

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 30
5275335

BETWEEN DUNCAN LLOYD
 PATCHETT
 Applicant

AND CONTOUR ROOFING
 NELSON LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, Counsel for Applicant
 Ralph D. Webster, Advocate for Respondent

Investigation Meeting: 17 August and 12 October 2011 at Nelson

Determination: 20 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Duncan Patchett worked for Contour Roofing Nelson Limited from November 2008 until he was dismissed in April 2009 following a positive cannabis test and an alleged refusal to undertake further drug testing, contrary to an *Alcohol and Drug Rehabilitation Contract* signed by him after the initial positive drug test.

[2] Mr Patchett says that he was unjustifiably disadvantaged and unjustifiably dismissed. He challenges the company's right to drug test him in the first place and the validity of two unpaid suspensions from work. He says that he was given no choice but to sign the *Alcohol and Drug Rehabilitation Contract*, that his infrequent recreational cannabis use posed no risk to safety at work and that the company did not treat him fairly in making its decision to dismiss him.

[3] David Freeman and Jeanine Freeman are both owners and directors of Contour Roofing Nelson Limited. For the company they say that it has a *zero tolerance zone*

for drugs and alcohol, that Mr Patchett's employment agreement permitted the company to require him to undergo a drug and alcohol test and to suspend him without pay, that following his positive test he agreed to the *Alcohol and Drug Rehabilitation Contract* which provided for further random testing but then he twice refused to undergo those tests. The company says that it did treat Mr Patchett fairly in coming to the decision to dismiss him.

[4] There are some evidential disputes which I will resolve as part of explaining the sequence of events that preceded the decision to dismiss. I will then apply the statutory test for justification of that decision and consider Mr Patchett's disadvantage grievance claim. The point about the company's right to suspend Mr Patchett without pay turns on the interpretation of the employment agreement. It is useful first to mention some provisions from the agreement.

Employment agreement

[5] Mr Patchett was first employed on a written fixed term agreement from 11 November 2008 until 23 December 2008 and then as a permanent employee under a written employment agreement dated 23 December 2008 but signed on 12 January 2009. He was employed as an *Aluminium Joinery Fabricatory & Site Installation Person*. Principally his worked involved assembling aluminium windows in the factory.

[6] The employment agreement provides at clause 16 for a disciplinary process which requires the employer to advise the employee before any disciplinary meeting of the specific allegation and the likely consequences if established. The employee must be advised of their right to have a support person present. They must be given an opportunity to explain or deny the allegation and their explanation and any mitigating circumstances must be considered by the employer before any decision.

[7] Immediately following these provisions clause 17 provides:

- 17.1 *Where the Employer believes that the circumstances warrant it, the Employer has the discretion to temporarily suspend the Employee from their duties prior to a full investigation of the allegations surrounding the circumstances involving the Employee.*
- 17.2 *Before suspending the Employee, the Employer will give the Employee an opportunity to give an explanation of the matter in question and to comment*

on the proposed suspension. The employee will be paid their normal remuneration while they are suspended, unless the period becomes protracted as a result of undue delay caused by the Employee. In the event of the period becoming protracted the employee remains suspended but without pay, pending resolution of the matter in question.

[8] The agreement includes provisions about health and safety but it is not necessary to set out those details. Consistent with those provisions and included as *APPENDIX A: DRUG AND ALCOHOL TESTING* to the employment agreement is a form signed by Mr Patchett on 12 January 2009 by which he gave consent to:

... provide a breath, urine or blood sample at the request of Contour Roofing Ltd for the purpose of testing unauthorised drugs and alcohol. Such request may be made when Contour Roofing Ltd has reasonable cause to suspect that I am under the influence of drugs or alcohol, or following an accident or incident in which I am involved.

...

I acknowledge that using, or being in possession of, or under the influence of, unauthorised drugs or alcohol whilst on Contour Roofing Ltd's premises, or whilst carrying out their business at any other location, is a breach of company rules and may result in summary dismissal.

I acknowledge that a refusal by me to undertake a test as set out above without a reason that is acceptable to Contour Roofing Ltd May be grounds for summary dismissal.

[9] Also consistent with the agreement's health and safety provisions there is a company *HEALTH & SAFETY HANDBOOK* which includes *SECTION B: CODE OF CONDUCT* and the following provisions:

DRUGS, ALCOHOL and SMOKING:

- a. Contour Roofing and Windows have a zero tolerance policy with regard to drugs and alcohol, and require that a drug testing clause is signed as part of our contract with Employees.*
- b. Employees or Contractors will not consume drugs or alcohol during the hours they are carrying our duties for our Company.*
- c. Employees or Contractors will not appear for work under the influence of drugs or alcohol.*
- d. If an employee's behaviour is such of a person under the influence of drugs and/or alcohol, the employer may pay for and request testing for that employee with no prior notice.*
- e. Failure to comply with testing or if drugs and/or alcohol are detected may mean termination of employment.*
- f. ...*
- g. Any breach of this policy may lead to disciplinary action.*

[10] Despite the informal reference to the company in some of this documentation Mr Patchett's evidence is that these provisions all applied to him in his employment.

Factory drug testing

[11] Mr Freeman's evidence is that there was poor productivity in the factory. While neither he nor Mrs Freeman worked on the factory floor they sometimes noticed noisy and disruptive behaviour in the factory. Mr Freeman's evidence is that he was concerned about the factory staff as a group exhibiting lateness, unreliability, errors in workmanship, performance fluctuations and disruptive behaviours such as yelling, swearing and extremely loud music. Mr Freeman told me that Mr Patchett could be aggressive when things were not going his way. When questioned, Mrs Freeman told me that she knew that Mr Patchett used to play loud music. Kerren Eggers is the company's health & safety and HR co-ordinator. Her evidence is that there was concern about lateness and disruptive work habits, unauthorised absences, swearing and yelling and unnecessary noise associated with the use of the staple gun. She told me that, while they had been addressing issues with some staff such as lateness, she had not seen any evidence to implicate Mr Patchett in that. Ms Eggers said that she had previously heard Mr Patchett angrily swearing and that she could hear his voice from her office. Ms Eggers also said when questioned:

All the window factory and roofing factory [staff] were tested – that's where the problem was.

We didn't want to single out people we thought were the problem – we thought it was better to randomly test everybody.

The decision to test the whole group of employees was made by Dave, Jeanine and myself.

[12] The company's evidence is intended to establish *reasonable cause to suspect that [Mr Patchett was] under the influence of drugs or alcohol ...* I will return to that point. In any event, the general concerns resulted in a decision to require all the factory staff to undertake a drug and alcohol.

[13] The company engaged a firm to undertake the testing. That firm decided to obtain urine samples from the factory staff on 6 March 2009. Mr Patchett arrived at work that day at about 7.30 am. Soon after he was approached by the foreman and told that he had to provide a urine sample. Mr Patchett went to see Mr Freeman. He told Mr Freeman that it was likely that he would fail the drug test because he had smoked some cannabis the previous night at home. Mr Freeman told him he still had to provide the sample which Mr Patchett did. The sample collector (Peter Bird) completed the associated paper work and marked *Random* rather than *Reasonable cause* as the reason for the test. Mr Bird did not give evidence but this form can be taken as showing his understanding of the company's basis for the drug testing. A

sample is first subjected to a screening test which is intended to demonstrate whether a substance may be present. That is the evidence of Dr Leon Nixon, an addiction medicine specialist with the Marlborough District Health Board. The evidence was not challenged and I accept it as accurate. In this case, Mr Patchett's urine sample screening test was *Unconfirmed, requiring confirmatory testing* for THC and *Negative* for other drugs and alcohol. Following this result Mr Patchett was told to go to Mr Freeman's office.

[14] Mr Freeman told Mr Patchett to go home and that he could not return to work until he provided a clear drug test. There was no mention whether this was to be a paid or unpaid suspension. When sending Mr Patchett home Mr Freeman told him that he could not have him at work while under the influence of drugs. Mr Patchett denied that he was under the influence of drugs. It is common ground that Mr Freeman told Mr Patchett that he was surprised that Mr Patchett had tested positive. Mr Patchett left the workplace. Mr Freeman did not explain to Mr Patchett why he had been drug tested.

[15] Later in the afternoon on 6 March 2009 Mrs Freeman rang Mr Patchett and told him he needed to come in and sign an *Alcohol and Drug Rehabilitation Contract* given his positive drug test. Mr Patchett told her that he was house hunting and could not come in that day. Mrs Freeman told him that he needed to come in as soon as he could and sign the contract if he wished to retain his employment. Mrs Freeman's evidence is that Mr Patchett became abusive and aggressive on the phone. She also says that she told Mr Patchett that he could take the contract away and get advice. Mr Patchett's evidence about this phone call differs somewhat. He says that he was asked to sign a document without further explanation and that he would lose his job if he did not return to the workplace that day and sign it. I will return to these differences shortly.

[16] As it transpired Mr Patchett went to the workplace before going on to his appointment. He first saw Mrs Freeman. His evidence is that he was handed the *Rehabilitation Contract* and told that he was required to sign it and would lose his job if he refused to do so. He started reading the document and then asked why he had to sign it as it did not apply to him as he was just an occasional user of cannabis and was not under the influence of drugs at the time of his suspension earlier in the day. Mr

Patchett's evidence is that Mrs Freeman told him he would lose his job if he did not sign the *Alcohol and Drug Rehabilitation Contract* before leaving the premises. He told her that he was entitled to get legal advice about the matter. However, Mr Patchett signed the *Rehabilitation Contract* because of his concern that he could not afford to lose his job given the impending birth of a child and his role as the family's main provider.

[17] At some point during Mr Patchett's exchanges with Mrs Freeman, Mr Freeman joined the meeting. Mr Freeman's evidence is that he and Mrs Freeman told Mr Patchett that he was welcome to take the *Alcohol and Drug Rehabilitation Contract* away and seek advice before signing it but it would need to be signed if he wished to retain his employment. Mr Patchett's evidence is that he had already signed the document by this point. It is common ground that Mr Freeman told Mr Patchett that the document needed to be signed if he wanted to retain his employment and Mrs Freeman told him that he needed to produce a clear drug test before he would be permitted to resume work. There was still no mention about whether the suspension would be paid or unpaid.

[18] Also at some point in these exchanges on 6 March 2009, in response to Mr Patchett questioning why he had been tested, Mr Freeman told him that there had been complaints about several staff in the roofing division going to work drunk so they decided to test everyone. Mr Freeman never suggested that Mr Patchett had personally given cause to be tested.

[19] I should set out some aspects of the *Alcohol and Drug Rehabilitation Contract*. Under it the subject agrees to participate in a rehabilitation programme run by a service provider nominated by the employer; to attend the programme outside work hours or using leave entitlements as required; to provide 5 random alcohol and drug tests within the following 12 months; and to authorise the service provider to report back to the employer. It goes on to say:

I agree and accept that if:

- a. *I do not attend or complete the required course of treatment under the Programme as outlined by the service provider; and/or*
- b. *On any future occasion including the subsequent alcohol and drug tests above, I return a positive alcohol breath test or drug test; and/or*
- c. *I refuse to take any of the required alcohol and/or drug tests;*

THEN the likely consequences are:

- *dismissal without notice; and*

• ...
I accept the terms of this Rehabilitation contract and acknowledge that I have been advised to seek independent legal advice if I have any queries about this document.
[Provision for signatures and date]

[20] Mr Patchett signed this agreement in the space provided immediately below the acknowledgement about having been given advice to seek independent legal advice. Despite this, Mr Patchett's evidence is that he was never told that he could obtain independent advice and was not given an opportunity to do so. As noted he says he had no choice but to sign the *Alcohol and Drug Rehabilitation Contract*.

[21] This matter has not been advanced as a claim for remedies for unfair bargaining under s.68 and s.69 of the Employment Relations Act 2000. Absent unfair bargaining, there is no power for the Authority to vary or cancel agreed terms of employment. I find that Mr Patchett did agree to the *Alcohol and Drug Rehabilitation Contract*.

Return to work & warning

[22] Mr Patchett provided a further urine sample on 10 March 2009. I have not been given the documentation relating to the results of this test but it is common ground that Mr Patchett tested negative for drugs and alcohol. I gather that the sample was not sent to ESR for analysis. Mr Patchett was phoned by Keren Eggers (Contour's HR co-ordinator) and told that his test was clear and he could return to work the following day. Mr Patchett asked and Ms Eggers agreed that he could return to work on Thursday 12 March 2009, which he did.

[23] Sometime after returning to work Mr Patchett learnt that he would not be paid for the period of his suspension. He spoke to Mr Freeman about this who told him that it was because he had been on drugs.

[24] Some days later Mr Patchett spoke to Mr Freeman and asked why he had been randomly drug tested. Mr Freeman told him that he had been surprised by and had not anticipated the result of Mr Patchett's initial drug test. However, Mr Freeman did not explain why Mr Patchett had been tested.

[25] Without any further discussion or forewarning about the issue Mr Patchett received a letter dated 23 March 2009 headed ***FINAL WARNING: Resulting from suspension for use of alcohol***. The letter summarises some of the events mentioned above and then goes on to say:

We are writing this letter to confirm that any further breach of company policy, your drug and alcohol rehabilitation contract, or your employment agreement with us could result in the termination of your employment with us. Please remember that as part of your rehabilitation contract you agree to take 5 random subsequent tests in the 12 months following the original test result.

[26] Mr Patchett was sick on 1 & 2 April 2009 and absent from work. He returned to work on Friday 3 April 2009 and he was asked by Mr Freeman to provide a urine sample for a further drug test. Mr Patchett told Mr Freeman that he had been sick and did not feel up to providing a urine test but could do so later in the day. He was not asked for a sample later in the day. In evidence Mr Freeman told me *When Duncan said he couldn't do the first test, he told me he was sick. I accepted that*. From this evidence I find that Mr Freeman at the time waived any negative consequences arising from Mr Patchett's failure to provide a urine test on this occasion.

[27] Mr Patchett was required to meet with Mr Freeman and Ms Eggers on 7 April 2009. There are two file notes of this meeting made by Ms Eggers. Ms Eggers told me that she typed up a file note after the meeting but she could not recall when. Ms Eggers also told me that she had edited the file note as part of the company's preparation for the Authority investigation. This edited file note was presented with the respondent's statement in reply as the minutes of the 7 April 2009 meeting. Parties are required to lodge relevant documents with the statement of problem and the statement in reply, but that does not extend to editing existing documents in order to bolster ones case. In the circumstances I will give little weight to either file note in assessing the events of 7 April 2009. Fortunately for the company there is not much dispute about the meeting.

[28] The meeting was to discuss Mr Patchett's concerns about the drug testing and his suspension. Mr Patchett asserted that he should not have been tested in the first place because there was no provision for random testing and there was no reasonable cause to suspect him of being under the influence. He was told (without elaboration) that there was reasonable cause and that it was part of the company's health monitoring. Mr Patchett expressed concern about how public the matter had become

and was told that it was his own fault. He questioned his unpaid suspension but was told that he was not entitled to payment otherwise there would be no incentive for him to return to work. Mr Patchett said that he was a casual cannabis user, never smoked at work and what he did in his own time was his own business. Mr Patchett was told that his rehabilitation contract would continue and that a refusal to provide a sample would be dealt with by use of the disciplinary process.

Disciplinary meetings

[29] On 20 April 2009 Mr Freeman asked Mr Patchett to provide a urine sample. Mr Patchett said the union had advised him not to provide a further test which they had also conveyed to Mr Freeman. Mr Freeman said they had the right to test and the union agreed with that. Mr Patchett asked for the matter to be deferred for several weeks until the union visited. Mr Patchett's evidence, not disputed by Mr Freeman, is that he was told his choice was to do the test or go home. Ms Egger's evidence is that she heard the confrontation with Mr Patchett angrily shouting that they had no right to test him and he should not have signed the rehabilitation contract. She joined the exchange and told Mr Patchett that his options were either to do the test now or go home and be called back later for a disciplinary meeting. Mr Patchett said he was going and left.

[30] Later on 20 April 2009 Mr Patchett received a letter from Mr Freeman requiring him to attend a disciplinary meeting scheduled for 4.45pm on Tuesday 21 April 2009. The reason given was that Mr Patchett had refused a random test required under the rehabilitation agreement on 20 April 2009 and on 3 April 2009. Having already received a final written warning on 23 March 2009 Mr Patchett was cautioned that his employment might be terminated and he was encouraged to bring a support person.

[31] Mr Patchett was not able to arrange for the union to support him at the meeting so he attended on his own. There are notes which Mr Patchett accepted as accurate as to the exchanges during the meeting and which I will summarise. The company was represented by Mr Webster. After some preliminary matters, Mr Webster referred Mr Patchett to his employment agreement, appendix A and the rehabilitation agreement. Mr Webster said that he had been told by Mr Freeman of his suspicion that some

behaviour and work in the factory was possibly the result of drug and alcohol use leading him to carry out testing on the factory employees as a group. It was not suggested by Mr Webster that Mr Patchett had exhibited any of the suspicious behaviour. Mr Webster then referred to Mr Patchett's positive test result and his refusal on 3 April 2009. Mr Patchett explained that he had been sick and could not provide a sample. Mr Webster asked if Mr Patchett had tried to urinate and when Mr Patchett said *no* Mr Webster said *So we will never really know whether you could have or not.* Next Mr Webster mentioned the second refusal and asked if Mr Patchett took marijuana casually. Mr Patchett confirmed that he did but never at work. He said he was never under the influence of marijuana at work. Mr Webster asked why Mr Patchett would refuse when he was subject to the rehabilitation contract. Mr Patchett referred to his union's advice that he should not have been tested in the first place. Mr Webster said that the company had a right because of the workplace behaviours, which the union agreed with when spoken to the day before. Mr Patchett disputed a right to test randomly and mentioned Mr Freeman's surprise at the first positive test. Mr Freeman confirmed his surprise. There was some further discussion about the basis for the union's advice and Mr Patchett said that if he was told through his own advice that he had to comply with the testing he would do so. Mr Webster referred again to the rehabilitation agreement and asked Mr Patchett why he would refuse the tests if he was clear of drugs and wanted to return to work. Mr Patchett said that he wanted to speak to the union but was told to either do the test or go home. Mr Freeman said that Mr Patchett could have phoned the union from the workplace. Mr Webster again referred to the rehabilitation contract and put to Mr Patchett that a fair employer would think that he had refused the test because he had drugs in his system. Mr Patchett denied coming to work under the influence of drugs. Mr Webster said that his role was to find a reason why the company should keep Mr Patchett on. There was some discussion about the suspension without pay and Mr Patchett was told that he would not be paid because he had caused the problem. Mr Webster told Mr Patchett that he was in a spot of bother and that it was a proven fact that anyone with marijuana in their system was under the influence. He said that it was a group screening not a witch hunt. Mr Patchett again disputed that he was under the influence. Mr Webster again referred to the union and Mr Patchett said it was not unreasonable for him to get his own advice. Mr Webster agreed but said that it appeared that Mr Patchett was refusing the tests because he was on drugs. Mr Patchett repeated that he would do the tests if that was his own advice. There was an

exchange about whether the company could randomly test. Mr Webster told Mr Patchett he was in a group that gave just cause for testing. Mr Patchett mentioned the affect of a dismissal on his (then) heavily pregnant wife and his recent house purchase. Mr Webster told Mr Patchett that he had brought it all on himself. Following a brief adjournment Mr Patchett was told that he could have until the end of the week to seek advice.

[32] Ms Sharma represented Mr Patchett when the meeting reconvened on Friday 24 April 2009. Again there are notes which are not disputed and which I shall refer to. The meeting was repetitive and to an extent argumentative. Ms Sharma asked several times why Mr Patchett was tested originally and was told each time that it was because of Mr Freeman's concerns about a group of people in the factory. On one such occasion Mr Webster said *Mr Freeman had no concerns that Duncan was taking drugs*. Ms Sharma challenged the suspension. Ms Sharma claimed that Mr Patchett had been forced to sign the rehabilitation contract. Ms Sharma stated that Mr Patchett was never under the influence at work and Mr Webster said that if the test was positive they had to assume he might be under the influence and act accordingly. Mr Webster said that it was fairly obvious why Mr Patchett was stalling about getting tested. Mr Webster agreed that he had been on the verge of dismissing Mr Patchett. Ms Sharma challenged the lack of opportunity given to Mr Patchett to obtain a representative before the previous meeting. Mr Webster mentioned that other employees had told Mr Freeman that Mr Patchett took smoko breaks alone suggesting he was smoking something other than tobacco. Mr Webster declined to give any further information on the basis that he was not going to use this against Mr Patchett *but it does make sense with the test result*. Mr Webster said he had authorised the testing and Mr Patchett mentioned, without contradiction, that Ms Eggers had said that the tests had been planned for some time. Reference was made to the company's zero tolerance of drugs. Towards the end of the meeting Mr Freeman said that the test results made sense in light of Mr Patchett's attitude and mood swings. After a brief adjournment Mrs Freeman gave her account of events surrounding the signing of the rehabilitation contract. Finally Mr Webster insisted on Mr Patchett taking a further drug test immediately following which they would make a decision about his employment.

[33] Mr Patchett did provide a sample for a test a little later that day. The sample produced an unconfirmed positive for THC and was otherwise negative. However, the ESR report dated 27 April 2009 of the same sample was negative for THC and any other drug. The company was advised of both the unconfirmed positive result and the ESR negative report.

[34] On 27 April 2009 Ms Eggers received from ESR some further information about one of Mr Patchett's drug test results. The email reported that Mr Patchett's sample (WDT0927694) contained THC at 110 nanograms per millilitre of urine. It included general information about the significance of any particular THC reading including:

*THC-Acid levels can vary depending on the concentration of the urine which varies with every void. A possibility is by drinking more fluid the urine is diluted and any THC-Acid level is lowered. There are other possibilities for the variation of the THC-Acid levels in urine after cannabis use.
Hence a THC-Acid level indicates that cannabis has been used but not how much or exactly when cannabis was used. Also THC-Acid levels from different people should not be compared as regards how much cannabis was used or when. If more information is required please contact us.*

[35] Ms Eggers told me that this information was not discussed with Mr Patchett but she did discuss it with Mr Freeman and it might have been part of the reason for the dismissal. Ms Eggers told me that she was trying to get some understanding of what the test levels meant. It is notable that the test referred to was the 9 March 2009 test when Mr Patchett first tested positive. It is difficult to understand why Ms Eggers would have been querying that test when the more pressing issue at the time was Mr Patchett's unconfirmed positive test on 24 April 2009. Ms Eggers also told me that the 24 April 2009 test triggered the threshold, that it was borderline, that it triggered the 15 nanogram threshold but on full testing it fell below the limit. Her evidence is that the tester used by the company (Peter Bird) had told her that the initial screening test was 99% accurate. The evidence is intended to establish that Mr Patchett's sample on 24 April 2009 showed the presence of cannabis but at a level lower than the threshold for reporting a positive test. Alongside that is the assertion during the disciplinary meeting that Mr Patchett was delaying so as to allow time for cannabis to be excreted. That also explains Ms Egger's interest in her exchange with ESR about THC levels.

[36] There was no direct evidence from Mr Bird. However, there is an email from him to Ms Eggers in December 2009 as follows:

I explain what is happening as the test is being conducted and then if the screening test is non negative, I explain that we will be sending the sample to the ESR in Wellington for confirmation, I explain what this means e.g. That the onsite test is a screening test only, it has now detected something that requires the sample to be sent to a lab that can conduct further testing to determine what the substance/substances are.

[37] This is what Mr Bird apparently tells those who are being tested. I doubt that he would explain the significance of a *non negative* screening test differently to someone such as Ms Eggers.

[38] In any event, Mr Freeman decided to summarily dismiss Mr Patchett without any further discussion. The decision was conveyed in a letter dated 28 April 2009. To summarise: Mr Patchett's non-compliance with the company's drug and alcohol testing policy and his rehabilitation contract made it difficult to continue his employment; the company disagreed with Mr Patchett's view that his recreational cannabis use did not affect his behaviour at work because of the company's zero tolerance policy; the company did not support Mr Patchett's refusal to seek support to discontinue his cannabis use; the company's policy was to suspend was to suspend staff without pay until they can produce a clear result so as to give an incentive to return to work and because the delay was entirely the employee's fault; despite Mr Patchett saying that he was declining further testing because he wanted an opportunity to get his own advice, the company had given him that opportunity and cautioned him about the disciplinary consequences of a further refusal to test.; the company could only conclude from the 24 April 2009 test results that Mr Patchett had delayed in order to allow his system to excrete the cannabis and that he must have used cannabis while on the rehabilitation agreement; that was why Mr Patchett wanted to wait until 27 April 2009 to provide a sample despite the company's requirement that he get tested on 24 April 2009; and in summary:

So while we understand that you have expressed a desire to continue working for our company we regret to inform you we cannot support your non compliance without policies, the breaches you have made to your Employment Agreement, and Drug and Alcohol Rehabilitation agreements with us, or your theory that you continuing to maintain the lifestyle of a recreational Cannabis User will not affect you while you are at work. Thus we have decided that your position of Employment with our Company is to be terminated as of 5.00pm today Tuesday the 28th of April 2009.

Justification

[39] Whether the decision to dismiss Mr Patchett was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time. A similar test applies to the decision to suspend Mr Patchett.

Disadvantage

[40] It is axiomatic that a fair and reasonable employer will comply with the applicable terms of employment.

[41] To some extent the company appears to be saying that it could randomly test for drugs and alcohol in reliance on clause 22.8 of the employment agreement under which the employee agrees to co-operate and participate in the employer's health monitoring and hazard minimisation programmes. If clause 22.8 permitted random drug and alcohol testing there would be no need for Appendix A which authorises reasonable cause testing. I do not accept that the general words in clause 22.8 can be deployed to broaden the carefully limited circumstances authorising drug testing as described in Appendix A. In other words, the company requires reasonable cause before it can require an employee to undergo drug or alcohol testing.

[42] At the Authority's investigation meeting there was evidence from Mr & Mrs Freeman and Ms Eggers to the effect that there was reasonable cause to suspect Mr Patchett of being under the influence of drugs or alcohol. I reject that evidence. During the company's disciplinary processes it was only at the very end and in the face of Mr Patchett's continual reference to the *reasonable cause* contractual requirement for testing that there was any suggestion of anything irregular about Mr Patchett's conduct at work. I have mentioned some but not all of the statements to the effect that the company decided to test all of the factory staff because they did not want to single out particular staff members. Mr Webster specifically told Mr Patchett that he had not been suspected by Mr Freeman of drug or alcohol use and Mr Freeman told Mr Patchett how surprised he was when he produced the positive test in March 2009. The additional difficulty for the company is that I have not been given any

details of when Mr Patchett supposedly behaved in a way so as to give reasonable cause. Ms Eggers specifically told me that the company had been working up to the point where they could test by getting their paper work in place. If that is correct, and it appears to be so, any conduct by Mr Patchett must have occurred much earlier in time.

[43] To support the company's actions in the present case its representative referred me to the determination of the Employment Relations Authority in *Hooper v Coca-Cola Amatil (NZ) Ltd* CA 211/10, 18 November 2010. However, that matter was subject to a de novo challenge to the Employment Court setting aside the Authority's determination: see *Hooper v Coca-Cola Amatil (NZ) Ltd* [2012] NZEmpC 11. The Employment Court, in finding a personal grievance, agreed with counsel's submission that:

It is a "reasonable cause" testing scheme. This means that before a test occurs, the defendant must have reasonable cause to test. There must be some nexus between the reasonable cause and the test, as the test is seen as corroborative of the reasonable cause. The reasonable cause is critical to the decision to dismiss. Here the test cannot be seen as corroborative of conduct that allegedly occurred some 7 months previously.

[44] The Court went on to say:

The collective agreement in the present case did not provide for random drug testing but only testing for cause. The company's managerial prerogative in relation to drug testing, in other words, was subject to that express requirement in the collective agreement. The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.

[45] Mr Patchett's case is at least as strong as the grievant's case in *Hooper*. The employment agreement in Appendix A and the company health and safety handbook both specified that Mr Patchett was subject to a reasonable cause drug testing regime. There was no reasonable cause to test Mr Patchett at or near the time that he was tested. Indeed Mr Patchett had never given any cause for the company to think that he might be under the influence of drugs or alcohol. He should not have been tested. The testing was a serious breach by the company of its obligations to Mr Patchett.

[46] The positive test produced by Mr Patchett on 6 March 2009 set the scene for what followed. First, Mr Patchett was suspended from his employment without any opportunity to comment. In acting this way Mr Freeman breached clause 17.2 of the

employment agreement. That was not an action that a fair and reasonable employer would have taken.

[47] Next, Mr Patchett was required to return to work later in the day and given the *Alcohol and Drug Rehabilitation Contract* to sign. At that point, Mr Patchett's test was *Unconfirmed, requiring confirmatory testing* for THC although he had admitted occasional recreational use of cannabis outside of work. The *Alcohol and Drug Rehabilitation Contract* represented a significant change in the terms of employment, including a requirement to submit to random drug testing for 12 months and participate outside work hours in an unspecified programme. There is merit in counsel's submission that a fair and reasonable employer would have waited for the ESR test result before embarking on this approach. The company says that it continued Mr Patchett's employment under the *Alcohol and Drug Rehabilitation Contract* rather than dismissing him for drug use. The difficulty with this is that a dismissal at this stage would have been unjustified for the reasons clearly expressed in *Hooper*.

[48] The suspension affected Mr Patchett's employment to his disadvantage because he was not paid. The suspension also contributed to the pressure Mr Patchett felt he was under to sign the contract.

[49] The company says that Mr Patchett caused the delay in returning to work because he took drugs in contravention of the terms of his employment. I am referred to the wording of clause 17.2 (set out above) which covers when a suspension may be unpaid. However, I do not agree with the company's interpretation of the clause. To paraphrase, and reading the whole of clause 17: an employee may be suspended on pay while there is an investigation; but the paid suspension may change to an unpaid suspension if it lasts longer than necessary for the employer to investigate because of the employee's undue delay. At the point of the suspension there was an allegation against Mr Patchett. The suspension was to allow for a full investigation. With one exception he did not cause any delay much less *undue* delay. The exception is that Mr Patchett could have returned to work on 11 March 2009 but he asked if he could return to work on 12 March 2009. The company also makes the general point that there would be no incentive for an employee to produce a negative drug test if the

suspension was fully paid. The difficulty with this view is that the situation must be dealt with under the clear terms of the employment agreement.

[50] To summarise to this point, a fair and reasonable employer would not have drug tested Mr Patchett, they would not have suspended him and they certainly would not have suspended him without pay and in the way that he was suspended. Mr Patchett has a personal grievance as defined by s.103(1)(b) of the Act as a result.

[51] Little needs to be said about the decision to give Mr Patchett a final warning on 23 March 2009. The company completely ignored the requirements set out in clauses 16.2 and 16.3 of the employment agreement. That is not the action of a fair and reasonable employer. This action also gives rise to a personal grievance as defined by s.103(1)(b) of the Act.

Dismissal

[52] In a number of ways the company in its actions and how it acted regarding the dismissal fell short of the standard of a fair and reasonable employer.

[53] The decision to dismiss Mr Patchett was fundamentally flawed because of its reliance on the initial drug test which was required of Mr Patchett in breach of the applicable employment agreement. A fair and reasonable employer would not have required Mr Patchett to provide the initial sample, they would not have required him to agree to a regime of random drug tests to preserve his employment and they would not have treated his subsequent failure on 3 April 2009 and refusal on 20 April 2009 to provide samples as grounds for dismissal.

[54] On 3 April 2009 Mr Patchett said that he was unable to provide a sample when asked. Mr Patchett's unchallenged evidence was that he said he could provide a sample later in the day but he was not asked to do that. At the time Mr Freeman accepted that Mr Patchett had good reason not to provide a urine sample. Later, Mr Freeman used that failure to help reach the conclusion about Mr Patchett's non compliance with *Alcohol and Drug Rehabilitation Contract*. A fair and reasonable employer would not have later revisited the relevance of the 3 April 2009 situation in this way.

[55] There was a failure by the company to share relevant information with Mr Patchett and give him an opportunity to comment prior to the decision to dismiss him. That was inconsistent with good faith requirements in a disciplinary process. I am referring in particular to the email and information received by Ms Eggers on 27 April 2009, which for the reasons set out above, was material to Mr Freeman's decision to dismiss Mr Patchett. The failure to share that information meant that Mr Patchett never had an opportunity to persuade his employer that the 24 April 2009 screening test was a false positive test. The expert evidence before the Authority is that the screening test process is designed to demonstrate that a substance may be present and has a high sensitivity to ensure that it produces few false negative tests. There will therefore be a significant proportion of false positive tests. That is the scientific evidence before the Authority and there is no reason to doubt its accuracy. It reinforces Mr Bird's description of a positive screening test as a *non negative* result. Importantly, it also undermines the validity of the company's conclusion, reached without Mr Patchett having an opportunity to comment, that he must have smoked cannabis during the currency of his rehabilitation agreement.

[56] For these reasons Mr Patchett was unjustifiably dismissed and has a personal grievance.

Remedies – disadvantage

[57] Mr Patchett lost remuneration as a result of these grievances. He is entitled to his normal rate of pay for the period of the suspension less one day for the reason explained above. The same analysis applies between 20 April 2009 and 28 April 2009. Leave is reserved in case of any difficulty with the calculation. There is also a claim for interest raised for the first time in counsel's submissions. I would have considered this if it had been raised in a more timely fashion.

[58] Mr Patchett was obviously upset and angry at the manner of his suspension and being required to undergo the initial drug test. Even by the time of the investigation meeting he was still indignant, even angry, about being tested and required to sign the random testing provision and the way that portrayed him to

others. He is entitled to compensation for those effects. I assess \$5,000.00 as the appropriate sum of compensation to remedy those effects.

[59] While there is a sense in which Mr Patchett's action contributed to the circumstances giving rise to these grievances I do not accept as a matter of fairness and proportionality that there should be any reduction in these awards. First, the wages are recoverable in any event as arrears without regard to the grievance. Secondly, I adopt the Court's approach in *Hooper*. Mr Patchett should not have been tested for drugs and alcohol and it would be wrong to allow the results of that test to be brought to account now. In effect the company must bear full responsibility for its significant and apparently deliberate breaches.

Remedies – dismissal

[60] There is a claim for compensation for lost remuneration. Although the statement of problem refers to these losses accruing for up to a year following the dismissal, in her submissions counsel argues for reimbursement for these losses for only six months. There is a submission for the company that Mr Patchett did not give satisfactory evidence of his attempts to mitigate this loss. However, Mr Patchett's wife (Anna Patchett) told me that her husband searched for work by looking in the newspaper and making inquiries of family and friends with no result. Mr Patchett gave similar evidence and also told me that there was very little work around at that time. Both their evidence, which I accept, is that Mr Patchett received no income from employment during the period of the claim. From this evidence I am satisfied that Mr Patchett lost remuneration as a result of this personal grievance rather than for any other cause, at least for the first three months following the dismissal.

[61] There is a submission about Mr Patchett asking for three months off work to do some renovations. The request was declined at the time. It is suggested that Mr Patchett spent his time after the dismissal doing this work rather than seeking employment. However, I accept Mr Patchett's evidence that he did some painting and decorating work on his recently acquired house and that he asked for two to three weeks off work. There is no evidence to indicate that Mr Patchett failed to seek paid employment so as to disentitle him to an assessment of his lost remuneration. Having said that, the evidence of job searching is limited and does not support assessing lost

remuneration beyond the period dictated by s.128(2) of the Act. Mr Patchett is entitled to be paid his ordinary time rate of remuneration for the three months following the dismissal.

[62] There is evidence which I accept of humiliation, injured feelings and lost dignity suffered by Mr Patchett as a result of the dismissal. At the time Mr Patchett and his wife were expecting a child and were purchasing a property. The loss of employment caused concern and a sense of failure particularly given those circumstances. Mr Patchett suffered sleeplessness. By March 2010 Mr Patchett needed to consult his doctor and was prescribed antidepressant medication. Mrs Patchett supported and enlarged upon this evidence. I assess \$10,000.00 as the appropriate sum to compensate Mr Patchett for these losses.

[63] There is a submission for the company that Mr Patchett's actions were a major contributory factor in this case. The submission is that Mr Patchett refused to comply with company policies and procedures that he had agreed to and refused to take the required tests when requested, delaying the process for some time that so that he ultimately passed the final drug test.

[64] The company's position is that Mr Patchett must have used marijuana after 10 March 2009 and that he was delaying the random testing so as to allow time for the THC levels to fall below the level at which a sample is reported as a negative result. The difficulty with this is the absence of evidence. The evidence of Dr Nixon is that a regular user who smokes daily or near daily will have levels of the inactive metabolite THC-COOH in urine in excess of 1380 ng/ml which is the usual maximum level of determination. His evidence is that a regular smoker who stops will retain significant levels of THC-COOH for up to 10 weeks. The 27 April 2009 email to Ms Eggers indicates that the 6 March 2009 test showed a level of 110 ng/ml. The subsequent test on 10 March reported no THC-COOH. It follows that Mr Patchett was not a daily or near daily user of cannabis or at least had not been such a user for some time. In the circumstances at the time I cannot say that it was likely that Mr Patchett would have continued using cannabis after 10 March 2009. As noted, Dr Nixon in his evidence spoke about the false positive results that can come from the initial screening test process. There is no evidence to indicate that the 24 April 2009 screening test result was anything other than a false positive. In other words, the evidence does not

support the company's submission. I therefore reject the submission. The real difficulty for the company is that, having insisted on Mr Patchett providing a sample on 24 April 2009, it was left with the inconvenience of a negative result.

[65] Mr Patchett had an increasing antipathy to the random testing as he developed a strong conviction that he should not have been drug tested in the first place. Eventually that view was confirmed by his contact with the union. Mr Patchett's view has been vindicated by this decision. The contractual provision was very clear so this is not a case where there was reasonable room for the parties to have different views about their rights and obligations. In these circumstances the company must bear the full responsibility for the consequences of its unreasonable and unlawful conduct: see also *Hooper*.

Summary and Orders

[66] Mr Patchett has personal grievances of unjustified disadvantage and unjustified dismissal.

[67] Pursuant to s.123(1)(c)(i) of the Act Contour Roofing Nelson Limited is to pay Mr Patchett \$5,000.00 compensation for his unjustified disadvantage grievances and \$10,000.00 compensation for his unjustified dismissal grievance.

[68] Pursuant to s.123(1)(b) and s.128(2) of the Act Contour Roofing Nelson Limited is to pay compensation for all the remuneration lost during the suspensions (less one day's wages) and compensation of three months' ordinary time remuneration for remuneration lost following the dismissal. Leave is reserved in case of any difficulty with quantum.

[69] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority