IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 103
5564043

	BETWEEN	GARY McLEOD Applicant
	A N D	ENVIROWASTE SERVICES LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Linda Ryder and Jeff Goldstein, Counsel for Applicant Jo Douglas, Counsel for Respondent
Investigation Meeting:	4 and 5 April 2016 at Christchurch
Submissions Received:	Written and oral submissions for Applicant on 5 April 2016 Oral submissions for Respondent on 5 April 2016
Date of Determination:	7 July 2016

DETERMINATION OF THE AUTHORITY

A. Mr McLeod was unjustifiably disadvantaged in his employment.

B. Mr McLeod was unjustifiably dismissed from his employment.

C. Envirowaste Services Limited is to pay Mr McLeod:

a. $11,000.00 without deduction pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

b. $20,762.60 pursuant to ss 123(1)(b) and 128(3) of the Employment Relations Act 2000.

c. $544.32 pursuant to s 123(1)(c)(ii) of the Employment Relations Act 2000.

D. Costs are reserved with a timetable set for submissions if required.

Employment relationship problem

[1] Mr McLeod's employer, Envirowaste Services Limited (Envirowaste), dismissed him because he failed a drug test. Envirowaste concluded that failing a drug test was serious misconduct and it warranted immediate dismissal.

[2] Mr McLeod says this dismissal was unjustified because Envirowaste failed to follow its drug testing procedure set out in the applicable policy, that there were failings in the disciplinary process and Envirowaste should have exercised its discretion to offer rehabilitation. Mr McLeod also complains of being unjustifiably disadvantaged in his employment by Envirowaste deciding to suspend him without pay.

[3] Envirowaste says:

a. Mr McLeod's dismissal was procedurally and substantively justified;

b. that its decision not to exercise its discretion in favour of granting rehabilitation was one that a fair and reasonable employer could have made in all the circumstances at the time; and

c. it did not cause any unjustifiable disadvantage to Mr McLeod's employment by suspending him without pay.

Factual background

[4] Mastagard employed Mr McLeod on 7 January 2013 as a truck driver. Mastagard transferred Mr McLeod's employment to Envirowaste on 1 May 2014 when Envirowaste purchased the Mastagard business.

[5] Mr McLeod's employment was governed by an individual employment agreement dated 8 April 2014. Envirowaste also has various policies and procedures including a drug and alcohol policy and a drug and alcohol rehabilitation policy that were relevant to Mr McLeod's employment.

[6] On 9 April 2015, Envirowaste selected Mr McLeod to undertake a random drug test. The result of that drug test was non-negative and Envirowaste sent Mr McLeod's sample to a laboratory for a confirmatory test.

[7] Because he had returned a non-negative test, Envirowaste suspended Mr McLeod on full pay until the lab returned the confirmatory test. On Friday, 10 April 2015, Envirowaste received the confirmatory test result. This test returned a positive result for THC. That is, the level of THC shown as present in Mr McLeod's urine sample was above the AS/NZS4308:2008 levels.

[8] On Monday, 13 April 2015, Envirowaste gave Mr McLeod a letter inviting him to attend a disciplinary meeting scheduled for 14 April 2015. That letter stated:

> This letter confirms that you are invited to attend a disciplinary investigation meeting on 14 April 2015 at 9am at Francella Street office with Mike Aberhart – Christchurch Branch Manager and Stewart McFadden – Christchurch Operations Manager.
>
> This meeting is to investigate allegations of you're [sic]:
> - Attending work under the influence of drugs or alcohol;
> - A confirmed positive result being received following a drugs or alcohol test.
>
> In particular your:
> - Producing a non-negative result for a random test taken at 11.53am 9 April 2015 and the subsequent test confirmation of the result on Friday 10 April 2015 confirming a positive drugs test for THC.
>
> As you are aware, such behaviour is a direct breach of Envirowaste's code of conduct and if proven, would likely constitute misconduct or serious misconduct. There is the possibility that the outcome of the investigation may be disciplinary action, which could include a formal warning or the termination of your employment.
>
> Given the seriousness of the allegation(s) and possible consequences, you are advised of your right and encouraged to bring a representative to this meeting.

[9] On 14 April 2015, Mr McLeod met with Mr Aberhart, Christchurch Branch Manager for Envirowaste and Mr McFadden, who was then the Operations Manager for Envirowaste. Mr McLeod's son, Riki, attended with him as his support person.

[10] During this meeting, Envirowaste advised Mr McLeod that the result from the lab confirmed a positive test result. He was not shown a copy of the test result with the amount of THC that was found to be present.

[11] By way of explanation, Mr McLeod said that he had been to a party over the previous weekend (being Easter weekend, Sunday, 5 April 2015) and he had been very intoxicated. His memory of that night was very vague but he did recall that there were people smoking cannabis. He stated that as far as he could remember he did not smoke any drugs at the party and his wife, who was at the party with him, did not recall seeing him smoking any drugs. Mr McLeod queried whether the cannabis in his system might have been by passive inhalation.

[12] The meeting was not concluded. Mr Aberhart advised Mr McLeod that there was a serious allegation to answer and that summary dismissal was a likely result so Mr McLeod should take some time to get legal advice in respect of his position and properly present his case for consideration.

[13] It is Mr McLeod's evidence that in fact Mr Aberhart told him, in the meeting, that Envirowaste would dismiss him. I do not accept that Mr Aberhart told him this in such emphatic terms. Mr Aberhart's evidence is contradictory to this and I believe that Mr Aberhart merely indicated to Mr McLeod the seriousness of the charge and the likelihood of dismissal but did not assert that Envirowaste would dismiss him. I note it is counter-intuitive on the one hand to suggest that Envirowaste would dismiss him and then suspend the meeting to get advice – that would be irrelevant and unnecessary if Envirowaste had already made that decision.

[14] Following the first disciplinary meeting, Envirowaste changed Mr McLeod's paid suspension to suspension without pay based on the positive result being received.

[15] Mr McLeod then sought legal advice. Mr McLeod's adviser, Ms Ryder, emailed Mr McFadden and Mr Aberhart on 14 April 2015 advising that she was instructed to act for Mr McLeod and requesting a copy of the test result showing the level of THC. Ms Ryder also questioned the reason for Envirowaste placing Mr McLeod on unpaid suspension.

[16] Ms McClurg, Human Resources Manager with Envirowaste, responded to Ms Ryder on 15 April 2015. She advised:

> Regarding your request for level of THC, Envirowaste deliberately do not receive this information from ESR in the results notification as the levels of THC are related to the amount of carotene in the urine which indicates dilution. Dilution impacts on the level of the THC. Both TDDA and ESR results have been above the AS/NZS4308: 2008 cut off levels and Envirowaste does not test for trace levels of THC.

> Mr McLeod's suspension is in accordance with our drug and alcohol policy and his employment agreement (both of which have been provided to Mr McLeod I understand). Mr McLeod was paid from the time of the non-negative result until this was confirmed as a positive test via the ESR laboratory and as per our process not paid from this time of confirmation.
>
> From our conversations with Mr McLeod briefly previously it appeared he wanted to discuss this matter expeditiously and while we encourage seeking advice we do agree we should not delay it unreasonably, so should meet this week.

[17] Ms Ryder responded on 16 April 2015 stating:

> It is certainly not my client's intention to unnecessarily delay a meeting, however I only met with my client late on 14 April 2015 and in order to provide him with professional advice, I need a reasonable opportunity to consider the issues, request information and take instructions from my client prior to meeting with the company.
>
> My client is extremely upset about returning a positive drug result. My client informs me that he is not a recreational/social drug user. He was therefore not concerned about providing a random drug sample on 9 April 2015. He was however extremely surprised when a positive drug test was returned. He can only speculate that this has occurred as a result of inhaling second hand smoke when he attended a party over the Easter weekend.
>
> …
>
> My client really enjoys his job at Envirowaste and does not want to lose his employment as a result of this situation. Therefore, he has sought our representation. In order for us to properly advise our client, we would appreciate the company providing us with the following information:
>
> (i) A copy of the testing standards 4308-2008;
> (ii) A copy of SHE-04-072 drug and alcohol rehabilitation procedure;
> (iii) The documentation relating to the drug testing processes carried out in accordance with section 7 of the drug and alcohol policy;
> (iv) Information relating to circumstances where Envirowaste have implemented rehabilitation as opposed to disciplinary action when a positive drug or alcohol test has been returned.
>
> As I indicated in my email to Mr McFadden dated 14 April 2016, my client has requested the test results showing the level of THC. My client would like the opportunity to consider that information before meeting. In our view, that is a reasonable request in the circumstances.
>
> I note that you have indicated that the positive drug test has been above the AS/NZS4308:2008 "cut off levels". Can you explain what the cut off levels are and how these levels relate to impairment. What

> does the cut off level tell you about the quantity of THC in the urine sample?
>
> …
>
> My client informed me that the company will not give him an opportunity to undertake a second test. My client attended at his doctor on the morning of 15 April 2015 and undertook a drug test. That test has come back negative. A copy of the test result will be provided to you as soon as it is to hand. This result indicates my client no longer has THC in his system. My client offered to undergo a second drug test.
>
> As a result of my client now producing a negative drug test, he would like to return to work pending the outcome of the disciplinary investigation. If the company should wish to verify this test result, then he is prepared to submit a further drug test in accordance with the company's procedures. If the company will not agree to my client returning to work pending the outcome of the investigation, then my client will agree to remain on paid suspension.
>
> …
>
> I note your advice that Mr McLeod has been suspended in accordance with the company's drug and alcohol policy. The drug and alcohol policy provides (page 7) in the fourth bullet point under the heading, "results"
>
> > "While such disciplinary investigation is carried out, the employee may remain or, subject to consultation with the employee, be suspended on full pay."
>
> There is no reference in the drug and alcohol policy to an employee being suspended without pay should a positive test result be returned.
>
> I have also considered clause 20 of the employment agreement. That provides that an employee may be suspended where the employee returns a positive drug test. The clause does not state that this suspension will be unpaid.
>
> Clause 20(ii) states that "normally, any suspension will be on pay". It is only in special circumstances that a suspension will be without pay. The examples given of what may constitute special circumstances do not apply in this situation.
>
> The employee handbook under the disciplinary process section (page 20) provides a section on suspension. That provides any suspension will normally be with pay.
>
> Therefore, I cannot identify any contractual ability for the company to suspend my client without pay.

[18] Ms McClurg responded to Ms Ryder in a letter of 17 April 2015. Ms McClurg recorded that Envirowaste had requested the Drug Testing Agency to report only on THC above *trace*. She went on to explain that this trace level assessment is standard

and effectively means that any positive result cannot be because of passive inhalation. Ms McClurg referred to the Drug Testing Agency having confirmed that scientists and toxicologists set the testing level at such a level in the standard to negate the possibility of the donor testing positive because of passive inhalation. The level is set to reflect actual consumption.

[19] In respect of the documents requested by Ms Ryder, Ms McClurg said that the testing standards are public information and Ms Ryder could access that if she wished. She then went on to affirm her understanding that Envirowaste carried out the required consent and testing processes in line with the Envirowaste policy. She then declined to provide any information regarding previous instances of rehabilitation claiming that that information related to other individuals and in any event, she believed it to be irrelevant.

[20] She then concluded by advising that the employment agreement and the policy *allow for suspension without pay pending consultation*. However, Ms McClurg said Envirowaste was prepared to pay Mr McLeod for a further week and up to two days until the second disciplinary meeting could be held if that meeting would be held on either the Monday or the Tuesday of that next week.

[21] On Monday, 20 April 2015, Ms Ryder requested a further extension of time for the second disciplinary meeting on the basis that Mr McLeod had made a request to the Drug Testing Agency for the THC levels and he had not received those results.

[22] Ms McClurg responded on 21 April 2015 stating that she understood that the results requested might take up to 20 days, which Envirowaste found to be an unreasonable delay. Envirowaste also believed the information they were waiting on was not required in order for the disciplinary investigation to proceed. Put simply, Ms McClurg said that the information, i.e. the test result levels, was not information that Envirowaste was relying on as part of its investigation so it wished to proceed. She stated that the levels displayed on the test would not have an impact on the process from Envirowaste's perspective as the level was above trace.

[23] Ms McClurg then recorded that she had previously offered to pay Mr McLeod up until the Tuesday of the current week provided the second disciplinary meeting was held promptly. On that basis, she said that Envirowaste did not feel that Mr McLeod's paid suspension could continue beyond that Tuesday. She requested

comments from Ms Ryder regarding that before Envirowaste made its decision on ceasing the paid suspension.

[24] On 22 April 2015, Ms Ryder replied advising that Mr McLeod required the test results in order to formulate his response to Envirowaste's allegations. It was her position that a fair and reasonable employer would not require the second disciplinary meeting to take place without the information being available. She recorded that the delay in obtaining the test results was not purposeful and not because of Mr McLeod's actions. Mr McLeod would be unjustifiably disadvantaged if Envirowaste was to put him on unpaid suspension awaiting the disciplinary meeting. She further recorded that Mr McLeod had subsequently provided a negative drug test and had offered to return to work pending the outcome of the disciplinary process rather than a continuation of the suspension. Ms Ryder also raised concerns about access to document AS/NZS4308: 2008 as there was a considerable cost involved in purchasing it.

[25] Ms McClurg responded to Ms Ryder on 22 April 2015. She advised that as purchaser of the standard they were not able to distribute it, in fact she did not have a copy herself and nor did the decision-makers in the process. Envirowaste did not view that information as material and again she reiterated that the test levels were not required to respond to the allegations as presented. She concluded by confirming that having considered Ms Ryder's comments regarding unpaid suspension, Envirowaste had taken a decision that Mr McLeod would be on unpaid suspension from Monday, 20 April 2015 onwards.

[26] On 23 April 2015, Ms Ryder advised that as a result of Envirowaste's insistence that Mr McLeod attend a meeting before receiving the test result and combined with the unpaid suspension, he felt he had no option but to comply with the request and he would be available for a meeting on Friday, or the following Tuesday.

[27] In the end, the second disciplinary meeting was held on 28 April 2015. Ms Ryder attended with Mr McLeod and Mr Aberhart and Mr McFadden were present on behalf of Envirowaste. That disciplinary meeting was recorded and a transcript was provided by way of evidence in the investigation meeting.

[28] Following this meeting, on 30 April 2015, a further meeting was held between Ms Ryder, Mr McLeod and Mr Aberhart. That meeting was a decision meeting at

which Mr Aberhart advised, amongst other things, that Envirowaste had considered that Mr McLeod had committed an action of serious misconduct and that in this case it justified termination. Envirowaste was not prepared to exercise its discretion to offer rehabilitation.

[29] On 30 April 2015, the decision, which had been relayed in that meeting, was recorded in writing. This letter stated:

> As you know, an allegation of serious misconduct has been made against you, and we have now concluded our investigation. Specifically, the allegation was:
>
> - Attending work under the influence of drugs or alcohol;
> - A confirmed positive result being received following a drugs or alcohol test.
>
> The above allegations were put to you and discussed at meetings with you on 14, 28 and 30 April 2015. You were given an opportunity to be represented at these meetings. You chose to be supported by Riki McLeod at the first meeting and at the subsequent meetings to be represented by Linda Ryder of employment lawyers, Goldstein Ryder Limited.
>
> You were given an opportunity to respond to the allegation and your response was carefully considered as part of the investigation carried out by Mike Aberhart – ESL Christchurch Branch Manager and Stewart McFadden – ESL Christchurch Operations Manager. In summary your response to the allegation was:
>
> - That you were at a function over the Easter break where drug use was occurring.
> - That you had not knowingly used drugs and do not use drugs.
> - That you cannot recall using drugs due to your intoxication levels, but assume you must have;
> - That you have a low tolerance to alcohol;
> - That you are an honest, hardworking employee who has an unblemished record;
> - That you have always prided yourself on your safety record;
> - You were planning to become an owner/driver with ESL and would not knowingly place that chance in jeopardy.
>
> After considering the findings of the investigation and your responses, we have concluded that the above allegation of misconduct, specifically your receiving a confirmed positive drugs test, has been upheld. Furthermore, your action is completely unacceptable to Envirowaste, and the misconduct is serious enough to warrant immediate termination of your employment.
>
> Any outstanding entitlements will be calculated, including holiday pay, and credited directly to your nominated bank account.

[30] On 19 May 2015, Ms Ryder raised a personal grievance on behalf of Mr McLeod alleging unjustified dismissal and unjustified action causing disadvantage.

[31] On 17 July 2015, Ms McClurg wrote to Mr McLeod and advised him:

> We have considered further your claim that you should have been paid during the period that you were suspended pending the outcome of the disciplinary process which led to the termination of your employment. We consider that Envirowaste had valid grounds to cease paying you during that period, and that it properly consulted with your representative about this decision.
>
> However, as a gesture of goodwill and, without any admission of any liability, Envirowaste has decided to pay you for the nine days that you were suspended up to the date of termination of your employment on 30 April 2015.
>
> Based on your ordinary hours of 8 per day you will be paid a gross amount of $2,351.86 on Tuesday 21 July 2015 into your nominated bank account. This figure includes the 8% holiday pay loading for this period.

The issues

Unjustified dismissal

[32] As a dismissal has occurred the onus shifts to Envirowaste to show that the dismissal is justified. In order to address this I must consider:

a. Whether Envirowaste complied with its drug testing policy;

b. Whether the disciplinary process conducted by Envirowaste was fair; and

c. Whether the decision to dismiss Mr McLeod was substantively justified.

[33] In her submissions on behalf of Mr McLeod, Ms Ryder says Envirowaste has failed to provide any evidence to the Authority that it complied with its own policy that applied to drug testing so Envirowaste has not discharged the burden imposed on it to show the dismissal was justified. I accept that I must consider this and therefore the issues are:

a. Did Envirowaste follow its own policy on drug testing in respect of the random drug test administered on Mr McLeod?

b. If not, what is consequence of this?

[34] On the question of whether Envirowaste conducted a fair process I must consider:[1]

a. Did Envirowaste investigate the allegation sufficiently including, in particular, carrying out any further investigation it may have been obliged to undertake regarding the circumstances of the failed drug test;

b. Did Envirowaste outline the allegation, explain the possible implications of a finding of gross misconduct and give all of the information it had that was relevant to the misconduct, to Mr McLeod for him to consider and respond to;

c. Did Envirowaste give Mr McLeod a reasonable opportunity to respond to the information and the allegation, before it made its decision to dismiss;

d. Did Envirowaste consider properly any explanation given by Mr McLeod before it made its decision to dismiss, which raises the question of whether Envirowaste had predetermined the outcome;

e. Did Mr McLeod have an opportunity to address the decision maker; and

f. If there was a failing by Envirowaste in any of the steps above, does that render the disciplinary process unfair?

[35] On the question of whether the decision to dismiss was substantively justified the issues are:

a. Did the gravity of the misconduct, the circumstances of the misconduct, and/or any mitigating factors mean dismissal was not a decision a fair and reasonable employer could have come to;

[1] Applying s 103(A) and s 4(1A) of the Employment Relations Act 2000

b. Was Envirowaste's decision not to allow Mr McLeod to undertake rehabilitation a decision that a fair and reasonable employer could have come to in all the circumstances.

Unjustified disadvantage

[36] The issues pertaining to personal grievance of unjustified action causing disadvantage include:

a. Was Mr McLeod's employment, or a condition of his employment, affected to his disadvantage by an action of Envirowaste;

b. If so, was that action by Envirowaste justified?

Discussion

Compliance with drug and alcohol policy

[37] The starting point for consideration of the operation of any drug test is, of course, the policy or contractual provisions that afford the employer the right to undertake the drug test. Put simply, drug testing policies or contractual provisions need to be interpreted and applied strictly. As Chief Judge Colgan stated in *Parker v Silver Fern Farms Ltd (No 1)*:[2]

> … Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly.

[38] A fair and reasonable employer must comply with its own policy. A failure to do so is likely to render a dismissal as unjustified. In *Hayllar and Matene v The Goodtime Food Company Limited* Judge Ford held:[3]

> [80] In short, I find there were a myriad of reasons as to why, in terms of the s 103A test for justification, the dismissal of each plaintiff was unjustified. My principal finding, however, is that the defendant acted in breach of its own drugs policy and in an inherently unfair manner in dismissing the plaintiffs for failing a second drugs test while they were still undergoing rehabilitation and counselling in respect of their initial drugs test.

[2] [2009] ERNZ 301 at [26]
[3] [2012] NZEmp 153 at [80]

[39] Mr McLeod's failed drug test was obtained pursuant to the Envirowaste Drug & Alcohol Policy SHE 04-070 (the Policy).

[40] Ms Ryder, in her submission, complains that Envirowaste failed to produce any evidence to show it complied with the Policy. Ms Ryder listed a number of requirements of the drug testing procedure contained in the Policy for which Envirowaste failed to provide evidence of compliance. Envirowaste did not provide that evidence in the Investigation Meeting nor was it provided in response to Ms Ryder's request for documents evidencing compliance with the Policy contained in her letter of 16 April 2015.

[41] Ms McClurg stated that she could confirm that the requirements of the Policy had been complied with, in her letter of 17 April 2015, which responded to Ms Ryder's request. Ms McClurg did not provide any evidence to prove this compliance

[42] In cross-examination Ms McClurg stated she simply relied on the testing agency to meet the requirements and assumed it had done so. She said she knew the consent form had been filled out but did not provide a copy to Ms Ryder as she believed Mr McLeod already had a copy. She did not say this in her written response to the request on 17 April 2015.

[43] The explanation for not providing the information requested by Ms Ryder is weak and superficial. The ability to comply with the request would be simple, obtaining and copying the required documents could not be an onerous task. In these circumstances, the failure to provide the documents to support the position of compliance raises questions about whether such documents existed or whether Ms McClurg knew Envirowaste had not complied and simply sought to avoid the issue.

[44] Further, I have reason to doubt Ms McClurg's credibility when it comes to her evidence on compliance. In her letter of 17 April 2015, Ms McClurg also addressed the issue of unpaid suspension by recording *we believe our employment agreement and policy allow for suspension to be without pay pending consultation.* However, in an internal email on the same day Ms McClurg conceded that the Policy and employment agreement were *light on the question of suspension without pay* and she circulated an amendment to ensure that the Policy would allow for suspension without pay in the future. It appears then that Ms McClurg was prepared to make a statement

to Ms Ryder she knew to be either incorrect or at least inaccurate in order to present the best possible case for Envirowaste.

[45] I cannot accept Ms McClurg's unsubstantiated evidence that the Policy had been complied with and in the absence of any other evidence I am not satisfied that Envirowaste strictly complied with the Policy.

[46] Ms Ryder also submits there is undisputed evidence that Envirowaste obtained Mr McLeod's drug test in breach of the Policy.

[47] In relation to random testing the Policy provides:

> Unless exceptional circumstances exist (see section 8 above), specimen collection and testing must take place on-site at the employee's normal place of work within three hours (for drug tests) or one hour (for alcohol tests) of the employee being notified. If testing for drugs, then this must be conducted by NZDDA in a NZDDA testing van in order to maintain the effectiveness and credibility of random testing.

[48] Mr McLeod's undisputed evidence is that he drove to the NZDDA testing site in Sawyer's Arms Road and provided his sample there and it was then tested at that site. There was no evidence to suggest that there were exceptional circumstances requiring Mr McLeod's random test to be undertaken at Sawyer's Arms Road rather than on-site in a NZDDA testing van. I note however, that if exceptional circumstances did exist then under the Policy an alternative site can be used for the random test but the employee must be supervised by an Envirowaste representative or NZDDA employee from the time of the decision to test until completion of the test *to maintain the integrity of the test*. This was not done for Mr McLeod's test and therefore, based on the Policy itself, this calls into question the integrity of the test.

[49] So, I have evidence of a clear breach of the Policy, compliance being required to maintain the effectiveness and credibility of testing and to maintain the integrity of the test. I also have no basis to conclude that other important aspects of the testing procedure in the Policy were adhered to. Failings in many of these requirements could have caused prejudice to Mr McLeod or impacted on the effectiveness or integrity of the test.

[50] Applying the clear statement of Chief Judge Colgan in *Silver Fern Farms* and following the findings of Judge Ford in *Hayllar and Matene* I find the failure to apply

the Policy strictly means the subsequent decision to dismiss Mr McLeod is unjustified.

Disciplinary process

[51] The failure to comply with the Policy does not conclude the matter, as there are other aspects of fairness to consider. The broad issue in terms of procedural fairness is set out in ss 103 and 103A of the Employment Relations Act 2000 (the Act). This requires me to determine whether Envirowaste's actions in carrying out the disciplinary procedure with Mr McLeod were what a fair and reasonable employer could have done in all of the circumstances, and I determine that by reference to the factors listed in s 103A(3) of the Act and any other factors I consider are appropriate pursuant to s 103A(4) of the Act.

[52] In this case I must consider:

a. Did Envirowaste investigate the allegation sufficiently including, in particular, carrying out any further investigation it may have been obliged to undertake regarding the circumstances of the failed drug test;

b. Did Envirowaste outline the allegation, explain the possible implications of a finding of gross misconduct and give all of the information it had that was relevant to the misconduct, to Mr McLeod for him to consider and respond to;

c. Did Envirowaste give Mr McLeod a reasonable opportunity to respond to the information and the allegation, before it made its decision to dismiss;

d. Did Envirowaste consider properly any explanation given by Mr McLeod before it made its decision to dismiss, which raises the question of whether Envirowaste had predetermined the outcome; and

e. Did Mr McLeod have an opportunity to address the decision maker?

[53] *Did Envirowaste properly investigate its allegations and concerns* – In the first instance it would appear there is little that Envirowaste needed to investigate in terms of the allegation. At its simplest, the allegation was that Mr McLeod failed a

drug test and this amounts to serious misconduct pursuant to the Policy. Therefore, on the face of it, a failed test does not require any further investigation. However, if Envirowaste intended to rely on the test result as evidence of serious misconduct it should have investigated the integrity of that result by checking it was obtained in compliance with the Policy. I have already addressed the question of compliance with the Policy so I just note here that compliance with the Policy was an investigation Envirowaste should have undertaken at the outset. This is not an onerous requirement.

[54] In the course of the disciplinary process, Mr McLeod stated that he did not recall smoking cannabis; he had been to a party on 5 April 2015 and had become so intoxicated he could not remember parts of the evening. He was aware that there had been cannabis at that party but no one was able to tell him if he smoked cannabis or not. He said he was not a habitual user of any kind of drug and he had not smoked cannabis for many years. He accepted that as there was a failed test, he must have consumed cannabis at the party and whilst he initially questioned whether this was by passive inhalation, he later accepted that was not possible, based on the elimination of any trace result in the test. He also stated he was sure that he was not under the influence of drugs when he attended work.

[55] Envirowaste did not investigate any of the matters Mr McLeod raised by way of explanation and mitigation. It could quite easily have spoken to Mr McLeod's wife or other family members who were at the party to determine if he was really so intoxicated he might have memory loss of that evening or whether they saw him smoke cannabis. Envirowaste could have determined (as Mr McLeod did) the likelihood of Mr McLeod being a habitual user or whether this was a one off event by having an expert compare the level of THC in the first test against a subsequent test. Envirowaste could have made some enquiries as to the likelihood of Mr McLeod being under the influence of drugs when he attended work.

[56] Dr Leo Schep, a Toxicologist at the National Poisons Centre, University of Otago gave evidence at the Investigation Meeting. He had reviewed Mr McLeod's drug test result and the result of a subsequent test that Mr McLeod had undertaken. He concluded that the test results showed that Mr McLeod was a *very infrequent user of the drug* and the failed drug test was likely from a *one off* single cigarette consumed prior to the test.

[57] Dr Schep also commented on the likelihood of Mr McLeod being under the influence of drugs at work based on the test result. He accepted that levels of impairment from drugs cannot be assessed testing a urine sample (as was the test in this case) but he was confident given the level of THC in the first test and the subsequent clear test that Mr McLeod would not have been impaired by cannabis at work. His evidence was that the effect of a weak cigarette, as he believed this one to be, would be gone in about 12 hours.

[58] I accept that Dr Schep's evidence on impairment was limited because the results he reviewed were from tests on urine rather than blood but it gave at least some credibility to Mr McLeod's statement that he was not under the influence of drugs at work. Dr Schep's evidence on likelihood of Mr McLeod being a habitual user and the failed test arising from a one off single cigarette was compelling and credible.

[59] It might not have been necessary for Envirowaste to undertake these investigations, particularly engaging a Toxicologist, if it was simply relying on the failed test as being serious misconduct but that was not the case. In evidence, Mr Aberhart stated he did not accept Mr McLeod's explanation that he was so intoxicated he had no recollection of events at the party so he concluded that Mr McLeod was lying. Mr Aberhart also believed the test result evidenced that Mr McLeod was under the influence of drugs when he attended work. And Mr Aberhart believed there was a risk that Mr McLeod would reoffend either because he was lying about being a habitual user or because he might put himself in the party/drinking situation again and consume cannabis.

[60] All of these conclusions informed Mr Aberhart's decision to dismiss Mr McLeod. As these conclusions were relied upon Envirowaste should have properly investigated them before reaching its conclusion.

[61] *Were Envirowaste's allegations and concerns put to Mr McLeod* – The first statement of the allegations Envirowaste required Mr McLeod to answer was slightly confused. In fact, throughout the process Envirowaste blurred two allegations, that Mr McLeod attended work under the influence of drugs and that Mr McLeod failed a drug test. These appeared as a single allegation, that Mr McLeod attended work under the influence of drugs, which was confirmed by the positive drug test. In the

transcript of the disciplinary meeting on 28 April 2015 Mr Aberhart is recorded as saying, by way of introduction to the meeting:

> To investigate the allegation that you attended work under the influence of drugs or alcohol and it was confirmed positive in the result we received from your drug and alcohol test.

[62] I believe this added some confusion to Mr McLeod's response but in the overall context of the process, particularly where the Policy records a failed drug test as being serious misconduct, I believe this was acceptable. I find that Mr McLeod knew that a failed drug test was serious misconduct and subject to a disciplinary process that might result in termination of his employment.

[63] I accept that based on the Policy, subject to carrying out a fair process, Envirowaste could dismiss an employee for failing a drug test. This is clear from Judge Ford's decision in *Thorne v Kiwirail Limited*.[4]

[64] However, as I have already noted, Envirowaste's decision to dismiss was informed by other conclusions or concerns. In questioning Mr Aberhart confirmed to me that his decision on dismissal was based on deciding that Mr McLeod was under the influence of drugs at work and he had insufficient trust that Mr McLeod would not put himself in that state in the future.

[65] Envirowaste should have put those conclusions to Mr McLeod to respond to but it failed to do this. Mr Aberhart accepted in cross examination that had he put these concerns to Mr McLeod, Mr McLeod may have been able to satisfy him that the concerns were not founded, but that depended on the answers he gave.

[66] *Did Envirowaste consider Mr McLeod's explanation* – It was clear that Envirowaste was not interested in any analysis of the level of THC in Mr McLeod's test result. Envirowaste simply relied on a failed test. But in doing this Envirowaste failed to give proper consideration to Mr McLeod's explanation that might have allayed its concerns or might have evidenced mitigating factors that could have persuaded it that dismissal was not the appropriate course of action.

[67] It is also clear that Envirowaste did not consider the explanations Mr McLeod offered but dismissed them as it concluded he was not being truthful.

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[4] [2015] NZEmpC 48

[68] *Was the Envirowaste decision pre-determined* – I am satisfied that initially Envirowaste approached the disciplinary with a view that dismissal was likely but it had an open mind to other possible outcomes. However, once it decided it did not believe Mr McLeod's explanations it had decided at that point that dismissal was inevitable. I believe this was before the disciplinary meeting on 28 April 2015.

[69] This is supported by Ms McClurg's response to Ms Ryder's comprehensive letter of 16 April 2015. In essence she dismissed any points raised by Ms Ryder, failed to explain Envirowaste's position adequately, failed to provide material and documents that Ms Ryder requested and appeared simply to want to proceed quickly to an end result.

[70] *Was Mr McLeod heard by the decision maker* – Ms Ryder submitted that based on the evidence Ms McClurg was the decision maker and Mr Aberhart was merely a conduit for the process. I accept that Ms McClurg was actively involved in the process by corresponding with Ms Ryder, advising Mr Aberhart and even drafting correspondence for him to send but I am not persuaded that she was the decision maker. I believe this was Mr Aberhart albeit with advice from Ms McClurg.

[71] *Did Envirowaste conduct a fair process* – To adopt the wording of Judge Ford in *Hayllar and Matene*, I find there are a myriad of reasons as to why the test for justification in s 103A of the Act has not been met and Mr McLeod's dismissal is unjustified. In short, Envirowaste acted in an inherently unfair manner in dismissing Mr McLeod.

Substantive justification

[72] The decision to dismiss Mr McLeod was not substantively justified.

[73] First, the failure to follow the Policy means the credibility and integrity of the test result can be questioned. Therefore, without an admission by Mr McLeod that he attended work under the influence of drugs, there is no basis for a finding of serious misconduct and subsequently unjustified dismissal.

[74] Second, even if I am wrong on that point, the procedural failings in terms of the disciplinary process are sufficiently serious (some individually but overall, collectively) that the decision to dismiss is unsound.

[75] Third, even if there was still a sound basis for Envirowaste to decide that Mr McLeod was guilty of serious misconduct it does not follow that dismissal was inevitable. An employer must consider the circumstances giving rise to the serious misconduct and any mitigating circumstances to determine if dismissal is the appropriate response.[5] Envirowaste failed to do this appropriately. I am not satisfied that the decision to dismiss was one that fair and reasonable employer could have come to in all the circumstances.

Rehabilitation

[76] Envirowaste has a Drug and Alcohol Rehabilitation Policy SHE-04-072 (the Rehabilitation Policy). The Rehabilitation Policy provides that its purpose is:

> To outline the Drug and Rehabilitation procedure which may be offered to employees where Envirowaste deems it appropriate to offer support and rehabilitate employees with drug and alcohol problems or following a positive drug and/or alcohol test in accordance with the drug and Alcohol Policy SHE-04-070.

[77] The Rehabilitation Policy also provides:

> Envirowaste management has the discretion to determine whether it is appropriate to offer a rehabilitation programme in the event of a positive drug or alcohol test.

[78] There are two points to note from this. The decision to offer rehabilitation is discretionary for Envirowaste and rehabilitation is considered for employees who have a drug and alcohol problem *or* where an employee has failed a drug test.

[79] In exercising its discretion the Rehabilitation Policy requires that Envirowaste:

> In determining whether it is appropriate to offer rehabilitation, the manager will assess all relevant factors in consultation with their Senior Manager, HR and H&S prior to making a decision under this policy.

[80] As part of his decision making Mr Aberhart considered whether Envirowaste should offer Mr McLeod rehabilitation. In his witness statement Mr Aberhart said:

> As part of this discussion with [Ms McClurg], we discussed whether we should offer rehabilitation. I was concerned that [Mr McLeod] hadn't admitted taking drugs, and I didn't feel that his story was very

[5] See *Housham v Juken New Zealand* [2007] ERNZ 183, *Howard v Carter Holt Harvey Limited* [2014] NZEmpC 157 and *Fuiava v Air New Zealand Ltd* [2006] ERNZ 806.

> credible – he had said he couldn't remember what had happened, and his explanations hadn't been very consistent. At one point he had suggested it might have been passive smoking, but then later said he probably had taken drugs.
>
> He therefore didn't seem like a good candidate for a rehabilitation plan. We discussed that rehabilitation is at the company discretion according to the Envirowaste policy. Of paramount importance is our trust is our drivers to do the right thing, to be honest and upfront, and of course to manage themselves in a way which is safe.

[81] I understood from Mr Aberhart's oral evidence, that his decision on rehabilitation was premised on a view that rehabilitation was for employees who admitted they had a drug or alcohol problem. If they faced up to it then rehabilitation would work but if they were in denial or lying then rehabilitation was not appropriate. And, if the employee was lying about taking drugs then he or she could not be trusted to manage themselves in a safe way.

[82] I am not satisfied that Mr Aberhart considered exercising the discretion to offer rehabilitation appropriately:

a. Mr Aberhart admitted in his evidence that he had not read the Rehabilitation Policy at the time;

b. Mr Aberhart did not follow the Rehabilitation Policy in that he failed to discuss rehabilitation with his senior manager and with H&S (health and safety at Envirowaste);

c. Mr Aberhart had the wrong understanding of when the Rehabilitation Policy should be applied, his evidence being that in essence it applies only to employees who admit to having a drug and alcohol problem when the Rehabilitation Policy contemplates it being offered on the separate basis of an employee who has simply failed a drug test; and

d. Mr Aberhart applied conclusions when exercising his discretion that were incorrect or had not been properly established and he did not obtain Mr McLeod's response to those conclusions and the application to exercising his discretion.

[83] In these circumstances, I cannot conclude that Envirowaste's actions and conclusion when exercising its discretion were ones that a fair and reasonable

employer could have come to in all of the circumstances. Had the discretion been properly exercised Mr McLeod may well have kept his job.

Unjustified action causing disadvantage

[84] Mr McLeod has raised a personal grievance for unjustified action causing disadvantage arising out of Envirowaste's decision to suspend him without pay pending the second disciplinary meeting. In order to determine this I must consider:

a. Was Mr McLeod's employment, or a condition of his employment, affected to his disadvantage by an action of Envirowaste;

b. If so, was that action by Envirowaste justified?

[85] On 8 April 2015, after the initial drug test, Envirowaste suspended Mr McLeod on pay pending the outcome of the second confirmatory test.

[86] Following receipt of that second test, confirming a positive result, Envirowaste invited Mr McLeod to a disciplinary meeting and it continued his suspension pending that meeting. However, Envirowaste believed that because the confirmatory test was positive Mr McLeod's suspension should be unpaid from receipt of that positive result.

[87] Ms Ryder questioned Envirowaste's decision that the continued suspension should be unpaid. As I have already noted, in response to that query Ms McClurg recorded in an internal email that the Policy was light on the issue of unpaid suspension and she amended it. In contrast, she told Ms Ryder, at the same time, that the Policy allowed for unpaid suspension but Envirowaste would pay Mr McLeod for the period of suspension up until the second disciplinary meeting so long as that meeting occurred in the period she stipulated.

[88] The Policy did not provide for unpaid suspension once Envirowaste had received the second test result and disciplinary action was being effected. I am satisfied that Ms McClurg believed it should have stated this and wanted it to, such that she amended the Policy. However, the relevant power to suspend at the time was only one to suspend on full pay. And Ms McClurg knew this. In another internal email of 17 April 2015 Ms McClurg stated, in reference to paying Mr McLeod during

the continued suspension, *I think we are obliged to pay the fixed period, and reassess at the meeting, following consultation*.

[89] Despite knowing that she could only suspend on full pay under the Policy, Ms McClurg tried to use the threat of suspension without pay to compel Mr McLeod and Ms Ryder to attend the second disciplinary meeting earlier than they were prepared to do. On 21 April 2015, the date by which Ms McClurg had requested the second disciplinary meeting be held, Ms McClurg recorded in an email to Ms Ryder:

> As we have been attempting to meet and advised previously that Mr McLeod would be paid for the week just been, provided a meeting was held promptly (on either Monday or Tuesday) we do not feel Mr McLeod's paid suspension can continue beyond today, please feel free to comment on this before any decision is confirmed via payroll.

[90] It is clear that Ms McClurg was frustrated by the lack of progress with the second disciplinary meeting. Ms Ryder had advised Ms McClurg that they were waiting on the record of the levels of THC that they had requested from the Drug Testing Agency and would not attend the second disciplinary meeting until that was received. However, that frustration does not justify her actions.

[91] On 22 April 2015, Ms McClurg advised Ms Ryder in an email that *(w)e have considered your comments, the situation and the information we have and confirm that Mr McLeod is from Monday 20th onwards on unpaid suspension*.

[92] I have no hesitation in finding that this action of placing Mr McLeod on unpaid suspension from 20 April 2015 was an action that caused disadvantage to his employment. It placed him under financial pressure and put further pressure on him to attend the second disciplinary meeting before he had all of the information he beleieved he needed in order to respond to the allegations.

[93] Given that the Policy did not allow for unpaid suspension and given that Mr McLeod's request to postpone the second disciplinary meeting was based on a reasonable request I find the action to be unjustified.

[94] I accept that in some circumstances an employee might unnecessarily delay a disciplinary process and if that employee is on paid suspension this may impose an unfair burden on the employer to continue to pay him or her. It may be that the imposition of unpaid suspension might be acceptable in response to that behaviour but this is not one of those situations. Mr McLeod faced allegations of serious

misconduct and probable dismissal. Unsurprisingly he wished to explore every reasonable avenue of explanation or mitigation to answer the allegations and protect his employment. This was not unreasonable and, in my view, Envirowaste should have acquiesced and should not have imposed unpaid suspension upon him particularly where it did not have a right to do so under the Policy.

Remedies

[95] Mr McLeod's personal grievances have been established and I turn to consider remedies.

Reimbursement

[96] In his statement of problem, Mr McLeod seeks reimbursement of lost wages and other benefits from 30 April 2015 to the date of the investigation and into the future. In submissions, Ms Ryder sought reimbursement of a sum equal to 3 months' wages being $20,762.60. Mr McLeod gave evidence of his actual earnings and the sum of $20,762.60 is his calculation of three months' wages using his actual earnings.

[97] Pursuant to s 128(2) of the Act, I must award the lesser of either a sum equal to Mr McLeod's actual loss or a sum equal to 3 months' ordinary time remuneration.

[98] Based on the evidence of loss I calculate the sum for reimbursement pursuant to s 128(2) of the Act as follows:[6]

a. Mr McLeod's average earnings with Envirowaste were $83,050.59 per annum. This is an average of $1,597.13 per week;

b. For the period from dismissal until 11 May 2015, Mr McLeod was unemployed. His loss for this period is 1.5 weeks of his average weekly earnings being $2,395.69.

c. From 11 May 2015, Mr McLeod commenced new employment and in the first six months, he earned an average of $1,031.73 per week. Mr McLeod had a shortfall between his average weekly earnings at Envirowaste and his new employment of $565.40.

[6] Using principles for calculating reimbursement under s 128(2) of the Act taken from the application of ss 40 and 41 of the Employment Contracts Act 1991 in *Trotter v Telecom Corporation of New Zealand Limited* [1993] 2ERNZ 659, and the application of s 128(2) of the Act by Judge Ford in *Alapiti v Chief Executive of the Department of Corrections* [2015] NZEmpC 7.

d. Mr McLeod's loss from the start of his new employment until the Investigation Meeting was 47 weeks at $565.40 per week being $26,573.80 plus $2,395.69 giving a total of $28,969.49.

e. Mr McLeod's ordinary time remuneration calculated pursuant to his employment agreement is 40 hours at $30.24 per hour being $1,209.60. Three months' ordinary time remuneration is $15,724.80.

f. The applicable amount for reimbursement under s 128(2) of the Act is the lesser amount of the two sums, being 3 months' ordinary time remuneration of $15,724.80.

[99] Pursuant to s 128(3) I can, in my discretion, award a sum greater than that under s 128(2) of the Act. The principles for exercising this discretion have been addressed by the Court of Appeal in *Telecom New Zealand Limited v Nutter*[7] and *Sam's Fukuyama Food Services v Zhang*[8]. An applicant's full financial loss arising from the unjustified dismissal sets the upper limit of the reimbursement amount. However, there is no automatic entitlement to reimbursement of that sum. Moderation is required and any award must be based upon the circumstances of a case and must allow for the contingencies that might have resulted in termination of the applicant's employment (in the absence of the unjustified dismissal).

[100] Mr McLeod's actual loss up to the investigation meeting was $28,969.49 and it continued to accrue at the rate of approximately $565.40 per week. Mr McLeod does not claim this full loss or any continuing loss and, in any event, applying the principles above I would not exercise my discretion to award this amount (or more) as reimbursement.

[101] Taking Mr McLeod's initial loss from being unemployed for 1.5 weeks and the ongoing loss of $565.40 per week I calculate that Mr McLeod's claimed loss of $20,762.60 would have taken 34 weeks from his dismissal to accrue. Looking at the circumstances of this case and applying the counter-factual analysis I am satisfied that Mr McLeod would have continued to be employed by Envirowaste for the period of 34 weeks. I find the appropriate sum for reimbursement pursuant to ss 123(1)(b), 128(2) and 128(3) is $20,762.60.

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[7] [2004] 1 ERNZ 315 (CA)
[8] [2011] ERNZ 482

[102] Mr McLeod also seeks reimbursement of lost remuneration during the period of unpaid suspension. Envirowaste retrospectively paid Mr McLeod for the period of unpaid suspension. Envirowaste calculated the amount on Mr McLeod's ordinary weekly hours of 40 hours at the applicable hourly rate and included 8% uplift for holiday pay. Mr McLeod claims this payment should have been calculated on 10 hours per day as this is the average number of hours he worked per day.

[103] I accept that Mr McLeod is entitled to be paid this shortfall as it represents overtime he would have worked during the period in question if he had not been suspended. The payment he would have received is a lost benefit he could reasonably have expected to receive if the grievance had not arisen.[9] I calculate this shortfall to be $544.32.

[104] The other issue I must address for the remedy of reimbursement is mitigation.

[105] The basic principle of mitigation is not that reimbursement should be reduced if an applicant has not mitigated his or her loss but rather a failure to mitigate breaks the causal link between the unjustified action and loss. In this case, the argument is Mr McLeod's loss stems from his failure to take proper steps to secure employment at a wage rate equivalent to his Envirowaste wage.

[106] Mr McLeod's annual wage at Envirowaste based on ordinary time remuneration was $62,899.20. He earned more than this due to overtime. Mr McLeod's salary at his new employment is $50,000 per annum. He also earns overtime pay at his new employment but this is not guaranteed.

[107] Mr McLeod's evidence is that he took this new employment as he needed to obtain an income straight away, he had already borrowed money to cover bills that were payable during his period of unpaid suspension. He also gave evidence that he believed he would struggle to find new employment because of his dismissal for failing a drug test. There was no evidence that he looked for other employment immediately after dismissal or for a period of time since being employed in his new employment. In cross examination Mr McLeod said there were driving jobs available but those jobs were not great paying jobs.

[9] Pursuant to s 123(1)(c)(ii) of the Act

[108] Mr McLeod did apply for a position at the start of March 2016 and thought he had secured a new, higher paying role, but that did not eventuate. Mr McLeod believes that was because this prospective employer was aware he had been dismissed for a failed drug test.

[109] I accept, given Mr McLeod's circumstances, that he did enough by way of mitigation. He acted quickly to find employment and whilst this has a lower salary than his wage at Envirowaste, I accept it was more important for him to be employed and have an income. I believe the difference in pay is accentuated by the availability of overtime, something that Mr McLeod may have no influence over. I accept that Mr McLeod was right not to wait around applying for other work where his evidence is that the driving jobs available were not great paying jobs, and he may have had difficulty securing a higher paying job because of the circumstances of his dismissal.

[110] I also accept that Mr McLeod did not need to apply for other higher paying work, at least not in the 34 week period that I have assessed as being the reasonable period for the assessment of reimbursement. And, in any event, Mr McLeod's recent experience with applying for a new job evidences the difficulties he may face with trying to secure higher paid employment.

[111] If Mr McLeod was seeking a greater amount as reimbursement then at some point he would need to take steps to find alternative employment. A prolonged failure to look for a higher paying job would cause me, at some point, to say Mr McLeod's loss starts to flow from a failure to find a higher paying job and no longer flows from the unjustified dismissal but that is not the case here.

Humiliation, loss of dignity and injury to feelings

[112] Mr McLeod seeks compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings arising out of the unjustified dismissal and the unjustified action of suspending him without pay.

[113] Mr McLeod's evidence of the impact of Envirowaste's actions included:

a. Embarrassment, shame and concern about what people would think of his dismissal;

b. Withdrawal from social activities due to lack of money and embarrassment;

c. Embarrassment at having to borrow money from his children to pay his bills and to buy airline tickets to travel to his daughter's wedding, for not being able to contribute financially to the wedding and for not being able to give his grandchildren treats when they visited;

d. Not spending time with his family out of embarrassment, lack of money and not wanting to interact with people;

e. Financial strain;

f. Strain on his relationship with his wife, from whom he was separated prior to the dismissal but was *working things out.*

[114] When he was asked if he suffered any form of depression as a result of his dismissal Mr McLeod was quick to state *men don't get depressed.* When pushed he accepted he probably was depressed but he did not consult his Doctor as he would rather just *deal with it*.

[115] Mrs McLeod's evidence of what her husband went through included the following:

> I think [Mr McLeod] has been depressed since his dismissal. I have talked to him about this. I think he needs to either take on counselling or see his doctor and possibly take medication to try and help him get back to being his usual self. He hasn't done this because he is too proud.

[116] Mrs McLeod also described other effects including:

a. That he had become a *total recluse*, only leaving the house to go to work and not seeing his friends anymore;

b. He is embarrassed, humiliated and ashamed and his whole demeanour has changed from someone who was a proud and confident man;

[117] Mr McLeod's son Riki described his father, after the actions of Envirowaste, as being withdrawn, down in the mouth, and a *sad sack* who would just sit on the couch all day. He also described his father as being humiliated by having to work in a

demeaning role and now earning less than his children. He also suggested that Mr McLeod might be depressed.

[118] Whilst there was no medical evidence to evidence a clinical diagnosis of depression I am satisfied from Mrs McLeod's evidence in particular that Mr McLeod was depressed, embarrassed and he withdrew from friends and family. It is also clear that the financial consequences of the unpaid suspension and then dismissal have had a significant impact on Mr McLeod's day to day life. I believe the evidence supports compensation in the mid-range of awards under s 123(1)(c)(i) of the Act for the unjustified dismissal, but this is at the lower end of that range, being $10,000.00.

[119] In terms of the compensation for unjustified dismissal, I must consider whether any of the humiliation, loss of dignity and injury to feelings arises out of Mr McLeod's guilt or embarrassment at putting himself in this situation. That is, does any of the humiliation, loss of dignity and injury to feelings arise because of feelings Mr McLeod has about his actions at the party on 5 April 2015 and the consequences of those actions. I believe that part of the humiliation, loss of dignity and injury to feelings does arise out of Mr McLeod's reaction to his actions on the evening of 5 April 2015 and reduce the amount of compensation to $7,000.00

[120] I also find that a separate award for humiliation, loss of dignity and injury to feelings is appropriate for the unjustified action and set this at $4,000.00.

[121] The total amount of compensation payable pursuant to s 123(1)(c)(i) of the Act, subject to contribution, is $11,000.00

Contribution

[122] As I have awarded remedies, I must consider contribution pursuant to s 124 of the Act.

[123] In order for there to be contribution, I must find that Mr McLeod's actions were causative of the outcome and blameworthy.

[124] On my assessment, in order to find contribution I would need to be satisfied that Mr McLeod had carried out any of the following:

a. Becoming so intoxicated that he acted inappropriately at the party on 5 April 2015 or at the very least becoming so intoxicated that he could not remember what he did;

b. Consuming cannabis;

c. Returning a failed drug test;

d. Being under the influence of drugs at work; and

e. Unnecessarily delaying the second disciplinary meeting.

[125] The action of becoming heavily intoxicated at the party on 5 April 2015 was causative of the grievances. However, whilst we all may have differing views on the appropriateness of consuming alcohol to the point of becoming heavily intoxicated, it is not my place to make a moral judgement of Mr McLeod's behaviour. I must be satisfied that the action of being heavily intoxicated, which contributed to his grievances, was blameworthy in the context of those grievances. I do not find this to be the case.

[126] I have already determined that Envirowaste failed to follow the procedure in the Policy and this puts the integrity of the test result into question. If Envirowaste cannot rely on the test result as evidence of serious misconduct then it also cannot rely on the drug test as being evidence that Mr McLeod did consume cannabis. Further, whilst Mr McLeod did accept, in light of a test result that excluded any trace elements of THC, that he must have consumed cannabis, if the integrity of the test result can be questioned then this admission is of little value. Overall, there is no evidence that Mr McLeod did consume cannabis.

[127] As the failed drug test cannot be relied upon there is no evidence that Mr McLeod returned a failed drug test.

[128] There is no evidence that Mr McLeod was under the influence of drugs at work.

[129] I have already determined that Mr McLeod's request to defer the second disciplinary meeting was a reasonable request so there is no evidence of any unnecessary delay.

[130] I find that Mr McLeod did not contribute to his grievances. There is no evidence to conclude that he undertook the actions that might be said to be causative of the outcome. The only exception is the action of becoming intoxicated at the party on 5 April 2015 but this is not blameworthy in the context of the grievances.

Determination

[131] Envirowaste acted in an unjustified manner by suspending Mr McLeod without pay and this caused disadvantage to his employment.

[132] Envirowaste unjustifiably dismissed Mr McLeod.

[133] Envirowaste must pay Mr McLeod:

a. $11,000 without deduction pursuant to s 123(1)(c)(i) of the Act;

b. $20,762.60 pursuant to ss 123(1)(b) and 128(3) of the Act; and

c. $544.32 pursuant to s 123(1)(c)(ii) of the Act.

[134] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that the Chief of the Authority has decided under s 174D(3) of the Act that exceptional circumstances existed for providing this written determination of findings later than the latest date specified in s 174D(2) of the Act.

Costs

[135] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[136] If they are not able to do so and a determination on costs is needed Mr McLeod may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. Envirowaste will have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority