*employer the authority to require the employee to participate in alcohol and drug testing within the terms of these policies. A copy of the Regional Amendment to Fulton Hogan Drug and Alcohol Policy (Nelson Region) is included as Appendix B.*

[9] Appendix B is a regional amendment to the Fulton Hogan Drug and Alcohol Policy (Nelson Region) which implements a regular, random drug and alcohol testing programme throughout the Nelson region. It came into effect on 1 November 2009 following, the amendment states, six weeks of consultation with the Health and Safety Committee, representatives of the Collective, Salaried Staff, and with all staff at the September Divisional Tailgate meetings. The amendment provides that the feedback was overwhelmingly supportive.

[10] Appendix B provides that there will be six random drug tests carried out each year and there will be ten people tested on each occasion. The timing of each random test is to be determined by the Regional Manager. The methodology for selecting employees to be tested is in Appendix B under the heading *Who will be tested?*. It provides as follows:

*Ten (10) randomly selected employees will be tested each time. The ten names will be drawn from a pool that includes all permanent staff and those temporary and casual staff who should currently be at work. The SQTE Manager and a representative of the Nelson Collective Union Incorporated will jointly draw the names to be tested. The following methodology will be followed:*

- *An alphabetical list of all current staff names will be prepared for each test.*
- *The names on the list will be numbered consecutively.*
- *Numbered tokens (one for each numbered employee) will be placed in a container.*
- *10 numbered tokens will be drawn from the container.*
- *The number of each token drawn will be matched with the staff list. (Ie: Token number 22 will mean that the 22nd person on the list will be tested.)*
- *The 10 people drawn will be required to undertake both an alcohol (breath) and drug (urine) test.*
- *If a person “drawn” is absent from work for any reason they will be tested when next back at work.*

[11] On 7 February 2014 Peter Denton, the Safety, Quality, Training and Employment Relations (SQTE) Manager, approached Andrew (Andy) Allen, the Regional Manager, about running a random test. Mr Allen was agreeable to that. On that afternoon at a time between 4.30 and 5.00pm Mr Denton asked the present Chairperson of the Collective, Hoani Takao, to return to the office building. Mr Takao was on his way home at that time and initially thought that he may be in some sort of trouble. He said that he was surprised when Mr Denton informed him that he required his assistance with the selection of names for random testing. Mr Takao had not been involved in the process previously.

[12] The evidence as to what took place is not really in dispute. Mr Takao accepted that Mr Denton had a list of names which he had prepared for the test. The list is found at Tab 11 in the joint bundle of documents. I am satisfied that list was of all the current staff names numbering at that point in time 155. The names on the list are in alphabetical order and are numbered consecutively.

[13] Mr Denton had a piece of paper with 155 numbers on it which he cut up in the presence of Mr Takao putting all 155 numbers into a clean empty waste bin. Mr Takao then drew 10 numbers from the waste bin. He recalled seeing Mr Denton write down each number as he drew it. Mr Denton said as Mr Takao pulled out the number he also circled the corresponding name to the number but I could not be satisfied that Mr Takao saw that. Mr Takao was then anxious to leave and Mr Denton agreed he could go. Whilst Mr Denton had started to write down on a separate list the names found at tab 12 of the bundle alongside the numbers Mr Takao was not present to observe that.

[14] Random testing is undertaken in circumstances where there is no suspicion of an employee and it is clearly the intention of Appendix B that the name selection be truly random. I agree with the evidence of Michael Gibney, who has been actively involved in the Collective serving as Chairperson and Secretary on the Executive Committee, that it is important that procedures around the selection of those to be tested are robust and transparent.

[15] Objectively assessed the first four steps of the process were undertaken as set out in appendix B by Mr Denton and Mr Takao. The only step in the process about which there could be any question is the fifth bullet point that provides the number of each token drawn will be matched with the staff list. Having heard from Mr Denton, I

am satisfied that is what he did when the number was drawn by Mr Takao at that time. The only concern that could exist is that Mr Takao left before seeing for himself the completed list of names beside the numbers. Mr Takao said when questioned by Mr Scotland about whether he had any concerns about Mr Denton's selection; *No, I'm not implying that at all.* Mr Kenmare under questioning agreed there was nothing to support someone was picking on or targeting him.

[16] Ideally Mr Takao would not have left the office until the written list of those to be tested showing the numbers drawn and the corresponding name from the list had been completed. Both Mr Takao and Mr Denton though had been present when the numbers to correspond with the names had been drawn. I am not satisfied that Mr Takao leaving early when assessed against the process as a whole amounts to a breach of the requirements of Appendix B. I am satisfied that one of the numbers that Mr Takao drew corresponded with Mr Kenmare's name on the consecutively numbered list of names. I do not find that the process adopted in selecting Mr Kenmare was flawed. I do note that Mr Takao drew out a number that corresponded with Mr Denton's name on the list and he was tested.

[17] I do not find that the allegation of breach is made out about the selection of names for random testing or that there was any disadvantage to Mr Kenmare.

[18] Mr Denton said in future he may have the representative from the Collective sign the list of names and numbers drawn which I think would be sensible. I also discussed with Mr Gibney that it would be sensible for the methodology set out in Appendix B in drawing names for random testing to be available in Mr Denton's office for a union representative to refer to.

**Was Fulton Hogan required in terms of the collective agreement to pay Mr Kenmare for the period away from the workplace between 11 February 2014 and the date of dismissal?**

[19] Shortly after Mr Kenmare arrived at work on Tuesday 11 February 2014 he was told that his name had been selected for random drug and alcohol testing. Nelson Nursing Service Limited was contracted by Fulton Hogan to undertake the onsite testing and a health nurse from Nelson Nursing, Fenella Hemm, conducted the test that day. Mr Kenmare signed the onsite drug and alcohol testing consent form found at Tab 13 of the agreed bundle.

[20] There was a nil recording for alcohol but the urine test results for drugs returned a non- negative result. Ms Hemm advised Mr Kenmare of the result and he was then asked to meet briefly with Mr Denton, Mr Allen and Nick Hill, the Construction Divisional Manager. A discussion took place about the test results and Mr Kenmare was told that his test sample would need to be sent to ESR for confirmation. He was advised that he was stood down in terms of the policy. Arrangements were made for Mr Kenmare to be driven home by Mr Hill after the brief meeting on 11 February 2014.

[21] Mr Kenmare remained without pay until his employment was terminated. I could not be satisfied from the evidence that there was any discussion with him at the end of the first disciplinary meeting on 14 February 2014 about the fact he was still stood down without pay. Ms Sharma when instructed by Mr Kenmare wrote a letter dated 18 February 2014 to Mr Allen and amongst other matters asked that Mr Kenmare be reinstated to the payroll, that his annual leave entitlements be returned to him and that he be fully reimbursed from 13 February 2014. Mr Allen responded to Ms Sharma and wrote to Mr Kenmare in letters dated 20 February 2014 advising that Mr Kenmare was stood down without pay in accordance with company policy. Mr Kenmare continued to be without pay until he was dismissed from 11 March 2014.

[22] Mr Kenmare says that he should have been paid for this period. Fulton Hogan says that it was entitled to stand Mr Kenmare down without pay under appendix B to the collective agreement. The following provision is relied on:

***What will happen after the testing?***

*Employees that return an “negative” drug test will return to work. 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 programme.*

*Those who return an initial “non negative” result will be stood down and their sample will be sent away for confirmation by ESR. If the confirmed result is negative then this “stand down” will be at the employers cost. If a “non negative” result is confirmed then the employee will be required to use annual leave or take leave without pay.*

*Those who return a non negative result for drugs or alcohol will not be able to use or operate any company owned vehicles plant or equipment until they complete a negative test and have complied with the terms of their rehabilitation.*

[23] Ms Sharma relies on clause 20 of the collective agreement which deals with suspension and provides:

*Where an employee is guilty of serious misconduct as defined in the company rules the Divisional Manager in conjunction with the Regional Manager (or his appointee) may suspend the worker, without pay for a maximum of 48 hours or on full pay until the matter is resolved. Should the matter be resolved in the employee's favour any lost earnings would be reimbursed.*

[24] Mr Scotland submits there is no limitation as to the duration of the stand-down and that to suggest, as Ms Sharma on behalf of the applicant did, that 48 hours stand-down exists in this context is to misunderstand the construction of the contract. He submits that that clause does not limit the unpaid stand-down period to the period of time between on-site testing and ESR confirmation of a failed test.

[25] The other part of appendix B that is relevant is under the heading Rehabilitation and provides:

*Employees who enter the company rehabilitation programme will be stood down. While stood down they will be required to take either annual leave or leave without pay. The length of the stand down period will be agreed between the employer and the employee but will typically be up to four weeks. A negative result must be achieved before a return to work is permitted. Failure to achieve a negative result within the stand down period will be considered serious misconduct and could lead to dismissal.*

[26] I find that there is reference in appendix B to two situations where there can be an unpaid stand down. The first is between returning a non-negative result and receiving a confirmed result from ESR. In those circumstances an employee is stood down and if ESR confirms the result as non-negative then the employee's stand down for that period is without pay or annual leave is to be used. Fulton Hogan received the ESR confirmation for Mr Kenmare on 13 February 2014 so that would support under appendix B a period of unpaid stand down for Mr Kenmare for two days, 11 and 12 February 2014. That is also consistent with clause 20 of the collective agreement. The second occasion where there can be unpaid stand down is where an employee enters the company rehabilitation program and until a negative result is returned an

employee is to be on unpaid stand down or can use annual leave. Mr Kenmare did not enter the company rehabilitation programme. Appendix B is silent I find as to what happens to an employee after ESR has confirmed a result and before rehabilitation or if rehabilitation is not offered although the evidence supported that if rehabilitation is to be offered it is done quickly.

[27] The national document about drugs and alcohol is called the Alcohol and Drug Standard (the Standard). The Standard does not refer to random testing and as expressed in appendix B random testing is an addition to the national policy but does not replace it. The Standard refers to pre-employment testing, post incident/accident testing, reasonable cause testing, serious misconduct and rehabilitation both voluntary and compulsory and specifically about what happens after returning a positive result following post incident/accident testing and reasonable cause testing. There are four options/scenarios outlined in those circumstances in the Standard to be selected by Fulton Hogan. There are no such options in respect of random testing in the Standard or in appendix B.

[28] Mr Scotland submits that to find that the unpaid stand-down only applies to employees when rehabilitation has been offered would mean those employees were disadvantaged because an employee facing dismissal would be paid. With respect I do not accept that submission. In circumstances where it is not specifically set out what will occur if rehabilitation is not offered I find the serious misconduct provision must apply and would include under clause 20 of the collective agreement paid suspension.

[29] There is nothing in appendix B or the Standard to support an unpaid stand down until employment is terminated if rehabilitation is not offered. The ability for a stand down without pay under appendix B for Mr Kenmare ended after ESR confirmed the test on 13 February 2014. Mr Kenmare should then have been suspended on full pay from 13 February 2014 under clause 20 of the collective agreement as he was facing an allegation of serious misconduct under the company rules until the matter was resolved.

[30] The failure to pay Mr Kenmare for the period he was away from the workplace affected him to his disadvantage and the action was unjustified. Further there was no discussion with him about the fact he would continue to be unpaid after ESR confirmed his results and he was not able to comment on that matter. That did

not meet the requirements for procedural fairness under the test of justification in the Act - s103A (3).

[31] Mr Kenmare has a personal grievance that he was unjustifiably disadvantaged when he was not paid during his period of suspension. He is entitled to remedies.

### **Remedies for unjustified disadvantage**

#### *Reimbursement of lost wages*

[32] Mr Kenmare in his statement of evidence claims loss of income for the period of his suspension from 11 February 2014 to 10 March 2014 on the basis of a 50 hour week at \$19.29 per hour as it was rare for him to work less than a nine hour day and he was paid time and a half after working eight hours. The 50 hours per week is intended to recognise both the hours worked and the overtime payments. Mr Scotland provided a breakdown of Mr Kenmare's pay details from 9 December 2013. The records are for a limited period and include the Christmas period when leave was taken and then Mr Kenmare was away from the work place from 11 February 2014. As best I can from the records and taking into account the evidence supporting Mr Kenmare worked overtime I conclude his reimbursement claim is made on a reasonable basis. Reimbursement will take effect from 13 February 2014.

[33] Mr Kenmare is entitled to be paid for the period between 13 February and 10 March 2014 (both days inclusive). That is a period of three weeks and three days. Mr Kenmare's hourly rate was \$19.29. His hourly rate multiplied by 50 is \$964.50. For the three day period I have divided \$964.50 by 5 and multiplied by 3 to arrive at a figure of \$578.70. I have then added the figure of \$578.70 to \$2893.50 which is the calculation for three weeks' pay at \$964.50 per week. The total reimbursement figure is \$3472.20 gross.

[34] The pay records show that Mr Kenmare took some annual leave and long service leave for some of the period he was stood down. It does appear that this was used for days in addition to 11 and 12 February 2014 and leave outside of those two days will either have to be reinstated or paid. I will return and address that matter later in this determination.

*Interest*

[35] There is also a claim for interest. The Authority has the power to award interest under clause 11 of schedule 2 to the Act. I find that it is appropriate that I do so on this occasion. Mr Kenmare said in his evidence that he had to obtain an increase to his loan in order to meet his outgoings. There is a loan variation agreement dated 25 February 2014 at tab 40 of the joint bundle that supports that. Mr Kenmare said he did not have enough money to meet his daily living expenses and interest payments.

*Kiwi Saver*

[36] There was no claim for lost Kiwi Saver benefits in the amended statement of problem but there was mention of this in Mr Kenmare's final statement of evidence. While it may well have been an award Mr Kenmare was entitled to it is important that such claims be made for remedies in the statement of problem so that there can be a proper response from the respondent. The late inclusion of such claims in evidence is unsatisfactory and I make no award for the lost benefit of the Kiwi Saver contribution.

*Compensation*

[37] Mr Kenmare seeks compensation for humiliation, loss of dignity and injury to feelings for not being paid for the period of suspension. Mr Scotland submits that Mr Kenmare would not have been able to work in any event given that he did not produce a negative result until 17 March 2014 even if he had been offered rehabilitation. I accept if he had been offered rehabilitation appendix B confirmed what would happen in those circumstances. The fact was that he was not offered rehabilitation. Mr Kenmare says that he was willing to return to work and do labouring work whilst suspended but Fulton Hogan said that they did not have work available that was not safety sensitive.

[38] Mr Kenmare said in his written evidence he felt shut out after returning a positive test with no income to support himself even though he was still employed and described it as harsh treatment. I am satisfied that Mr Kenmare did experience considerable financial hardship and stress as a result of being suspended without pay and the issue became a distraction to the disciplinary issue being investigated. Failing to pay an employee for just short of a month is a serious matter where there is no

contractual basis to support non-payment. Mr Kenmare had to borrow money and call in favours to meet everyday costs.

[39] Subject to any finding of contribution and taking into account the reimbursement ordered with interest I am of the view that an award should be made in the sum of \$4000.

#### *Contribution*

[40] The right to payment while suspended is a contractual one and I do not find that Mr Kenmare contributed to the way in which Fulton Hogan chose to apply that provision. The awards referred to above are to be made without deduction.

#### **Orders for unjustified action causing disadvantage**

[41] I order Fulton Hogan Limited to pay to Jesse Kenmare the sum of \$3472.20 gross being reimbursement of wages lost under s 123 (1)(b) of the Employment Relations Act 2000 (the Act).

[42] I order Fulton Hogan Limited to pay interest on the sum of \$3472.20 gross from 11 March 2014 to the date of payment at the rate of 5% being the prescribed rate under s 87 (3) of the Judicature Act 1908.

[43] I order Fulton Hogan Limited to pay to Jesse Kenmare the sum of \$4000 without deduction being compensation under s 123 (1)(c)(i) of the Act.

#### *Penalty*

[44] A penalty of \$20,000 has been claimed in relation to this matter. During the second disciplinary meeting, Fulton Hogan agreed to obtain some legal advice about its position on the unpaid stand down and if the opinion was that its position was wrong it would make payment. The legal advice was promptly sought and provided to Ms Sharma. It supported the approach taken by Fulton Hogan.

[45] I have already made orders for reimbursement and compensation and take into account the steps Fulton Hogan took to ascertain whether its stance was the right one. I do not in the circumstances award a penalty.

**Was there a full and fair investigation undertaken by Fulton Hogan at the conclusion of which it could be found that serious misconduct was disclosed**

*The test of justification and good faith obligations*

[46] The Authority is required in determining the justification of Mr Kenmare's dismissal to do so objectively by applying the test in s 103A of the Act. The test is whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The statutory good faith obligations inform s 103A.

[47] In applying the test the Authority must consider four factors specifically set out in s 103A(3) which is summarised below:

- (a) Having regard to the resources available to Fulton Hogan, whether it sufficiently investigated the allegations against Mr Kenmare before dismissing him;
- (b) Whether Fulton Hogan raised the concerns it had with Mr Kenmare before dismissing or taking action against him.
- (c) Whether Fulton Hogan gave Mr Kenmare a reasonable opportunity to respond to the concerns before dismissing him.
- (d) Whether Fulton Hogan genuinely considered Mr Kenmare's explanation before dismissing him.

[48] The Authority may also, as provided under s 103A(4) of the Act, consider any other factors it thinks appropriate and under s 103A(5) must not determine a dismissal or an action to be unjustifiable because of defects in the process followed if they were minor and did not result in the employee being untreated unfairly.

[49] The statutory duty of good faith applies when an employer is considering whether to dismiss an employee. The duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are responsive and communicative. An employer proposing to make a decision that is likely to have an adverse effect on the continuation of employment must provide the employee with relevant information

and an opportunity to comment on that before a decision is made. – s 4(1A) (b) and (1A)(c) of the Act.

*Reason for the dismissal*

[50] Mr Kenmare was dismissed for recording a positive result under the company drug and alcohol standard.

*Start of the disciplinary process*

[51] The disciplinary process commenced when Mr Denton telephoned Mr Kenmare on 13 February 2014 to advise that ESR results confirmed a failed test. Mr Denton advised Mr Kenmare that he was to attend a disciplinary meeting the following day, Friday 14 February 2014, and that he was to collect a letter from Fulton Hogan about this.

[52] Mr Kenmare went that same day to the Fulton Hogan reception to collect the letter. The letter had been signed by Mr Allen and invited Mr Kenmare to a meeting on 14 February at 10am to hear his explanation on two matters. The first was that he was under the influence of alcohol or illegal drugs when reporting for work and the second was recording a positive result under the Alcohol and Drug Policy. Mr Kenmare was, in the letter, encouraged to have a representative present with him. Mr Allen set out that he would have present with him Mr Denton and possibly other members of the Fulton Hogan management team.

[53] There was a dispute in the evidence about whether during the earlier telephone conversation Mr Denton suggested to Mr Kenmare that he bring a representative with him to the meeting. Mr Kenmare does not accept that such advice was given and Mr Denton is firmly of the view that he did give that advice. Given that Mr Kenmare on the same day picked up a letter with that advice I do not find that much turns on the point. For completeness though, having heard the evidence I find it more likely consistent with the advice in the letter Mr Denton suggested Mr Kenmare obtain some legal advice.

*14 February 2014 meeting and the explanation to the positive test*

[54] Mr Kenmare attended the meeting. Mr Allen and Mr Denton were present together with Mr Hill and Mr Kenmare's Manager, the Civil Department Manager, Mary Falconer.

[55] Mr Denton took notes at the meeting and they appear in the common bundle at Tab 17. Mr Kenmare confirmed at the start of the meeting that he was fine without a representative and I do not find there can be any unfairness in that regard. Mr Allen said that if Mr Kenmare had wanted a representative the meeting would have been adjourned.

[56] Ms Falconer was not attending as a representative of Mr Kenmare as she was asked to be present by the management team. She did though I find act in a supportive manner towards Mr Kenmare and at an early stage in the meeting requested appropriately that he be shown the ESR results. Mr Kenmare was shown the results. It showed he had greater than 300 nanograms per millilitre (ng/ml) of tetrahydrocannabinol acid (THC acid) in his urine. The cut off level for testing in Fulton Hogan's Drug and Alcohol Standard is 15 nanograms which is in accordance with the Australian/New Zealand Standard for urine testing (AS/NZS 4308:2008).

[57] Mr Kenmare explained that the non-negative test result occurred because he had inadvertently consumed one or two cannabis laced cupcakes at a party on the evening of 8 February or early morning 9 February. He said he had been drinking heavily and did not feel any adverse effects. He also said that his friend who I shall call J had also consumed cupcakes and tested positive during a random test at his workplace. Mr Kenmare got the impression that that the management team was not convinced by his explanation.

[58] There was an adjournment during the meeting so there could be a general discussion amongst the management team. Mr Kenmare sat outside of the room while the discussion took place. Ms Falconer said in her evidence that she spoke supportively of Mr Kenmare during the adjournment. She said that he was a good worker and an important part of the civil team. Ms Falconer said that she raised the possibility of rehabilitation with the management team but there was little or no response to that.

[59] The notes during the meeting with the management team record Mr Hill expressing concern that Mr Kenmare chose to smoke cannabis over the Christmas/New Year period. That referred to a statement Mr Kenmare had made at the meeting on 11 February in explanation for the non-negative result although Mr Kenmare did not I find elaborate on that at the time and neither was he asked to do so at the 14 February meeting. In his evidence Mr Kenmare described the Christmas/New Year smoking as pretty much *a non-event* during which he had *a couple of puffs* as a mate handed a cigarette around the group. There was a discussion about a requirement to get evidence of the party to confirm the story together with the need to obtain professional advice on the effects of *pot cakes*.

[60] When the meeting reconvened, Mr Denton asked for details about the party and also the name of his friend and his friend's employer. Mr Denton explained that there was a need to verify Mr Kenmare's story and the facts. Mr Kenmare disclosed J's name and the name of J's employer. When he gave his evidence Mr Kenmare said that the person having the party was J's brother's flatmate.

[61] Mr Kenmare left the meeting with the understanding that further inquiries would be made with J's employer and with some professionals about the effects of *pot cakes*.

[62] There was an agreement that the meeting would reconvene at 10am on Monday 17 February 2014. The date was then changed to 20 February 2014 and then to 26 February 2014.

*Further investigations undertaken by Fulton Hogan*

[63] After the conclusion of the disciplinary meeting, Mr Allen made enquiries of J's employer. In his oral evidence he said that he asked of J's employer whether J worked there and whether any random drug test were undertaken within the previous two months. It was confirmed J worked at the organisation but that the company had not conducted any random testing in the last two months. Mr Allen said in his evidence that he was concerned that Mr Kenmare had lied about J failing a random drug test or even having undergone a test at all.

[64] Mr Denton made enquiries with several professionals knowledgeable about drug test results before the second disciplinary meeting was held. He wanted to know whether Mr Kenmare's explanation that he had consumed one or two cannabis laced

cupcakes would result in a THC-Acid level of 300 ng/ml after 50 hours. He spoke to five individuals.

[65] Ms Hemm who had conducted the testing advised Mr Denton that it was unlikely consumption of cannabis laced cupcakes alone could produce such a high result, but if they were very strongly laced with cannabis oil then potentially they could produce such a result. Her advice was the THC level would drop significantly within 24 to 48 hours of consumption for someone who was otherwise a non-user of cannabis. Mr Denton felt that given Ms Hemm is an occupational health nurse more conclusive information was needed. Ms Hemm gave Mr Denton the name of a toxicologist at ESR Sarah Russell.

[66] Mr Denton contacted Sarah Russell who advised him that while it would be possible to achieve the reading from consuming cannabis laced cupcakes after 50 hours the amount of THC-Acid present should be much lower. There was an email sent by Ms Hemm to Mr Denton on 26 February 2014 and it did occur to me that the first contact with both Ms Hemm and Ms Russell may have been after the second disciplinary meeting. However given that it is accepted by Fulton Hogan that the names of those contacted were not disclosed to Ms Sharma and neither was the 26 February 2014 email that is not as significant as it could have been.

[67] Debbie Christie is an independent local drug and alcohol specialist in Nelson. Mr Denton spoke to her but he said Ms Christie was not so definitive in her view that the THC-Acid level would drop in this way. Mr Denton noted that she was not a toxicologist.

[68] Mr Denton spoke to Sue Nolan who is a toxicologist and manages a company called Drug Free Sites. Mr Allen sat in with Mr Denton on the discussion with Ms Nolan that occurred by way of telephone. Ms Nolan advised it would be possible to achieve a reading greater than 300 ng/ml for THC-Acid from consuming cannabis laced cupcakes. However after 50 hours the amount of THC present should be much lower. Mr Allen said in his written evidence that he became concerned that Mr Kenmare may have lied about the circumstances in which he consumed cannabis.

[69] Mr Denton also contacted Steve Williams of the New Zealand Drug Detection Agency. Mr Williams advised that the explanation by Mr Kenmare was conceivable but the test result would likely be less than 300 ng/ml for THC-Acid. Mr Williams

also commented that Mr Kenmare's explanation was a *classic story used by many drug users as an excuse*.

[70] Mr Denton in his written evidence said this advice received from experts with regular involvement and experience in workplace drug testing added to a concern that Mr Kenmare was dishonest in his explanation of a non negative test result.

*Correspondence before the second disciplinary meeting*

[71] On 14 February 2014 Ms Falconer sent an email to Mr Allen advising that Mr Kenmare came back in after the meeting and that *he is quite upset*. Ms Falconer wrote that she had recommended again that he bring a representative to the next meeting which she advised he was going to do but that the representative could not attend until the following Thursday.

[72] On 14 February 2014 Mr Allen responded to Ms Falconer and said that he would talk to Mr Kenmare. He confirmed in evidence that no discussion took place.

[73] A series of letters were sent by email between Ms Sharma and Mr Allen from 18 February 2014 until the second disciplinary meeting that took place on 26 February 2014. Ms Sharma made several requests for information from the wider investigation that she understood had been undertaken by Fulton Hogan after 14 February 2014. She referred to the importance of Mr Kenmare having a fair opportunity to respond to the information.

[74] Mr Allen provided the drug test results and the chain of custody document. He also provided Ms Sharma with a copy of the minutes from the 14 February 2014 meeting.

[75] Mr Allen was asked to provide information about the professional advice on the effects of *pot cakes* and any other information obtained. Mr Allen responded to this in a letter dated 25 February 2014 -*Advice was obtained verbally from a Professional who stated that -a Joint smoked over the Christmas/New Year break with a couple of "pot cakes" eaten the previous weekend would not result in the level reported by the ESR laboratory*.

[76] On receipt of that letter Ms Sharma wrote to Mr Allen the same day and asked for the name of *the professional* contacted. She also wrote that Mr Kenmare's result

had been discussed with another individual and that he is entitled to know who and what information was given in substantiating the response and that this was presumably obtained in writing. On the same day 25 February Mr Allen wrote *We did contact a professional regarding a hypothetical situation and at no time was Mr Jesse Kenmare's confidentiality breached or was any information regarding Jesse Kenmare discussed with the professional. In addition to this we have used our own company wide experience in this matter.* No name was provided.

[77] Mr Allen when asked why he did not provide the information requested accepted on reflection he would have done some things differently. It was also put to him that his reference to *a professional* was misleading. He did not accept when Ms Sharma questioned him that he had *lied* although did agree that at the time he wrote the letter more than one professional had been contacted and he had an opportunity to correct it in later correspondence but did not do so.

[78] There was no mention by Mr Allen before the disciplinary meeting of 26 February 2014 of the discussion with J's employer and the advice he received that there had been no random testing for two months. I do not find it would have been apparent to Mr Kenmare before the meeting on 26 February 2014 that Fulton Hogan had formed the view he [Mr Kenmare] had been untruthful about that matter.

[79] Mr Kenmare did know that J's employer had been contacted because he talked to J directly. He gave evidence that J told him the weekend after the 14 January 2014 meeting that his employer held a meeting and advised the employees present that someone had ingested cannabis with a Fulton Hogan employee and that there was to be more random testing. Mr Kenmare said that J was annoyed that this had occurred and they had a falling out.

[80] It was also apparent from the correspondence from Mr Allen that he regarded the 26 February 2014 meeting as an outcomes meeting. From the correspondence it is clear that Ms Sharma took issue with this and said that she would be tabling a response in writing at the meeting.

### **26 February 2014 meeting**

[81] Mr Kenmare and Ms Sharma were present at the second and last disciplinary meeting on 26 February 2014. Mr Allen attended the meeting with three other

members of the management team and Fulton Hogan's national human resource advisor Karen Connor. Mr Denton and Mr Hill were in attendance and had also been present at the 14 February meeting. Clive Lane was present. He had not attended the meeting on 14 February 2014. Mr Lane is the Servicing/Transport Divisional Manager and second in charge for the respondent in the Nelson/Tasman/Buller region. Ms Sharma had been told who would be attending the meeting although she did express some surprise at the number of attendees.

[82] There was agreement that both parties would record the meeting but unfortunately neither of the recordings worked. This was not discovered until after the first adjournment which, Mr Denton's notes reflect, occurred at 11.32am. The meeting commenced at 10.35am. In the belief that the meeting was being recorded full notes were not taken. There are some brief notes from Mr Denton and Ms Connor in the joint bundle of documents and a copy of a six page letter tabled and read by Ms Sharma.

[83] The evidence supported Fulton Hogan considered the meeting was heated and the tension escalated and that it had not gone the way they thought it would. Objectively assessed I find that the meeting was not as constructive as it could have been which was unfortunate.

[84] The opening of the meeting on 26 February 2014 supports that Fulton Hogan had made its decision about serious misconduct and wanted to obtain input for the consequence of that. Ms Connor at the start of the meeting stated that it was a continuation of the disciplinary meeting to present the findings and consider Mr Kenmare's response before a final decision was made. It is likely that she put forward an interim proposal that Mr Kenmare be summarily dismissed for serious misconduct. Mr Kenmare was at that point facing two allegations, being under the influence of illegal drugs when reporting to work and recording a positive result for drugs.

[85] Ms Sharma interrupted/stopped Ms Connor and advised that was not fair because Mr Kenmare was not properly represented at the earlier disciplinary meeting on 14 February 2014. Ms Sharma was then able to read her letter in which she questioned for the first time amongst other matters the selection of names for random testing. This led Mr Denton to respond as he was directly involved in the selection of names. There were other interruptions as Ms Sharma read the letter and the meeting

started to get heated. Ms Sharma in all likelihood told the management team to keep quiet and listen. Ms Sharma was then able to read her letter uninterrupted in the main. Fulton Hogan did not appear to have been asked about the findings reached and why Mr Kenmare's explanation was not accepted.

[86] There was no new information additional to the explanation about the reason for the positive test but a statement that it was difficult to understand why Mr Kenmare would not be believed as he had been employed by Fulton Hogan for six years and his general performance had been viewed positively. A reference from Ms Falconer was attached to the letter.

[87] Ms Sharma was aware from Mr Allen that a professional had been contacted about the credibility of Mr Kenmare's explanation by this time and in response to that wrote that it was *pharmacologically possible* that eating a cupcake laced with the cannabis in the timeframe that it occurred would have a presentation of THC in the urine a few days later. Fulton Hogan say that supports Mr Kenmare sought professional advice. I do not find evidence to support that what Ms Sharma wrote was other than a view and it was written without knowing what information Fulton Hogan had or who they received it from about the level of THC-Acid.

[88] One of the significant issues in this case is whether Mr Kenmare was told that Fulton Hogan had formed a view about his truthfulness or the believability of his explanation from its investigations with J's employer and the professionals at this meeting. One of the factors set out in s 103A(3) for a fair process is that the employer raises the concerns that it had before dismissal.

[89] There were two concerns Fulton Hogan had about Mr Kenmare's truthfulness. The first followed Mr Allen's contact with J's employer and the second was the explanation about consuming cupcakes in light of professional advice received. Not all of the professionals contacted at that time were definitive in their views about the level and the explanation given by Mr Kenmare.

[90] There is nothing in the notes taken by Ms Connor or Mr Denton about the interaction with J's employer. Mr Kenmare said that that matter was never put to him for explanation at the meeting. He said that had it been put to him he would have denied that he had lied about that and that he had simply told Mr Allen what his friend had told him. I questioned Mr Kenmare how he had communicated with J about that

matter before the 14 February 2014 meeting. He said that he texted J on 12 February 2014 that he had failed a drug test and that later that day J sent a text mentioning the cupcakes [at the party] and saying he had failed a test too. I asked Mr Kenmare if he still had the text messages on his phone. Before answering me he turned towards Ms Sharma and asked if she still had them. It would not have been appropriate for her to respond at that point. He then said that they were not saved and he had a new phone.

[91] I have carefully read the extract from Ms Sharma's letter that she read on 26 August 2014 about J's employer which I have set out below:

*.....it is difficult to understand why it was necessary for his employer to question the credibility of his understanding that J had been caught in coincidental random drug test at his own place of work on 11 February. It is also difficult to understand why confidentiality issues were breached around exposing another individual to his employer about drug related issues that had no bearing on this matter. That pathway of enquiry has also been destructive of Mr Kenmare's friendship with J.*

[92] In the paragraph in the letter about J, Ms Sharma questions why Mr Kenmare was simply not believed about his understanding that J had been caught in a coincidental random drug test rather than J's employer being contacted. It could not be taken I find from Ms Sharma's letter that she was responding to a concern Mr Kenmare had not been truthful about his understanding J had also been tested for drugs and had failed the test. That needed to be put clearly to be fair. Fulton Hogan could not be criticised as the paragraph suggests for having approached J's employer by way of further investigation. Mr Kenmare knew that was going to occur and he provided Mr Allen with J's employer's details so that investigation could be undertaken.

[93] Mr Lane said Mr Allen spoke about his interaction with J's employer at the meeting and Mr Denton said in oral evidence that he was 90% sure it was Mr Allen. Ms Connor could not be sure who talked about J and Mr Allen said he thought Ms Connor talked about the matter.

[94] The evidence from Mr Allen and Mr Denton was that there was no response from Mr Kenmare and/or Ms Sharma that they could recall. Mr Allen said that he had taken the failure to respond to be that Mr Kenmare had no credible response to make about J. Mr Lane in his written evidence thought Ms Sharma had raised an issue

about the confidentiality of J in response but was less clear about that in his oral evidence. Ms Connor on the other hand said that she could recall clearly what was said by Ms Sharma and it was along the line that J's employer would know why Fulton Hogan asked and *how dare we wreck another person's life*. The response seemed more consistent with what Ms Sharma had written in her letter and is a less likely response to a concern about truthfulness of Mr Kenmare. I have also taken into account that there was no mention of this matter in the correspondence following the meeting, and in particular the letter of 28 February 2014 from Mr Allen to Ms Sharma after the second disciplinary meeting setting out the preliminary decision.

[95] I could not be satisfied Fulton Hogan put its concerns to Mr Kenmare about the truthfulness of his explanation that J had also failed a random test. Whilst an employer who has identified a concern about truthfulness can deal with it in the pre-existing process the requirements of a fair process must be met – *George v Auckland Council* [2014] NZCA 209. I think it is unlikely had the concern been put that Mr Kenmare would have had nothing to say in response.

[96] There was also a dispute as to whether there was any discussion about the professional advice received and the credibility of the explanation about the cupcakes. Mr Kenmare does not accept that there was any discussion about that advice. There is some difference in the evidence about who from Fulton Hogan raised the issue about the professional advice and it is not referred to in the notes. Mr Denton said he did communicate that the company had sought professional advice that did not support Mr Kenmare's explanation. Mr Denton said that he had advised that this advice was received from Nelson Nursing and ESR. Fulton Hogan accepts that those professionals consulted were not referred to by name.

[97] If there was a discussion on 26 February 2014 about who was contacted about the credibility of the cupcake explanation it was not full disclosure of the advice/information received by Fulton Hogan. The information received by Fulton Hogan was relied on to conclude Mr Kenmare had lied or been evasive about the reason for the failed test.

[98] Both these matters are relevant not only to a finding as to whether or not there was serious misconduct but to the continuation of Mr Kenmare's employment because a conclusion that Mr Kenmare had lied about the circumstances in which he had

consumed cannabis and his drug use was one of the main reasons Mr Kenmare was considered not to have been an appropriate candidate for rehabilitation.

[99] I could not be satisfied that it was clearly put to Mr Kenmare at that meeting for his explanation that there was doubt about the truthfulness of his explanation for the reason for his non-negative result.

[100] Mr Kenmare answered two questions towards the end of the meeting. He stated that he was aware of the respondent's drug and alcohol policy and that in respect of any likely disciplinary outcome that he would expect to be supported, believed and be more careful in the future about eating cupcakes. There was some reference I find towards the end of the meeting to concerns around Mr Kenmare stating he had been smoking cannabis during the Christmas/New Year break.

[101] The meeting then adjourned on the basis that the information given would need to be considered and responded to and there was some discussion about a further meeting to take place on 7 March 2014.

[102] There is no dispute that rehabilitation was not referred to by either party at that meeting. Appendix B made it clear that the Standard contained an opportunity for the parties to enter into a rehabilitation programme. The Standard is silent as to random testing. It needs therefore to be read in conjunction with appendix B which provides about the Standard –*This policy includes an opportunity for the parties to enter into a rehabilitation programme.* The provision in the Standard for rehabilitation is as below:

#### *10.2 Compulsory Rehabilitation*

*Employees returning a positive drug and/or alcohol test for the first time in internal transfer, post incident or reasonable cause testing and who are offered the opportunity of continuing employment are required to join the company sponsored Alcohol and Drug Rehabilitation Programme. Failure to take part or complete the programme may result in disciplinary action including dismissal. NB: Fulton Hogan reserves the right not to offer rehabilitation.*

#### *After the meeting*

[103] Mr Allen says that rehabilitation, an alternative to dismissal, was considered by the management team but was not an option in this case because Mr Kenmare was not an appropriate candidate. That was because he had been deliberately evasive about his drug use and had lied about it and the circumstances in which he had

consumed cannabis. Further his explanation did not lend itself to rehabilitation. Rehabilitation was not raised or discussed by either party before Mr Kenmare was dismissed.

[104] Following the meeting Mr Allen wrote to Ms Sharma on 28 February 2014. The letter advised the preliminary decision was dismissal for serious misconduct. There was confirmation that there was no evidence of Mr Kenmare being under the influence of alcohol or drugs when reporting to work and there would be no further disciplinary action taken on that matter. In relation to the second allegation of recording a positive result Mr Allen referred to the company rules and the Standard both recording this to be serious misconduct. He attached a copy of the relevant page from each.

[105] Mr Allen advised that professional advice received suggested that Mr Kenmare had consumed greater quantities and/or more recent consumption of cannabis. He said that in making the preliminary decision the company had taken into account Mr Kenmare's length of service and positive reference from Ms Falconer. Mr Allen gave Ms Sharma until noon 7 March 2014 for a response.

[106] By letter dated 7 March 2014, Ms Sharma responded to the preliminary decision. She referred to an understanding that the parties were to tentatively meet on 7 March and her advice on 27 February that 11 March would be a preferable date to resume the matter and to some surprise then to receive the preliminary decision to dismiss. She questioned whether a positive test result on its own justifies a decision to dismiss. She said that it would be understandable if Mr Kenmare was on a rehabilitation programme and then presented with a positive drug test but that this was not the situation and it was the first time Mr Kenmare had presented with a positive drug test. Ms Sharma referred to the positive reference by Ms Falconer and that Mr Kenmare has been a loyal and hardworking employee and that would suggest that he does not have a drug problem. Further, she wrote that it is more reasonable to suppose that his explanation about the laced cupcakes was truthful and his honest belief. Ms Sharma noted in her letter that despite requests information was not forthcoming to substantiate the finding about professional advice concerning the quantity of THC in Mr Kenmare's system.

[107] On 10 March 2014 Mr Allen wrote letters to both Ms Sharma and Mr Kenmare advising that Mr Kenmare's employment was to be terminated from

11 March 2014. In the letter to Mr Kenmare there is reference to a post-incident positive result under the Company Drug and Alcohol Policy. I am satisfied that this was an error and that it should have referred to a random positive test result.

[108] Fulton Hogan was not aware that Mr Kenmare had presented at Nelson Nursing Service Limited and provided a urine sample on 5 March 2014. That test was confirmed positive for THC-Acid at a level of 47 ng/ml. A further test on 14 March 2014 was negative.

[109] After termination Mr Allen obtained a letter from the managing director of J's employer in which he confirmed a telephone conversation with Mr Allen on 14 February 2014 and his advice that the organisation had not conducted any random testing in recent months. The letter stated the manager had approached J over the matter and J confirmed that he had taken drugs prior to the weekend of 8 February 2014 but to his recollection he said it was two weeks prior to this date.

### *Conclusion*

#### *Good faith and procedural fairness*

[110] Fulton Hogan concluded that Mr Kenmare's explanation for the non-negative test was not credible. It did this after carrying out further investigations. I have not found that the nature of those investigations and the concerns arising from them were properly raised with Mr Kenmare so he could have a reasonable opportunity to respond to them before he was dismissed.

[111] Ms Sharma specifically requested information from the further investigations which was never provided. There was a failure to provide an email from Ms Hemm to Mr Denton sent after the second disciplinary meeting concluded which had information relevant to the continuation of employment. Adverse conclusions had been reached about matters which Mr Kenmare did not have an opportunity to respond to before he was dismissed. Mr Scotland submits to the effect that it would have not have made a difference if the names of the professionals consulted with had been provided. I do not accept that submission. Mr Kenmare or Ms Sharma may have wanted to consult someone themselves about the advice received by Fulton Hogan. I find that there was a failure to meet the requirement of s 103A (3) (b) and (c) of the Act in that regard. There was also a breach of the statutory obligations of good faith.

[112] Fulton Hogan says they considered rehabilitation for Mr Kenmare but decided not to offer rehabilitation because Mr Kenmare had not been truthful about the reasons for the positive test and not admitted that he may have a drug problem. He would not therefore have been a suitable candidate. I accept that under appendix B and the Standard rehabilitation could be offered but Fulton Hogan was not obliged to offer rehabilitation.

[113] The Authority heard from a previous employee at Fulton Hogan Nelson who had been offered rehabilitation following a first positive test from random testing and Mr Kenmare referred to another previous employee at Nelson who had been offered rehabilitation. There are some employees returning positive tests at Fulton Hogan who are not offered rehabilitations. I was provided with numbers in each region but was not advised of the particular circumstances of each so as to be able to reach any firm conclusions about them. I was also provided with a number of different collective agreements from different regions between Fulton Hogan and other union parties. Some of these but not all provide that rehabilitation is to be offered and undertaken for a first positive drug test regardless of any explanation. Nelson though has its own collective provisions that apply to its employees.

[114] A fair and reasonable employer could be expected to consider alternatives before dismissing an employee. In clause 10.2 of the Standard Fulton Hogan reserves the right not to offer rehabilitation but there should be a fair and transparent process around the offering or not of rehabilitation after a first positive drug test. Otherwise it could result in inconsistency in the application of the Standard and a risk that the decision to offer rehabilitation is ad hoc and not transparent. I find that there was unfairness in failing to advise Mr Kenmare why rehabilitation had not been offered. Mr Kenmare said he would have accepted rehabilitation had it been offered because he would not have lost his job. He said in time it would have showed he did not have a drug problem.

[115] Fulton Hogan says that the issue of rehabilitation was not raised by Mr Kenmare or Ms Sharma. That is part of the circumstances at the time that should be considered. If Mr Kenmare's explanation that he had inadvertently consumed cannabis was accepted there would in all likelihood not have been any finding of misconduct or referral to rehabilitation and Mr Kenmare was consistent in his explanation.

[116] While I am satisfied that Mr Kenmare knew that rehabilitation was usually offered and there was reference to that in appendix B a full copy of the Standard should have been provided to Mr Kenmare or Ms Sharma. The relationship between appendix B and the Standard are not clear and the Standard was relevant information to the continuation of employment. I do not find that its availability on the intranet is an answer when Mr Kenmare was suspended. For completeness I find that the Standard read with appendix B distinguishes this matter from the policy under consideration in *Air New Zealand v V* [2009] ERNZ 185.

[117] I find that the procedural failings I have set out above were fundamental and serious. They were not minor and resulted in unfairness to Mr Kenmare. Most significantly I find that he was not able to respond to matters relied on to not offer him rehabilitation as an alternative to dismissal.

#### *Substantive justification*

[118] Mr Kenmare recorded a positive drug test which under the Standard and the company rules is considered to constitute serious misconduct. If an employee admits drug use then rehabilitation is considered. Mr Kenmare said that he unknowingly ingested cannabis. There had to be some reasonable basis for concluding that was not a credible or likely explanation, something more than suspicion but not evidence beyond reasonable doubt that Mr Kenmare knowingly had cannabis in whatever form. Substantive justification is to be assessed at the time Mr Kenmare was dismissed.

[119] It is important not to lose sight about why these tests are undertaken. A random drug test for alcohol and drugs is undertaken solely for safety reasons. Fundamentally Fulton Hogan needed to be satisfied of Mr Kenmare's safety if he was to return to the workplace. Fulton Hogan considered that the level of the THC-Acid which was considerably higher than the minimum set for a positive test gave cause for concern against the explanation offered as did the discussion with J's employer.

[120] I have not concluded that the investigation was a fair one. Nevertheless I find that a fair and reasonable employer could have concluded on the balance of probabilities from the professional advice received between the two disciplinary meetings that Mr Kenmare's explanation about one or two cupcakes lacked credibility and was not probable or reasonable. There was advice from professionals in the area that the level of THC-Acid in urine would have been expected in a non-user of

cannabis to have dropped significantly by the time of the test which was in excess of 50 hours after consumption. J's name had been put forward but he had not been the subject of a recent positive test on investigation and there was no corroboration of Mr Kenmare's version of events from that source or from any other. The expert evidence does not lead me to a different view on substantive justification than reached by Fulton Hogan at the time of the dismissal.

[121] A fair and reasonable employer could conclude that Mr Kenmare's explanation about the unknowing consumption of cannabis in one or two cupcakes was not probable and not credible. Returning a positive test for drugs under the Standard is serious misconduct but in this case there was an alternative to dismissal in that rehabilitation could be offered. That was not considered appropriate because Fulton Hogan concluded Mr Kenmare had not been untruthful. That was never fairly put to him to answer.

[122] The application of the tests in s 103A of the Act takes place not only in relation to the decision about serious misconduct but also to the consequence of summary dismissal that followed.

**Was the decision of Fulton Hogan to summarily dismiss Mr Kenmare what a fair and reasonable employer could have done in all the circumstances?**

[123] There was a failure to provide information, when requested, about the professionals consulted about the credibility of Mr Kenmare's explanation and to put clearly to Mr Kenmare that it was considered he had been untruthful. Mr Kenmare was not told why he was considered unsuitable for rehabilitation so that he could respond to that alternative to dismissal. Given the nature of procedural flaws I am not persuaded in this case, assessed on an objective basis, a fair and reasonable employer could have dismissed Mr Kenmare in all the circumstances at the time of dismissal.

[124] Mr Kenmare has a personal grievance that he was unjustifiably dismissed. He is entitled to consideration of remedies.

## Remedies

### *Contribution*

[125] The Authority is required, under s 124 of the Employment Relations Act 2000, if it determines that an employee has a personal grievance, in determining the nature and extent of the remedies to consider the extent to which the employee contributed to the situation that gave rise to the personal grievance and if the actions so require reduce the remedies that would otherwise have been awarded.

[126] Mr Kenmare explained in the context of the cupcake consumption that his friend J had also failed a random test on 11 February 2014. When I asked Mr Kenmare why J would have sent a text saying something that was not true he said that he thought J may have sent it to make him feel better as they were *pretty good mates*. I accept on the very narrow point as to whether J had failed a random test Mr Kenmare was less likely, if he thought J was untruthful, to have told Mr Allen the name of J's employer particularly where he knew Mr Allen knew the managing director of that organisation.

[127] Mr Kenmare said the reason for the positive test was inadvertent consumption of cupcakes in the early morning of 9 February 2014 and that he had not had used cannabis apart from over Christmas/New Year. The Authority heard some expert evidence about the explanation and the scientific evidence regarding the two positive urine tests.

[128] Dr Leon Nixon is an addiction medicine specialist. He is a Director of an inpatient drug and alcohol treatment service in Australia and a clinical senior lecturer in addiction medicine at the University of Otago. Dr Paul Fitzmaurice who has amongst other qualification a PhD in toxicology and had been employed by ESR as both a science leader in the ESR Toxicology Specialist Analytical Services Group, Wellington and as a manager in the Forensic Business Group. Dr Timothy Sprott is a registered medical specialist in aviation and occupational medicine and had previously been the Chief Medical Officer for Air New Zealand.

[129] The evidence from all three experts supported that there were fewer studies of urinary excretion of THC-Acid following oral consumption of cannabis than there are with the smoking of cannabis. Dr Fitzmaurice in answer to a question from Ms Sharma said that there was about 8-10 publications relating to oral consumption of

cannabis and whilst some was dated there were some more recent studies, 1997 and 2003.

[130] From the literature available and the test results both Dr Fitzmaurice and Dr Sprott concluded with a one off single ingestion of cannabis laced cupcakes they would have expected the second urine sample to be negative. Dr Nixon also said he would have expected the second urine sample to be negative but that there is not the *empirical evidence to come down hard*.

[131] Dr Fitzmaurice said that with a naïve user of cannabis ingested orally the levels peak at about 12 – 24 hours and then decline rapidly. He said that the initial level at 50 plus hours of >300 ng/ml was inconsistent with the literature although he said that if he only had the first test he would be a bit more cautious about that and *paused for thought*. He said though that a positive test result after 22 days was unprecedented in the literature and more consistent with a reservoir in the system which is consistent with a habitual user. He clarified that a habitual (regular) user could be someone who used once or twice a week.

[132] Dr Sprott referred in his written statement to a 1988 study, *Cone E* that he considered comparable because it examined the urinary excretion of THC-Acid in five drug free males who consumed two brownies containing marijuana material. Peak THC-Acid urinary concentration for oral consumption equivalent to one or two marijuana cigarettes was 11.4 and 14.7 hours and the peak concentration was 177-436 ng/ml. THC-Acid was detected between 3-14 days after consumption of two muffins laced with THC. I should note here that the cut off for detection in this study was 5 ng/ml which extended the window of detection.

[133] Dr Sprott said in relation to the second positive test that he had never seen positive results of that duration from a single exposure event and that even allowing for differences in absorption for orally ingested cannabis a level of 47 ng/ml 22 days after a single event is unlikely in those circumstances. He said that it would be unusual to test over the standard level of 15 ng/ml beyond 6 or 7 days and that by 55 hours he would have expected the levels to drop well below the 300 ng/ml recorded. He did consider whether an alternative explanation may be that the dose of THC in the cupcakes was significantly higher than 44.8mg of THC which is the equivalent of two marijuana cigarettes. He said then Mr Kenmare would be expected to experience, in addition to effects of alcohol use, some behaviour or physiological

effects of the ingestion but his explanation was that he had not experienced any effects. Dr Sprott said that even if the concentration of THC is higher the timing of the peaks independent of concentration was still the same. Dr Sprott concluded that the scientific evidence was not consistent with the explanation of a one off consumption.

[134] Dr Nixon said that Dr Fitzmaurice and Dr Sprott may have been correct in their interpretation of urinary cannabis levels but may have been wrong to place too much reliance on the 20 year old study. That is because preparation of cannabis cakes now starts with cannabis of a much higher THC concentration than in earlier years. He said that there was no empirical evidence to clarify how the cupcakes had been prepared and no detailed pharmacokinetic information concerning first pass metabolism of THC. Given that lack of information Dr Nixon turned to clinical judgement to try to resolve whether Mr Kenmare used on a one off occasion or was a habitual, regular user who stopped on 11 February 2014. He placed reliance on Mr Kenmare's positive work reports, motivation to undertake and pass work related courses and the fact that if he was a regular user he would have been unlikely to have stopped use after 11 February 2014. He concluded that it would seem improbable that Mr Kenmare is a habitual cannabis user and his explanation of a one off use was the only reasonable conclusion. Dr Nixon also met with Mr Kenmare.

[135] I have carefully considered the expert evidence. I prefer the scientific evidence of Dr Fitzmaurice and Dr Sprott that the levels in the urine tests particularly after 22 days are inconsistent with the explanation given by Mr Kenmare to Dr Nixon's views based on clinical judgement that one off use was the only reasonable explanation. I find that the studies support the conclusions even allowing for variables such as size of individuals and THC concentration.

[136] The Authority received a few facebook images in the bundle from Mr Kenmare's facebook page. Some but not all could be seen as drug related images. All sorts of images get put on a facebook page and there is a danger that only a few images out of many have been selected and that these are then unfairly used to reach certain conclusions. I bear that in mind. What I do conclude from the images is that they support some knowledge about terms associated with cannabis and some images such as a *cannabis joint* but any inference to be drawn can be taken no further than that.

[137] I conclude on the balance of probabilities that it is less likely Mr Kenmare's failed test was caused by the one off unknowing consumption of one or two cupcakes. Mr Kenmare was I find more likely than not untruthful in his explanation. I find that there is blameworthy conduct to be taken into account in determining the nature and extent of the remedies to be provided. Mr Scotland says that contribution should be 100%. A lack of honesty does call for a finding of contribution to reflect the seriousness of that. Against that though there are reasonably significant procedural flaws in this case particularly around the failure to tell Mr Kenmare the reason it was decided not to offer him rehabilitation.

[138] I find that any monetary remedies are to be reduced by 50%.

[139] To the extent that it was suggested that there was after discovered misconduct I do not find that there was.

#### *Reinstatement*

[140] Reinstatement is no longer a primary remedy but the Authority may, whether or not it provides for any other remedy provide for reinstatement if it is practicable and reasonable to do so – s 125 of the Act.

[141] Reinstatement is strenuously opposed by Fulton Hogan.

[142] Mr Kenmare wants to be reinstated. He said that he really enjoyed the work, and the good working relationships he formed with those he worked alongside. He progressed through training at Fulton Hogan and says that he is very focussed on safety. He has support from his manager and others in the workplace. The evidence supports that there were no previous issues with Mr Kenmare's approach to health and safety issues at work. His manager Ms Falconer says that Mr Kenmare works with safety in mind and she had never had cause to think that he might be impaired in any way that would compromise his or others safety. I also heard from Ross Campbell who has worked for Fulton Hogan for 29 years. During that time he worked as an advisor in health and safety. Part of his job was to meet weekly with the management committee and identify employees who posed a safety risk. Mr Campbell said that Mr Kenmare was one of the employees he was least worried about from a safety risk perspective. Mr Kenmare tested not positive for three previous drug tests at Fulton Hogan including a pre-employment test, the latest in 2012.

[143] Turning firstly to the practicability of reinstatement. The practicability of reinstatement requires looking back to the events that led to Mr Kenmare's dismissal and other factors relating to his work but more so looking forward to the future. Both counsel referred the Authority to the well-established meaning and application of *practicable* endorsed by the Court of Appeal in *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [2] – *Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.*

[144] The Employment Court dealt with Mr Kenmare's challenge to the application for interim reinstatement- [2014] NZEmpC 96. Judge Corkill stated at [54] that the expert evidence [at that stage in affidavit form] will also be important in determining what rehabilitation steps would be necessary if the Authority were to conclude that Mr Kenmare should be reinstated and rehabilitation undertaken.

[145] Given my findings which include regard to the expert evidence, reinstatement through a rehabilitation contract is the only basis I find on which it would be practicable. The practicability and reasonableness of reinstatement has to be further assessed on that basis.

[146] The opposition to reinstatement is based on concerns about safety including the trust and confidence that Fulton Hogan can have in Mr Kenmare given that he has not been truthful. The strict rehabilitation contract that Fulton Hogan has could overcome some of the safety issues. If reinstated under a rehabilitation contract then the scientific testing and the counselling sessions replace explanations to a degree and reduce concerns in that way. A further positive test is likely to result in dismissal so there is an incentive to cease using drugs and remain drug free.

[147] A significant difficulty though is Mr Kenmare continues to maintain that he unknowingly consumed cannabis and it is difficult to see how rehabilitation could be effective in those circumstances. He does not I find have insight into any issues that there may be with his positive drug test and his view is that his explanation should simply be believed because he is a truthful and honest person. He said in evidence during the Authority process that he thought he should have been offered rehabilitation but he did not say that during the disciplinary process even when he was asked for his view about possible disciplinary outcomes for a positive test for drugs. I find in all likelihood that was because it did not fit with his explanation.

[148] The reasonableness of reinstatement requires a broad assessment of the equities of the parties' cases. Mr Scotland submits that Mr Kenmare misled or deceived Fulton Hogan about his cannabis use including withholding his second positive urine test.

[149] I do not find that Mr Kenmare had to provide details of his second positive test which he had paid for before he was dismissed. He could not obviously mislead his employer about it but there is no evidence he did. Truthfulness though is important to take into account in assessing the reasonableness of reinstating Mr Kenmare because it goes to the trust and confidence Fulton Hogan can have in him and whether he can operate safely in the workplace if he cannot be truthful about drug use. His explanation went beyond minimising the quantity or frequency of cannabis use and if accepted he would have not had any disciplinary or rehabilitation outcome.

[150] I do take into account that many witnesses spoke positively about Mr Kenmare and he was well regarded by those he worked with. His work performance was good and he had achieved pay and grade increases. There was evidence from those he worked with there were no signs he was a habitual user or had a problem with cannabis in the work place and evidence from a flatmate that Mr Kenmare was never observed using drugs. He was regarded as a pleasant and honest person.

[151] I have though found Mr Kenmare's explanation improbable against the weight of the scientific evidence from the urine tests and that he was not straightforward with his employer. Even under a rehabilitation contract I do not find in those circumstances reinstatement to be practicable or reasonable.

#### *Lost remuneration*

[152] Mr Kenmare claims reimbursement of lost wages for the period between 11 March and the 29 July being the commencement of the investigation meeting. In the circumstances of this case and given the contribution I intend to limit reimbursement to three months until Tuesday 10 June 2014. There were issues raised about mitigation but I take into account Mr Kenmare made an application for interim reinstatement and then challenged that when the application was not granted. His focus was for a time on being reinstated and then any loss would be mitigated on that basis. Mr Kenmare did attempt to look for other work from late May 2014.

[153] Mr Kenmare is entitled to be reimbursed for 13 weeks wages less earnings received during that period and 50% contribution.

[154] I do not award interest on that sum.

[155] I was not able to ascertain with the required certainty from the information provided the earnings received for that period. I will leave it up to counsel to calculate wages and if agreement cannot be reached then counsel can return to the Authority. Leave used during the suspension period from 13 February 2014 is to be reinstated and paid to Mr Kenmare.

### *Compensation*

[156] The evidence about compensation focused on Mr Kenmare's financial situation since dismissal, the fact he was not believed in his explanation and embarrassment flowing from being called a habitual drug user. He said that he trusted his employer to offer him choices but they did not.

[157] Fulton Hogan did not conclude that Mr Kenmare was a habitual user. That term was first used by Dr Fitzmaurice in an affidavit and was clarified by him to mean regular use. Whilst Mr Kenmare may well have been surprised not to have been believed he knew he had had a high test result and the matter was serious because that was Fulton Hogan's approach to positive tests for drugs. It was I find because he was not straightforward about the result that most of the humiliation occurred. There was though I accept no discussion of options to dismissal. That would have caused, I accept, some hurt. Taking those factors into account the amount I award under s 123 (1) (c) (i) of the Act is \$2,000 which is to be reduced by 50% contribution.

[158] I order Fulton Hogan to pay to Jesse Kenmare the sum of \$1000 being compensation for hurt and humiliation.

### **Costs**

[159] I reserve the issue of costs.

[160] Failing agreement Ms Sharma is to lodge and serve submission as to costs by Friday 26 September 2014 and Mr Scotland has until Friday 17 October 2014 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority