IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 332
5300686

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| | BETWEEN | WARREN KUBLER<br>Applicant |
| | AND | ENVIRONMENTAL FERTILISERS LIMITED<br>Respondent |

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| Member of Authority: | Vicki Campbell |
| Representatives: | Alex Hope for Applicant<br>Kim Stretton for Respondent |
| Investigation Meeting: | 24 January 2011 and 23 June 2011 |
| Additional Documents Received: | 8 February and 11 March from Respondent |
| Submissions Received: | 5 July 2011 from Applicant<br>No submissions from Respondent |
| Determination: | 26 July 2011 |

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DETERMINATION OF THE AUTHORITY

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**A** **Mr Kubler was unjustifiably disadvantaged in his employment and was unjustifiably dismissed.**

**B** **Environmental Fertilisers Limited is ordered to pay to Mr Kubler the following sums within 28 days of the date of this determination:**

**(i)** **$5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act; and**

**(ii)** **$8,864.64 gross pursuant to section 123(1)(b) of the Employment Relations Act.**

**C** **Costs are reserved.**

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**Administrative History**

[1] The Respondent in this matter, Environmental Fertilisers Limited (EFL) has at all times been represented by Ms Kim Stretton an Employment Law Specialist. The matter was set down on 19 October 2010 by agreement with the parties' representatives. The usual Notice of Investigation Meeting was despatched and received by the representatives in the normal way.

[2] By agreement the witness statements for the Respondent were due to be lodged in the Authority on 20 December 2010. On 17 January 2011, despite follow-up by the Authority's Support Officer no statements were received from the Respondent. Counsel for Mr Kubler applied to the Authority to have the hearing proceed in the absence of the respondent's witness statements. That application was granted and Counsel for the respondent was advised.

[3] On 24 January 2011 the respondent failed to attend the investigation meeting. Attempts were made to try and contact Ms Stretton which were eventually successful. Ms Stretton had failed to advise her client of the date and time of the investigation meeting. In order to allow the respondent time to attend the meeting, it was rescheduled to commence at 11.45am. This allowed the respondents just over an hour to travel to Hamilton for the meeting. Ms Stretton advised the Authority that her clients would be unable to attend and that she also would not be in attendance.

[4] As advised to Ms Stretton, I proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear the matter as if the respondent had attended or been represented.

[5] On 28 January 2011 during a conference call with the parties representatives the failure of the respondents to attend the investigation meeting was discussed. Ms Stretton was asked to provide affidavits in support of the reasons why the respondent had failed to attend the investigation meeting. These were duly received on 8 February 2011.

[6] Prior to the Authority embarking on the investigation meeting or setting timetables the Authority had directed Ms Stretton to deliver to the Authority a copy of all records documenting communications between the parties during the period 11 to 31 March 2010. Despite the direction being given on 10 June 2010 the documents were never lodged. Ms Stretton was reminded of her failure to lodge these documents

during the conference call on 28 January 2011. The required documents were lodged in the Authority on or about 16 March 2011.

[7] The Authority was satisfied that the failures by the respondent to adhere to the agreed timetables or to attend the investigation meeting were solely attributable to Ms Stretton's failure to communicate effectively with her client.

[8] After taking into account the affidavits lodged by the respondent, a fifth conference call was then to be arranged between the parties to discuss and agree on how the respondent's evidence would be heard by the Authority.

[9] The Authority Support Officer made a number of attempts to set the conference call down for 23 March, however no communication was received from Ms Stretton confirming the suitability or otherwise of the timing for the call.

[10] On 31 March 2011 the Authority set a time of 9.30am on 8 April for a conference to take place. Ms Stretton was advised to notify the Authority within 24 hours if that time was not suitable. Four days later, on 4 April 2011 Ms Stretton made contact with the Authority and advised that the conference call could go ahead on 8 April at 9.30am.

[11] At the appointed time, Ms Stretton was not available, despite her assurances that she would be. Numerous attempts were made to contact Ms Stretton including leaving messages on both her landline and mobile phone and via email.

[12] Eventually Ms Stretton was contacted and it seems a failure in her communications systems on 8 April 2011 meant that she was unable to attend at the agreed time. A further and final conference call was arranged for 12 May 2011 during which the respondent in person was also in attendance at the request of the Authority.

[13] It was agreed that the evidence of the respondent would be taken via a conference call on 23 June 2011. Ms Stretton was advised that her delays and unavailability throughout the Authority's investigation process would sound in costs.

**Employment Relationship Problem**

[14] Mr Warren Kubler was employed by EFL in manufacturing and dispatch from 28 September 2009 until about 23 March 2010. Mr Kubler's employment was subject

to a written employment agreement. Mr Kubler's duties included a requirement that he drive a front loader and a forklift.

[15] On or about 9 March 2010 Mr Kubler approached Mr Grant Paton, Managing Director of EFL and advised him he [Mr Kubler] had been arrested for driving whilst under the influence of alcohol. Mr Kubler also advised Mr Paton that he had a methamphetamine (P) addiction and he would like assistance with this.

[16] Mr Kubler says that he was suspended without pay on 10 March 2010 and then dismissed on or about 23 March 2010. He claims both the suspension and other actions by EFL led to his employment being subject to unjustifiable disadvantage and that his dismissal was unjustified and seeks remedies.

[17] EFL denies the claims. It says Mr Kubler was not dismissed but rather he either resigned or abandoned his employment.

[18] The issues for the Authority are whether Mr Kubler was subject to a disadvantage in his employment and whether he was unjustifiably dismissed by EFL.

**Unjustified disadvantage**

[19] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether EFL's actions disadvantaged Mr Kubler in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[1]

[20] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If EFL can establish justification for a disadvantageous action, there is no grievance.[2]

[21] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[3]

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[1] *Mason v Health Waikato* [1998] 1 ERNZ 84
[2] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004
[3] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[22] Mr Kubler says he was disadvantaged in his employment by the following unjustified actions of EFL:

- suspending Mr Kubler without pay and without following the suspension procedure set out in the employment agreement;
- holding a meeting with Mr Kubler when his employment was in jeopardy without giving him the opportunity to be represented at the meeting; and
- failing to communicate with Mr Kubler through his nominated representative at the time, Mr Chris Watchorn.

[23] For the sake of simplicity I have considered each of Mr Kubler's complaints as a whole. The issue surrounding the failure to communicate with Mr Watchorn is addressed under the heading of Dismissal rather than as a contributing factor towards his unjustified disadvantage claim, although the issues are all intermingled.

[24] Mr Kubler advised Mr Paton of his drug and alcohol problems on or about 9 March 2010. Mr Paton raised with him safety issues with respect to him undertaking his duties. Mr Kubler was asked if he would undertake only basic duties but he declined saying he had never worked under the influence of P.

[25] On 10 March 2010 Mr Paton, Ms Bibianna Spence (Human Resources) and Mr Paul Thompson (Mr Kubler's foreman) met with Mr Kubler in the tearoom. The timing of the meeting is disputed. I find it is more likely than not that the meeting took place after Mr Kubler had sought medical intervention for his drug and alcohol problems. At the meeting, Mr Kubler advised Mr Paton he wished to enter into rehab but he was not able to do so due to the number of people seeking help.

[26] I note here that while Mr Paton and Ms Spence thought it important to have Mr Thompson involved in the meeting with them, they did not take any steps to advise Mr Kubler of the importance of the meeting, nor did they offer him the opportunity to have any support or representation at the meeting.

[27] A discussion ensued and it was agreed that Mr Kubler could have the following day off work to attend Court. Mr Kubler asked Ms Spence to write a letter for him to present at Court stating that if he lost his licence or went to prison he would lose his job. Ms Spence agreed to write the letter, which she did. It was also agreed that Mr

Kubler would undergo a drug test. Mr Kubler was instructed that while awaiting the results of the drug test he would be placed on sick leave.

[28] Mr Kubler did not have any entitlement to sick leave and therefore he was placed on leave without pay. In the absence of any agreement from Mr Kubler I find that the instruction to take unpaid sick leave was akin to a suspension of Mr Kubler's employment. The suspension was without pay.

[29] My conclusion that Mr Kubler was instructed to take unpaid leave is supported by Ms Spence's evidence that she did not feel comfortable having Mr Kubler on site until he had passed the drug test. Ms Spence told the Authority Mr Kubler had been paid his full hours from 11 March to 23 March 2010. However the pay records show that Mr Kubler was not paid any ordinary hours for that period but was paid only his outstanding holiday pay.

[30] The employment agreement at clause 20.2 allows EFL to request Mr Kubler to undergo a drug test if there is a belief that Mr Kubler is under the influence of alcohol or drugs when at work. It is only after a positive result is returned from the test that the agreement allows for Mr Kubler's suspension.

[31] Mr Kubler agreed to undergo a drug test but events intervened to an extent that he did not receive notification from Ms Spence as to the timing of the test. Consequently Mr Kubler did not attend the appointment.

[32] Suspension is a disadvantageous act and in this case, I find Mr Kubler's suspension to be unjustified.

**I find the actions of EFL were not the actions of an employer acting fairly and reasonably and that Mr Kubler was disadvantaged in his employment by an unjustifiable action by EFL. Mr Kubler is entitled to a consideration of remedies.**

**The dismissal**

[33] On 11 March 2010 Mr Kubler dropped off a handwritten note to Mr Paton and Ms Spence seeking their attendance at mediation to discuss his suspension on sick leave. During a telephone conversation between Mr Kubler and Ms Spence about the request for mediation, Mr Kubler was told they would not attend mediation and he should to speak to EFL's lawyer, but no contact details were provided.

[34] Ms Spence arranged for Mr Kubler to undergo a drug test for the following day (12 March 2010). The arrangements for the drug test were set out in a letter which Mr Paton says he hand delivered to Mr Kubler. Mr Kubler says he never received the letter as it was left in the door of his accommodation. Mr Kubler had been evicted from the accommodation and had not returned.

[35] Mr Kubler had been residing temporarily in an industrial premise next to his workplace for approximately 1 month. The premises were leased by Mr Dick Sturgeon who also worked for EFL. On 11 March 2010 Mr Kubler was evicted from the premises by the owners of the building and the locks on the building were changed.

[36] Mr Sturgeon gave evidence, which is accepted by the Authority, that he attended the premises on Monday 15 March 2010 and found the letter dated 11 March 2010 from Ms Spence advising Mr Kubler of the drug test arranged for 12 March 2010. Mr Sturgeon handed the letter to Mr Thompson and suggested he contact Mr Kubler on his cellphone and find out where he was staying. It seems no action was taken by Mr Thompson to contact Mr Kubler.

[37] As a result Mr Kubler failed to attend the drug test. Ms Spence had notified Mr Kubler in the letter of 11 March 2010 that a failure to attend the drug test would be considered serious misconduct. Ms Spence was advised by the medical centre that Mr Kubler had failed to attend the drug testing appointment. At this time, Ms Spence was unaware that Mr Kubler had been evicted from his accommodation.

[38] On Monday 15 March 2010 Ms Spence wrote again to Mr Kubler setting up a disciplinary meeting for 19 March 2010. Ms Spence advised Mr Kubler in the letter that his employment was in jeopardy and that a failure to attend the meeting would result in an assumption that he no longer wished to work for EFL and the employment relationship would be deemed to be at an end. Ms Spence told the Authority that Mr Kubler was not at his accommodation on 15 March 2010 and so she left the letter under the door.

[39] On 17 March 2010 Mr Watchorn contacted Mr Paton and discussed the situation surrounding Mr Kubler and his suspension. Mr Watchorn was keen to attend mediation and offered Mr Paton the opportunity to get into mediation to try and resolve the issues between EFL and Mr Kubler. From this conversation it would have

been clear to Mr Paton on 17 March 2010 that Mr Kubler was being represented by Mr Watchorn.

[40] Mr Kubler did not attend the meeting on 19 March 2010. I am satisfied Mr Kubler did not know about the meeting. He had been evicted from his accommodation the week before Ms Spence left the letter under the door and no mention was made of the meeting by Mr Paton when Mr Watchorn spoke to him on 17 March 2010.

[41] On 23 March 2010 Ms Spence made up Mr Kubler's final pay. She says she did this as it was obvious Mr Kubler was not returning to work, he had threatened to take a case to the Employment Relations Authority and she says EFL had been served with a statement of problem claiming unjustified dismissal.

[42] I find Mr Kubler was dismissed from his employment when Ms Spence paid his final pay on 23 March 2010. I also find the dismissal to be unjustified. There was no full or fair enquiry into any conduct on the part of Mr Kubler that could justify a summary dismissal. Therefore the decision to dismiss was not one an employer acting fairly or reasonably would have made in all the circumstances of this case.

[43] Mr Paton and Ms Spence had been provided with two opportunities to attend mediation to resolve any difficulties the parties had in their employment relationship. Ms Spence did not take any steps to try and contact Mr Kubler before making up his final pay. At the very least both Mr Paton and Ms Spence had Mr Kubler's cell phone number and Mr Paton was aware Mr Watchorn was acting on Mr Kubler's behalf.

[44] Further, the statement of problem was not served on EFL until 29 March 2010, therefore Mr Kubler's claim that he had been unjustifiably dismissed was not known to Ms Spence until after she had paid his final pay.

**Mr Kubler has been unjustifiably dismissed and is entitled to a consideration of remedies.**

**Remedies**

[45] Mr Kubler gave compelling evidence as to the effects the dismissal has had on him. At the time of his sentencing on the excess breath alcohol charge he may have received a penalty of home detention had he still been in the employment of EFL. However, instead Mr Kubler was sentenced to a term of imprisonment.

[46] I have taken a global approach to the remedy of compensation and have determined that an appropriate award is $5,000.00.

**Environmental Fertilisers Limited is ordered to pay to Mr Kubler the sum of $5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act within 28 days of the date of this determination.**

[47] On 30 April 2010 EFL offered Mr Kubler his job back. This offer was accepted on 4 May 2010 however, the offer was withdrawn after acceptance, as Ms Spence was concerned that there was still an issue with regards outstanding wages for the period between 11 March 2010 and the date at which Mr Kubler would recommence his employment.

[48] Mr Kubler was imprisoned on 6 July 2010. On that date he was no longer available to work. He is entitled to his lost wages from 11 March 2010 to 5 July 2010.

**Environmental Fertilisers Limited is ordered to pay to Mr Kubler the sum of $8,864.64 pursuant to section 123(1)(b) of the Employment Relations Act within 28 days of the date of this determination.**

[49] As required by section 124 of the Employment Relations Act I have given consideration as to whether the remedies ought to be reduced for contribution. I find there was no contribution by Mr Kubler to the actions giving rise to his personal grievances. It follows that no reduction in remedies will be ordered.

**Costs**

[50] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Mr Kubler may lodge and serve a memorandum as to costs within 28 days of the date of this determination. EFL will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[51] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around $3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case and

as set out earlier in this determination EFL is on notice that the delays experienced in progressing this matter will be an issue to be considered in any costs award.

Vicki Campbell
Member of Employment Relations Authority