

Attention is drawn to the non-publication orders set out in paragraph [4] of this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 341
3069594

BETWEEN TFZ
Applicant

AND QTE Limited
Respondent

Member of Authority: Vicki Campbell

Representatives: Ethelred Chey, counsel for Applicant
Chris Baldock, counsel for Respondent

Investigation Meeting: 23 June 2020

Submissions and further information: 23 and 29 June 2020 from Applicant
23, 24 and 30 June 2020 from Respondent

Determination: 26 August 2020

DETERMINATION OF THE AUTHORITY

- A. TFZ was unjustifiably dismissed and one or more conditions of his employment were affected to his disadvantage by the unjustified actions of QTE Limited.**
- B. QTE Limited is ordered to pay to TFZ the following sums within 28 days of the date of this determination:**
- a) \$43,736.10 under s 123(1)(b) of the Employment Relations Act 2000; and**

b) \$19,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. TFZ was not subject to discrimination by QTE Limited.

D. The claims for penalties and special damages are declined.

E. Costs are reserved.

Non-publication orders

[1] At the commencement of the investigation meeting I invited the parties to address a proposal to make non-publication orders regarding the names and identities of the parties to this employment relationship problem. Submissions were received from both parties.

[2] After considering the nature of some of the evidence heard during the investigation of this employment relationship problem and taking into account comments made by the Employment Court, it is my view that the interests of justice require the making of non-publication orders.¹

[3] In making these orders I have taken into account that the nature of the evidence may have a lasting adverse impact on the applicant's future job prospects and reputation.

[4] The names of the parties and any information leading to either party's identification is prohibited from publication.

[5] A random online letter selection tool has been used to select the letters used in this determination in place of the parties' names. These three letters do not bear any relation to the parties' real names. Because the identity of the witnesses may lead to the identification of either party the names of witnesses have also been anonymised.

¹ *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

Employment relationship problem

[6] TFZ worked for QTE Limited from 12 July 2013 until his dismissal on 27 December 2018. In his role TFZ prepared and dispatched kits for distribution and use within the health sector and processed the kits on their return. The kits contain implants and other medical instruments for orthopaedic surgeries and are provided to hospitals on a loan basis to enable surgeons to carry out hip, knee, spinal and other joint replacement surgeries.

[7] TFZ has been diagnosed with epilepsy. He advised QTE Limited of his medical condition during his first year of employment. On 11 December 2018 two managers (Mr A and Mr B) at QTE Limited observed TFZ drinking from a vessel in his car and leaning his head against the open window of his car. TFZ was approached while still in his car and was invited to attend Mr B's office.

[8] Mr B was concerned TFZ had consumed alcohol and was impaired. He explained this to TFZ and instructed him to undertake a drug and alcohol test. TFZ refused and was subsequently sent home in a taxi.

[9] After a disciplinary process including two meetings, TFZ was dismissed on 27 December 2018. TFZ challenges his dismissal which he says was unjustified. He also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of QTE Limited when he was suspended. He says he was discriminated against on the grounds of his disability, claims QTE Limited has breached its statutory duty of good faith and seeks remedies including penalties and special damages.

[10] QTE Limited denies TFZ's claims. It maintains TFZ's dismissal was justified and denies TFZ was disadvantaged, discriminated against or that it has breached its statutory duty of good faith.

Issues

[11] In order to resolve TFZ's application I must determine:

- a) Whether TFZ was unjustifiably dismissed?
- b) Whether one or more conditions of TFZ's employment were affected to his disadvantage by the unjustified actions of QTE Limited?

- c) Whether TFZ was discriminated against by reason of his disability?
- d) If the answer to a), b) and/or c) above is 'yes' what if any remedies should be awarded?
- e) Whether QTE Limited breached its statutory duty of good faith and if so what if any penalty should be imposed?
- f) Whether special damages should be awarded?

[12] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Background

Events in 2017

[13] In 2017, on four separate occasions, over a period of about three months, TFZ had been found asleep in locations around the workplace during working hours. He had appeared incoherent and struggled to respond to questions concerning his health and wellbeing.

[14] QTE Limited was concerned about TFZ's wellbeing and fitness to perform his role in a way that was safe for himself and for patients. QTE Limited sought information from TFZ's doctor about his medical condition and any steps QTE Limited would be required to take to ensure his safety at work.

[15] On 27 October 2017 TFZ's doctor reported to QTE Limited that while the description of TFZ's behaviour suggested a seizure, TFZ's main problem was his alcohol consumption which could precipitate his seizures. TFZ agreed to a plan of cessation with the assistance of medication. TFZ returned to work on 30 October.

[16] It was agreed that if there was a repeat of the behaviour QTE Limited would:

- a) Call TFZ's emergency contact person to pick TFZ up as taxis were no longer a suitable or safe option, to ensure TFZ got home or to medical care safely and, in an emergency health situation, call an ambulance;

- b) Require TFZ to return to his doctor for review and provide updated medical information for the business, before returning to work; and
- c) Consider whether to take disciplinary action in accordance with its drug and alcohol policies.

[17] QTE Limited continued to be supportive of TFZ who agreed to continue with the treatment plan outlined by his doctor including follow up reviews, medications and EAP support.

[18] On 12 December 2017 TFZ was observed by Mr B sleeping in the workplace kitchen. There was a distinct smell of alcohol emanating from TFZ. Mr B met with TFZ to seek an explanation from him about his conduct. TFZ refused to provide an explanation when asked. Mr B left the meeting briefly so he could seek some advice. While he was out of the office TFZ left the workplace and refused to return that day.

[19] TFZ met with Mr B again on 18 December 2017 where TFZ denied he had a problem with alcohol and insisted that while he drank beer it was low in alcohol. In relation to leaving the worksite before the end of his working day, TFZ explained he thought Mr B wanted him to leave.

[20] On 22 December 2017 Mr B wrote to TFZ recording concerns that TFZ had left the workplace during the day without notice on 12 and 18 December 2017. QTE Limited further recorded its concerns that TFZ had made mistakes on 23 November 2017, when he had incorrectly packed a kit. Another kit had to then be delivered urgently to enable a surgery to take place.

[21] A further concern was raised that TFZ had been absent from work for more than 40 days over a two year period. The majority of these absences were short term intermittent absences that had not been explained and resulted in additional pressure being put upon TFZ's colleagues.

[22] TFZ was reminded of QTE Limited's alcohol and drug free workplace policies and copies of two policy documents: Australia and New Zealand (ANZ) and the Global document, were provided to him

[23] In his letter Mr B set out QTE Limited's expectations of TFZ including:

- a) That TFZ would work to his agreed hours and adhere to the allocated break times. Requests by TFZ to start earlier or leave work before his usual finish time would need approval from Mr B before TFZ left the office. Mr B advised that emails or text messages were not acceptable methods of communication.
- b) All future absences where TFZ could not attend work or had to leave work because of illness, required the production of a medical certificate by him.
- c) Employees were not to report for work while under the influence or impaired by alcohol. Mr B advised TFZ that QTE Limited could request an alcohol test where he exhibited unexplained behaviour or where he appeared impaired in performing his duties in an effective or safe manner.

[24] TFZ was informed that failure by him to meet these expectations or if he was found to be in violation of QTE Limited's policies, may lead to disciplinary action up to and including dismissal. TFZ was encouraged to utilise EAP assistance if he required personal support.

Events prior to 11 December 2018

[25] On 11 October 2018, TFZ approached Mr B asking to speak with him. In an email dated 14 October 2018, Mr B described TFZ as looking tired and speaking with a shaky voice. TFZ had recently suffered a bereavement of a close friend and mentor.

[26] TFZ told Mr B he was not well and wanted to go home. TFZ was concerned that he would make mistakes in his job and put patients at risk. Mr B encouraged TFZ to stay at work and offered to find him tasks that did not involve risk.

[27] During that conversation TFZ acknowledged that he was drinking intermittently. Mr B was concerned that TFZ's struggles were impacting on the team. Mr B met with TFZ and reminded him of the QTE Limited's policies regarding alcohol and drugs, recommended he seek medical assistance and that he should continue with the EAP services.

[28] On 15 October 2018, TFZ's clinical psychologist advised QTE Limited that TFZ was suffering from the effects of alcohol abuse and was in need of psychological treatment to prevent a relapse.

[29] On 6 November 2018, TFZ voluntarily entered into an alcohol detoxification program. On his discharge from hospital he was advised by the medical staff to continue with his detox medication and to seek a medical review if he developed tremors or other symptoms of withdrawal. He was told by the medical staff not to drink alcohol while taking his medication.

[30] Mr B told me that while he was aware TFZ's counsellor had indicated TFZ may need to be referred to a specialist addiction service, it was not until he read TFZ's witness statement in these proceedings that he became aware he had entered into a detox program. Mr B believed TFZ had been in hospital due to a problem with his knee.

Alcohol and Drug Free Workplace Policies

[31] QTE Limited has published two policies relating to alcohol and drugs in the workplace.

[32] Under the ADFW – ANZ Policy, managers who suspect an employee of being under the influence of alcohol or drugs whilst at work may take the following actions:

- a) Draw upon a peer to act as a witness and provide a second opinion;
- b) Raise the issue with the employee and obtain their response;
- c) If the misuse of alcohol or drugs is reasonably suspected by that manager, send the employee home in a taxi; and
- d) Contact the health and safety and human resources teams and take steps to address the behaviour including disciplinary action.

[33] The ADFW – ANZ policy makes references to the Global Alcohol and Drug-Free Workplace Policy (ADFW Global). This policy provides for a process of drug and alcohol testing where reasonable suspicion exists. Reasonable suspicion is defined in the policy in the following terms:

Situations where a medical assessment by the site-designated health professional may be initiated based on specific, observed behaviour:

- An employee exhibiting overt and unexplained behavioural changes on the job
- An employee who appears impaired in performing job duties in an effective or safe manner

The decision to conduct the drug test is at the discretion of the occupation/examining medical professional who has the sole responsibility for determining if testing is necessary.

[34] A site-designated health professional is defined as a physician or nurse holding a current license and who has been identified as a service provider in the administration of the occupational health components of the ADFW Global policy.

[35] The policy states that breaches of the ADFW Global policy may result in disciplinary action including dismissal.

11 December 2018 incident

[36] On 11 December 2018 several employees observed TFZ as being unsteady on his feet and acting in an intoxicated manner. He was observed making multiple trips to his car where he was seen drinking from a vessel and sleeping.

[37] Mr B and Mr A also observed TFZ drinking from a vessel in his car. Without any investigation they concluded TFZ was drinking alcohol. Mr B approached TFZ's vehicle, woke him up and asked him to attend a meeting in his office.

[38] At the meeting on 11 December 2018, Mr B and Mr A explained to TFZ that they had arranged for an onsite testing agency to attend site because he appeared to be intoxicated. According to Mr B, TFZ's reaction was to nod and acknowledge that he knew this was coming. This was taken by Mr B and Mr A as an acknowledgement that TFZ had been drinking alcohol in his car while at work.

[39] Mr A advised TFZ that because he had declined a test it would be treated as a positive result. Mr A told TFZ he could not be on site and he would be sent home until he received a medical clearance to return to work.

[40] Mr A and Mr B then discussed how TFZ would get home. TFZ felt he would be able to drive but Mr A was concerned that this would be unsafe. He offered to call a taxi or his partner. TFZ opted to take a taxi home.

[41] After TFZ had left the workplace Mr B took steps to secure his car. When doing so he observed a number of cans of alcohol around the driver's seat. At the investigation meeting Mr B told me he noticed an open can of alcohol and a pack of the same cans in the centre console of the car, as well an open empty can in the driver well of the car where TFZ's feet would have been. Mr B took photos but later deleted them.

[42] Mr B did not put any of this information to TFZ during the disciplinary process. At the investigation meeting TFZ told me the cans would have been in the car from before his detoxification treatment and insisted that if he was drinking in his car it would have been water or an energy drink.

The suspension

[43] On 14 December 2018, TFZ attended work after his doctor cleared him as being fit for work. On his return to work TFZ was given a letter inviting him to attend a meeting scheduled for 18 December 2018, so that he could respond to allegations that he may have been intoxicated at work on 11 December 2018.

[44] In the 14 December 2018 letter Mr B advised TFZ that following the meeting he would be asked to go home. He was advised he would continue to be paid but not required to perform any work. TFZ never returned to work, he remained suspended throughout the disciplinary process.

The disciplinary process

First disciplinary meeting

[45] In his letter dated 14 December 2018, Mr B set out some of the history of TFZ's employment including the 2017 events. Mr B set out six questions to be discussed at the 18 December 2018 meeting:

- a) Why TFZ declined testing?
- b) Would TFZ agree to an alcohol test in the future?
- c) Would TFZ commit to ensuring he was not impaired when performing his role?
- d) Why did TFZ not adhere to previously communicated expectations?

- e) What assurances TFZ could provide that he would refrain from being under the influence and impaired by alcohol while at work?
- f) Why disciplinary action up to and including termination of employment should not be taken?

[46] TFZ attended the disciplinary meeting and was accompanied by his partner. Notes were taken during the meeting and have been provided to the Authority. During the meeting Mr B sought answers to each of the six questions set out in his 14 December 2018 letter. TFZ responded as follows:

- a) *Declining testing* - TFZ explained that he assumed the test would involve a blood test and explained he was uncomfortable with his blood being taken onsite in an uncontrolled environment.
- b) *Agreement to future tests* – TFZ explained he would agree to a future test if he was referred to a lab test environment. When pressed TFZ agreed that he would do whatever was required and if any test was required in the future he would do it.
- c) *Commitment to not being impaired when performing his role* – TFZ denied being impaired.
- d) *Failure to adhere to expectations* – TFZ denied he had not met expectations and denied he had been drinking on site on 11 December 2018
- e) *Assurances to refrain from being under the influence or impaired while at work* – TFZ again denied he was under the influence or impaired while at work on 11 December 2018 and advised he was taking prescription drugs which prevented him from consuming alcohol. TFZ’s partner confirmed that the drug was potent and would make TFZ very sick if he consumed alcohol.
- f) *Why dismissal was not appropriate* – TFZ asked Mr B and Mr A not to dismiss him and reminded them that they had no evidence that he had consumed alcohol at work.

[47] In addition to answering the six questions TFZ's partner also raised concerns that TFZ did not understand the testing procedure. TFZ also raised the possibility that his behaviour could have been caused by his depression or epilepsy including partial seizures.

Second disciplinary meeting

[48] A second disciplinary meeting was convened on 21 December 2018. As with the first meeting TFZ was accompanied by his partner. The invitation to the meeting stated that the meeting was for the purpose of allowing Mr B and Mr A to seek clarification from TFZ after hearing his explanations on 18 December.

[49] The meeting focused on TFZ's explanations about why he had declined to be tested on 11 December 2018 and why he had not raised any questions or concerns about the alcohol testing process when he had received the 22 December 2017 letter. TFZ told Mr B he could not think of anything further to say as he believed he had answered the question.

[50] In answer to specific questions TFZ continued to deny consuming alcohol on 11 December 2018

[51] Before the meeting ended TFZ's partner asked Mr B to clarify what observations had been made and what behaviours TFZ had displayed on 11 December 2018. The response from Mr B was that if there was a suspicion of alcohol use, testing would be undertaken and a failure to comply would be considered a failed test. Neither Mr A nor Mr B answered TFZ's questions

[52] TFZ's partner again raised TFZ's epilepsy and that while alcohol may be a cause, stress and not eating were also contributors TFZ's behaviour.

The dismissal

[53] On 27 December 2018, Mr B met with TFZ to confirm his conclusion that it was more likely than not that TFZ had been intoxicated at work on 11 December 2018 and he considered summary dismissal was the appropriate outcome.

[54] TFZ's dismissal was confirmed in writing by QTE Limited on 27 December 2018. The reasons for the dismissal were:

- a) TFZ's decision to attend work on 11 December 2018 where he appeared to be under the influence of alcohol which was observed by several employees. This behaviour caused significant concern that TFZ was impaired in his ability to perform his role, creating an unacceptable risk to patient safety; and
- b) TFZ's failure to follow a reasonable management direction to attend an alcohol test.

[55] TFZ was paid one month's salary in lieu of notice and an additional ex-gratia payment equivalent to two weeks' salary. QTE Limited made its EAP service available to TFZ until 31 March 2019 and provided a certificate of service.

Was the dismissal justified?

[56] The onus falls upon QTE Limited to prove that its actions in dismissing TFZ were justified. Under s 103A of the Act I must objectively determine whether QTE Limited's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[57] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, QTE Limited sufficiently investigated issues, raised its concerns with TFZ, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to making the decision to dismiss him.

[58] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in TFZ being treated unfairly.² A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[59] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) of the Act provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

² Employment Relations Act 2000 (the Act), s 103A(5).

[60] For the following reasons I am not satisfied QTE Limited's decision to dismiss TFZ was within the range of responses open to a fair and reasonable employer.

Under the influence?

[61] QTE Limited's conclusion that TFZ attended work on 11 December 2018 under the influence of alcohol and was impaired in his ability to perform his role was not open to it on the evidence available to it at the time the decision to dismiss was made.

[62] In reaching his conclusions Mr B was largely influenced by previous events and assumptions made when he viewed the contents of TFZ's vehicle. Neither Mr B nor Mr A could see from their vantage point, what vessel TFZ had been drinking from when he was in his car. TFZ maintained he had been drinking from a water bottle.

[63] Mr B took photos of the contents of TFZ's vehicle but these were deleted and never shown to TFZ for his explanation. Nor did Mr B put to TFZ for his explanation his observations of the contents of TFZ's car.

[64] QTE Limited says "several employees" witnessed TFZ behaving in a way that gave cause for concern. QTE Limited relied on these reports in reaching its conclusions. Despite TFZ requesting more information he was never told what specific behaviours had been observed.

[65] At the first disciplinary meeting TFZ raised his epilepsy as a possible explanation. However, this possibility was not investigated by QTE Limited. Information from previous events indicated that the behaviour exhibited by TFZ on 11 December 2018 may have been consistent with him having suffered a seizure.

Refusal to undertake an alcohol test

[66] The starting point here is whether the instruction to undergo an alcohol test was a lawful and reasonable instruction. As noted by the Employment Court:³

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.

³ *Parker v Silver Fern Farms Ltd* (No 1) [2009] ERNZ 301 at [26].

[67] On 11 December 2018 TFZ refused to undertake an alcohol test. He gave no explanation at that time. However, on 18 December 2018 TFZ explained that he was unsure of the procedure for testing and believed it required a blood test. He explained that he refused because of concerns about the environment in which the blood would be taken.

[68] Neither of the policy documents, relied on by QTE Limited, set out how and where testing will be conducted or the protocols for maintaining the integrity of any samples taken.

[69] According to the ADFW policies reasonable suspicion testing is reserved for situations where a medical assessment has been made by a licensed health professional. At no time on 11 December 2018 was a medical assessment undertaken. At the investigation meeting Mr B conceded that this requirement of the policy was not met.

[70] Further, there is nothing in the policy to indicate that a refusal to undergo a test would result in a deemed positive result.

[71] In the circumstances of this case the instruction for TFZ to undergo an alcohol test on 11 December 2018 was not reasonable.

Additional concerns with QTE Limited's process

[72] After TFZ's previous epileptic episodes in the workplace QTE Limited agreed with him on the steps it would take to ensure TFZ was returned home safely. Those steps included contacting his emergency contact person and not using a taxi for transport. Neither of these steps were taken on 11 December 2018. This was primarily because Mr B and Mr A had already determined that TFZ had been consuming alcohol while he was in his car and never considered the possibility that he had actually suffered a seizure.

[73] Mr B's letter dated 14 December 2018 has hallmarks of pre-determination in relation to the six questions identified for discussion. At least three of the six questions appear to be based on the assumption by Mr B that TFZ had been impaired by or under the influence of alcohol on 11 December 2018. I have concluded these assumptions were based on the premise that TFZ had declined an alcohol test and therefore he had consumed alcohol while at work.

[74] Further, Mr B was told on 7 December by another employee that she had smelt alcohol on TFZ's breath on 7 December 2018. Because it was late in the afternoon no action was taken by Mr B to follow this up. This information was never put to TFZ during the disciplinary process even though it appears to have influenced Mr B's conclusions on 11 December 2018 that TFZ had been drinking alcohol in his car.

Conclusion

[75] The deficiencies in QTE Limited's process were not minor and have led to TFZ being treated unfairly. There are hallmarks that QTE Limited's investigation was based on pre-determined conclusions. QTE Limited has failed to follow its own policy in relation to alcohol and drug testing. Further, there is a lack of any defined testing procedure included in the policy documents which led to TFZ being concerned about how the test would be undertaken. TFZ had raised these concerns with QTE Limited at the first meeting on 18 December 2018.

[76] The outcome reached by QTE Limited was not one an employer acting fairly and reasonably could have reached in all the circumstances known at the time. TFZ has established a personal grievance for unjustified dismissal and is entitled to a consideration of remedies.

Unjustified disadvantage

[77] TFZ claims one or more conditions of his employment were affected to his disadvantage when he was suspended.

[78] The onus of establishing whether one or more conditions of his employment were affected to his disadvantage lies with TFZ in the first instance. If he establishes disadvantage the burden moves to QTE Limited to establish on the balance of probabilities that the disadvantage TFZ suffered was justified.

[79] The employment agreement provides for suspension in the following terms:

The Company has the right to suspend your employment to investigate any allegation of misconduct that may be made against you or where the Company believes that you constitute an immediate hazard to yourself or to others or negligence in the performance of your duties or other serious concerns relating to your employment.

[80] TFZ says there was no consultation with him before he was suspended and so was deprived of an opportunity to comment on the suspension or understand the reasons

for his suspension. Further, TFZ says that he should have been allowed to return to work after the first disciplinary meeting on 18 December because there were no longer sufficient reasons to continue the suspension and his presence at work would not have caused any significant problems.

[81] TFZ was sent home on 11 December and again on 14 December. I am satisfied TFZ agreed to leave work on 11 December and to return once he had received medical clearance. However, I find TFZ was suspended on 14 December and that suspension was unjustified.

[82] Despite suspension being provided for in the employment agreement TFZ was entitled to be told on 14 December that suspension was being contemplated and the reasons why, before the decision was made.⁴

[83] The situation on 14 December did not involve the sort of circumstances that might otherwise justify a departure from the usual requirement to be heard before a decision is made. There were no issues of imminent danger or any other circumstances which might otherwise have justified summary suspension. There is no evidence TFZ attended work on 14 December showing any signs of impairment or that he was unable to satisfactorily undertake his normal duties.

[84] It is apparent the decision to suspend TFZ had already been made before TFZ attended a meeting with Mr B on 14 December. I find TFZ has established one or more conditions of his employment were affected to his disadvantage when he was suspended without consultation on 14 December 2018.

[85] The action taken by QTE Limited in suspending TFZ in those circumstances was not an action an employer acting fairly and reasonably could take. QTE Limited says it was justified in suspending TFZ because of the risk to patient safety. However there was evidence that tasks that had previously been assigned to TFZ without the associated risks to patient safety attached, could have been offered to TFZ.

[86] TFZ has established a personal grievance and is entitled to a consideration of remedies.

⁴ *Hong v Auckland Transport* [2019] NZEmpC 54 at [50].

Discrimination

[87] TFZ claims he was treated less favourably and discriminated against on the grounds of his disability.

[88] Section 103(1)(c) of the Act provides that a personal grievance includes a grievance an employee may have against his or her employer, that the employee has been discriminated against in the employee's employment.

[89] For the purposes of such a grievance, an employee is discriminated against in that employee's employment, if the employer by reason directly or indirectly on any of the prohibited grounds of discrimination specified in s 105 refuses or omits to offer or afford the employee the same terms of employment or conditions of work as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances.⁵

[90] Section 105 of the Act states that one of the prohibited grounds of discrimination is that of disability, a term which is to have the meaning given to it by s 21(1) of the Human Rights Act 1993.

[91] TFZ says he was discriminated against on the grounds of his epilepsy. For discrimination purposes, TFZ's circumstances are to be compared with any other person employed in the same or substantially similar circumstances at QTE Limited's workplace.

[92] There is no evidence that QTE Limited dismissed TFZ for any reason other than those set out in its letter dated 27 December 2018. I accept the submissions made on behalf of TFZ that he made it known to Mr B on 18 December that his behaviour may be connected to his epilepsy. However, I am not persuaded that he was then subjected to detriment and dismissed as a result of those assertions.

[93] TFZ has failed to establish to my satisfaction that he was subjected to any detriment in circumstances in which other employees were not subjected to such detriment by reason of his disability.

⁵ Employment Relations Act 2000, s 104(1).

Remedies

[94] Where the Authority determines that an employee has a personal grievance it may, in settling that grievance, provide for one or more of the remedies set out in s 123(1) of the Act.

[95] QTE Limited maintains any entitlement TFZ may have to remedies ought to be extinguished due to his egregious conduct. TFZ's conduct on 11 December cannot be classified as outrageous or egregious misconduct. There is no evidence TFZ was drinking alcohol at work and QTE Limited failed to take into account the possibility that TFZ was suffering from the effects of a seizure even after he raised it on 18 December.

[96] TFZ seeks reimbursement of all wages lost as a result of his dismissal, compensation for humiliation, loss of dignity, and compensation for medical costs incurred.

Lost wages

[97] TFZ seeks reimbursement of lost wages from 27 December 2018 to 21 October 2022. There are essentially two aspects to TFZ's claim:

- a) Actual lost wages for the period between 27 December 2018 to 21 October 2019 when he started his new employment; and
- b) The difference between his wages with QTE Limited and his new employment for a three year period from 21 October 2019 to 21 October 2022

[98] TFZ has given evidence of the steps he took to find alternative employment during 2019. He was successful in obtaining a new position which he started on 21 October 2019 although at a lower salary than he received from QTE Limited.

[99] Section 123(1)(b) of the Act provides for the Authority to award reimbursement to an employee of the whole or any part of wages or other money lost by an employee as a result of a grievance. Section 128(2) of the Act provides for mandatory reimbursement of the amount actually lost or three months' ordinary time remuneration whichever is the lesser amount. Section 128(3) allows the Authority to award more than the lesser amount.

[100] TFZ was paid six weeks wages at the time of his dismissal. He was out of work for a period of 42 weeks. Taking into account the six weeks wages paid to TFZ I have calculated that he sustained lost wages for a period of 36 weeks. This amounts to a sum equal to \$46,038. Three months lost wages amounts to \$16,625. Under s 128(2) of the Act TFZ is entitled to reimbursement of \$16,625.

[101] TFZ has asked the Authority to exercise its discretion to order payment of a greater sum. He seeks reimbursement of the remuneration lost up to 21 October 2022. Such a claim is highly speculative and assumes TFZ would have remained in employment with QTE Limited until 2022 and that his salary in his current employment will not meet or exceed the salary he received at QTE Limited.

[102] QTE Limited submitted TFZ failed to take reasonable steps to mitigate his loss. I am satisfied TFZ has taken adequate steps. His unchallenged evidence is that he applied for no less than 27 jobs between February 2018 and October 2019.

[103] I have concluded there is no reason to deny TFZ reimbursement of the loss of remuneration he suffered up to commencing his new employment on 21 October 2019. Subject to my findings on contribution it is appropriate to exercise the discretion conferred by s 128(3) to order QTE Limited to reimburse TFZ fully for that loss amounting to \$46,038.

Compensation

[104] TFZ claims compensation for medical costs plus compensation under s 123(1)(c)(i) of the Act in the sum of \$55,000. There is no evidence on which to base any awards relating to medical costs accordingly this claim is declined.

[105] In relation to TFZ's claim under s 123(1)(c)(i) of the Act, the evidence given by TFZ as to the impact on him of both the suspension and his dismissal overlap. Accordingly, I consider a global award of compensation is appropriate.

[106] In support of his claim TFZ gave evidence of the hurt, humiliation and loss of dignity he has endured. He told me the stress and anxiety he experienced during the disciplinary process conducted by QTE Limited resulted in him suffering from a tonic clonic seizure and this prevented him from attending the final meeting on 24 December 2018. A tonic clonic seizure may cause the person loss of consciousness, the muscles

stiffen and jerking movements are observed. TFZ suffered a second tonic clonic seizure in January 2019 which he has attributed to the stress of being dismissed.

[107] TFZ's unchallenged evidence is that he became further depressed after the dismissal and struggled to leave the house and avoided contact with other people. Until his dismissal TFZ was heavily involved at a senior level in sport in New Zealand and this was a significant part of his life. He told me he felt he needed to move away from the sport because the prospect of explaining why he was unemployed was too much for him to bear.

[108] TFZ gave compelling evidence as to the financial impact of his dismissal and how this also impacted on his health and wellbeing.

[109] It is clear TFZ suffered humiliation, loss of dignity and injury to his feelings following his dismissal. However, I am not satisfied that the sum he claims is warranted in the circumstances. Subject to my findings on contribution I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$20,000.

Contribution

[110] Where the Authority determines an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁶

[111] QTE Limited says TFZ contributed to such an extent that remedies should be reduced by 50 percent. It submits that TFZ's contributory conduct included his refusal to be tested on 11 December and his acceptance that his refusal would result in a finding that he had been drinking at work and was impaired or under the influence of alcohol.

[112] The evidence shows TFZ was not behaving normally on 11 December. However, QTE Limited breached its own policies when it failed to have an independent assessment undertaken before arranging for TFZ to undertake a test at work. TFZ

⁶ Employment Relations Act 2000, s 124.

provided an explanation on 18 December as to why he refused the test and agreed, when pressed, to undertake a test in the future. He also raised questions about whether his depression or epilepsy had contributed to his behaviour on 11 December, but this was never investigated by QTE Limited.

[113] One aspect of TFZ's evidence has given me pause for concern. It is clear from the text messages he sent to QTE Limited between Monday 5 November and Sunday 11 November 2018 that he was hiding his admission to detox. Instead he allowed QTE Limited to believe he was seeking medical assistance for a sore knee. On 5 November TFZ advised Mr B his knee pain was bad and that he would not be at work that day. In another text message sent in the middle of his detox program TFZ told Mr B that he had seen six specialists that day. Implying that the specialist treatment was for his knee.

[114] Clearly QTE Limited was aware on 15 October 2018 that TFZ may need specialist addiction services due to his alcohol abuse issues. Had TFZ been open with QTE Limited about his reasons for his absence in the week 5 – 11 November 2018, QTE Limited may have been able to put support processes in place to assist TFZ with his transition to work from 12 November 2018.

[115] On an objective basis I find this failure by TFZ to be open with QTE Limited has contributed overall to the situation giving rise to his personal grievance and his remedies should be reduced by 5 percent to recognise his blameworthy conduct. Accordingly QTE Limited is ordered to pay to TFZ the following sums within 28 days of the date of this determination:

c) \$43,736.10 under s 123(1)(b) of the Act; and

d) \$19,000 under s 123(1)(c)(i) of the Act.

Breach of good faith

[116] TFZ claims QTE Limited failed to comply with its duty of good faith. In particular TFZ says QTE Limited had a duty not to mislead or deceive him and to provide all relevant information during the disciplinary process.

[117] I consider the good faith issues raised by TFZ have been captured by the personal grievance claims and wish to avoid the prospect of TFZ double dipping for grievance remedies and penalties. In the event that I had to consider penalties the issues

raised by TFZ cannot be described as deliberate, serious and sustained in such a way as to justify a penalty under s 4 of the Act.

[118] The application for penalties to be imposed is declined.

Special damages

[119] TFZ claims special damages for legal fees he incurred prior to lodging his statement of problem in the Authority. Special damages may be available on occasions, however there needs to be a “bright line” between costs incurred in quantifying time owed and money lost as a result of a breach of the employment agreement and party and party costs associated with legal representation to recover the loss.⁷

[120] The claim for special damages amounts to a claim for pre-litigation costs and such claims have been consistently rejected by both the Employment Court and the Authority. It is not appropriate to classify costs incurred prior to the filing of a statement of problem as special damages.⁸

[121] TFZ’s claim for special damages is declined.

Costs

[122] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to resolve the issue of costs TFZ shall have seven (7) days from the date of this determination to lodge and serve submissions on the matter. QTE Limited will have a further seven (7) days in which to lodge and serve submissions in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[123] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

⁷ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [96].

⁸ *George v Auckland Council* [2013] NZEmpC 179 at [128].