

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 148/08
5077981**

BETWEEN "V"
Applicant

AND AIR NEW ZEALAND LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Anne-Marie McNally for Applicant
Kevin Thompson for Respondent

Investigation Meeting: 3 July 2007
4 July 2007

Submissions Received: 9 July 2007
12 July 2007
13 July 2007
17 July 2007

Determination: 22 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] On 20 November 2006 the applicant ("Mr VB") was dismissed from his employment with Air New Zealand Limited ("Air New Zealand") because he had failed a random drugs test. Mr VB says the dismissal is unjustifiable. Air New Zealand denies the dismissal was unjustifiable. The parties were unable to resolve the problem between them by the use of mediation.

[2] Mr V sought an order that his name not be published "beyond the Auckland division of the business in which he was employed". There is evidence from Mr V's mother's general practitioner of a concern for Mr V's mother's health if such an order is not made. Ms McNally submits that it is in the interests of justice that Mr V's name not be published. Air New Zealand has no view either way on the matter. Given that

neutral stance, I accept Ms McNally's submissions and I am satisfied it is an appropriate order to make. I therefore order pursuant to Clause 10 of Schedule 2 to the *Employment Relations Act 2000* ("the Act") that Mr V's name be prohibited from publication.

The facts

[3] Mr V had been employed by Air New Zealand for about 17 years before he was dismissed. For the last four years of his service he worked as an Alfa Operator ETV (Elevating Transfer Vehicle) in Air New Zealand's cargo division. Mr V was employed under the terms of the Air New Zealand/New Zealand Amalgamated Engineering Printing and Manufacturing Union Incorporated Collective Employment Agreement.

[4] It is agreed that Mr V worked in a safety sensitive area and Mr V confirmed his agreement when he was asked by his employer. Mr V's work involved direct interaction with and use of heavy machinery and powered equipment. Any error or slip in the operation of machinery had the potential to result in serious injury or loss of life to Mr V and others in and around the equipment. The work area featured a considerable amount of moving equipment traffic and other vehicle movements and inattention could lead to serious harm. It is a high visibility area.

[5] On Thursday 28 September 2006 Mr V was working a shift commencing at 4.00am and finishing at 12.30pm. While he was at morning smoko, Mr V was informed by his manager Mr John Ward ("Mr Ward") that he was required to take a random drugs test.

[6] Mr V complied and accompanied Mr Ward to the medical centre to have the test. I find that Mr V told Mr Ward that he would have a problem with the test implying that he would fail it. I find this statement was not a self-disclosure. Mr V signed authorisation and declaration forms giving his consent for the test.

[7] When he had provided his urine sample, Mr V returned to work to complete his shift. He was then rostered off work for the next two days. He then took annual leave.

[8] While he was on leave, Mr V received a telephone call from Mr Ward. Mr Ward informed Mr V that he had failed the random drugs test. Mr V's reading was 300 nanograms of THC per ml of urine. According to Air New Zealand's Chief Medical Officer Dr David Powell ("Mr Powell") this result is in fact 20 times the confirmatory test threshold level.

[9] I find that Mr Ward further advised that Mr V was stood down from work on full pay and that Mr V would receive a letter as to what would occur next.

[10] On 5 October 2006 Mr V met with Dr Sara Souter, Aviation Medical Officer ("Dr Souter") who verified to Mr V his positive test result. Mr V's was informed his bodily sample had returned a result of 300 nanograms of THC per ml of urine.

[11] By letter dated 6 October 2006, Mr V was summoned to attend a meeting on Sunday 8 October 2006 (his first day back at work) the purpose of which was stated to be "to discuss our(sic) possible suspension of employment". The letter advised Mr V that on no account was he to enter the workplace except for the said meeting, that he would be paid and that he was entitled to bring representation to the meeting and it was recommended that he did so. The letter stated:-

The company is in receipt of a note from Dr Sara Souter, Aviation Medical Officer which notifies of a positive result following your random Alcohol and Other Drugs test. A copy of this note as per below,

[Mr V] was seen by myself yesterday for verification of his recent test result. I can advise you that [Mr V] had a urine drug screen performed on 28th September at 0945, and that the result of this is verified positive by myself. I have advised David Powell, CMO of this result also. Under the AOD policy, [Mr V] is required to be stood down from work pending the results of an investigation. I have arranged some further assessments for [Mr V] next week as part of this, including possible follow-up with David on Wednesday as I will be on A/L. I understand [Mr V] is on A/L himself from Thursday next week. Please call me should you wish to discuss, I have left a phone message for you today.

Regards
Sara

...

As Sunday is your first day back at work following your leave you are requested to attend a meeting at 8am on Sunday 8th October 2006 in the new Cargo Offices. You are entitled to bring representation to this meeting and we recommend that you do so.

Given the report from the MRO the company is seriously considering your suspension to enable us to investigate this positive result and therefore the purpose of the meeting is to discuss our(sic) possible suspension of employment.

You will be meeting with me and another company representative who will be taking notes. I want to reinforce that on no account are you to enter the workplace other than for the purposes of this meeting. If you are unable to attend at this time or unable to arrange for your representative to be in attendance then we will meet on Monday at 930am. You would(sic) be paid for not attending work on Sunday.

*Yours Sincerely
John Ward
Operations Manager
Air New Zealand Cargo
Auckland*

[12] The meeting actually took place on Monday 9 October 2006. Present were Mr V, Mr Ward, human resources consultant Ms Siobhan Cohen and Mr Ward's support person Mr Kelvin Moyes, a senior delegate of Mr V's union ("Mr Moyes"). Mr V advised Air New Zealand he had no objection to suspension and undertook to cooperate. He accepts the Minutes of the meeting are correct which record him also stating he was not going to make a fuss and that he was not going to argue or make an issue if Air New Zealand did not "get the process right".

[13] The following day on Tuesday 10 October 2006, Mr V met with Dr Powell. Dr Powell explains the purpose of this consultation is to comply with Air New Zealand's policy requiring medical intervention to ensure that managers are appropriately informed as to any medical or other factors which are relevant to the positive test result, including the need and willingness for rehabilitation. Following the consultation Dr Powell reported back to Mr Ward (copied to Graeme Norton, company solicitor, and Dr Souter):-

*I saw [Mr V] today as arranged.
As you are aware, he had been very open and co-operative at every stage. He has declared that he has been using cannabis on a regular basis for some years, in the evening, and says that he did not believe that it would be impairing him in his ability to work safely. He has abstained since the random test was performed, and is committed to permanent abstinence from cannabis. He realises the implications of what has occurred, and concedes that he has had a problem, but believes that he can stay clean on a permanent basis. He shows a willingness to comply with ongoing monitoring, follow-up, and medically directed testing as required. However, he does not believe he is substance dependent. I am awaiting a report from an alcohol and drug counsellor, and also have recommended that [Mr V] attend some AA and NA meetings. I will review him (with Sara) next Thursday at 9am and report again at that stage when all of the information is to hand. In the meantime, [Mr V] is going to Australia on a football tournament (not involving staff travel)
Cheers dp*

[14] Mr V made contact with Alcoholics Anonymous and Narcotics Anonymous immediately. I find that the same day on 10 October 2006, Mr V met with Mr Roger Green, chemical dependency clinician ("Mr Green").

[15] Mr Green provided a report dated 12 October 2006 to Dr Powell on about 20 October 2006. Mr Green's initial diagnosis was that Mr V had a high probability of being alcohol and cannabis dependent with physiological symptoms. Mr Green ruled out major depression. He recommended that Mr V abstain from all mood altering chemicals with particular reference to alcohol and cannabis, that Mr V visit a registered alcohol and drug counsellor to help him devise a programme to arrest the progression of his dependency and that he attend Alcoholics Anonymous meetings preferably with support of a member who attends regularly. The report concluded with these prognoses:-

Prognosis - general

The evidence certainly suggests the view that [Mr V] has a significant problem with cannabis and alcohol and if he remains free of cannabis only his alcohol use will increase. Whilst it is difficult to formulate a prognosis at this early stage, [Mr V]'s lack of insight to his condition and his possible reluctance to abstain from alcohol use altogether, coupled with his alibi of a need to use cannabis to relax in his home situation means he needs to take positive action to remain chemically free. [Mr V], like anyone else in his situation, has options and should he find the resolve and support necessary to make changes to his behaviour he could quite quickly return to being a dependable employee as he has obviously been in the past.

Prognosis - initial

If Mr V makes a commitment and makes the changes to remain free of a alcohol and cannabis use and abides by CAA and Air New Zealand regulations with regard to alcohol and other drug use around his support role in the aircraft industry his prognosis is good.

[16] On the evening of Wednesday 11 October 2006, Dr Powell wrote to Mr Ward:-

*Further to my earlier message, I failed to specify it but of course, I have verified that this is a clear positive test.
Cheers dp*

[17] Mr Ward wrote to Mr V by letter dated 16 October 2006. That advice stated:-

Dear [Mr V]

We met on Monday 9 October to discuss the advice of Dr Sara Souter of a positive result from your random Alcohol and Other Drugs test. In our meeting

attended by yourself, your representative Kelvin Moyes (EPMU Delegate), myself and Siobhan Cohen from HR, we agreed to suspend you whilst we undertook an investigation into the positive result following your random Alcohol and Other Drugs test. At that time we discussed the investigation process and I advised you that the company views the positive result of a failed test very seriously and that depending on the outcome of the investigation action up to and including termination of employment may result.

Further to our discussion this afternoon regarding postponing our meeting to further discuss and investigate the positive result following your random Alcohol and Other Drugs test, I am able to confirm our meeting time as follows:

Date: Tuesday 31 October 2006

Time: 1pm

Location: Cargo Office building

The time of the meeting is to enable Dr David Powell, the Chief Medical Officer to meet with you on Thursday 19 October 2006 at 9am. Dr Powell will report back following this meeting, I understand that he has already explained the process to you at your first meeting.

As discussed following your return from annual leave, you will remain on suspension whilst we continue the investigation. You will be meeting with me and another company representative who will be taking notes. You are advised to bring a representative to the meeting.

[Mr V], again, I want to reinforce that on no account are you to enter the workplace other than for the purposes of this meeting.

Yours sincerely

John Ward

[18] Mr V met with Dr Powell again on Friday 20 October 2006. Dr Powell then wrote to Mr Ward by email of the same date:-

I saw [Mr V] again today. Once again, I believe he has been open and honest. The full report from the alcohol and drug counsellor is here and reports a high probability of substance dependence. It is up to [Mr V] whether he wishes you to see this report. However, [Mr V] himself does not agree with this assessment. He has stopped using cannabis from the day of the test, and reports no difficulty in achieving this. He continues to drink alcohol but informs me that this is in a moderate and controlled manner without negative consequences on his well-being. He does not believe he has a dependence problem; although he has decided to remain cannabis-free for his own well-being, he sees no need to be alcohol-free. Myself, I am unsure whether he is chemically dependent and I believe that only time will tell. I do note that he appears to be in a positive frame of mind and well-motivated. Let me know if I can assist further.

Regards

David Powell

[19] Mr V and his representative Mr Moyes met with Mr Ward and HR consultant Ms Martha Gibbons ("Ms Gibbons") on Tuesday 24 October 2006. Mr V accepts the Minutes of this meeting are accurate. Mr Moyes presented a written submission in support of Mr V.

[20] There was a further meeting on Thursday 26 October 2006 with the same participants. Mr V accepts the Minutes of this meeting are accurate. Mr V presented the report from Mr Green to Mr Ward and Ms Gibbons. He said he disagreed about the statements as to frequency and amount of his drinking and the statement that he frequently found himself thinking about using drugs and/or getting high and that he gets the shakes etc when he stopped using. He said the statements related to historical use. He also said he never missed work because of drinking and that the reference to driving after drinking related to his socialising at the RSA. Mr Ward advised that further assistance would be sought from Dr Powell. Mr V accepts the Minutes of this meeting are accurate.

[21] By email of 30 October 2006 Ms Gibbons wrote to Dr Powell advising him of progress in Air New Zealand's investigation. Ms Gibbons sought a meeting with Dr Powell to discuss Mr Green's report and to seek expert assessment of the testing results and Mr V's medical fitness to return to work. At 7.09pm Dr Powell advised by email he was unable to meet as he was away until 9 November 2006. He suggested Ms Gibbons seek a meeting with Dr Souter. Dr Souter was not able to meet on 31 October 2006.

[22] Ms Gibbons submitted the Minutes of meetings with Mr V to Dr Souter and Dr Powell. She also posed some questions for these same medical professionals which Dr Souter answered as a joint response by email of 3 November 2006 to Ms Gibbons. The questions and answers were these:-

1. Based on the levels present from the testing (6 times over the threshold), the stated history and frequency of use and the report provided from Recovery Resources, can you please provide your expert assessment as to whether this would greatly impair someone's ability to work safely and effectively?

Based on the results of the workplace urine drug screen, the presence of a substance (cannabis) was identified. The level is consistent with the history of use.

Cannabis is a recreational drug which can cause cognitive impairment in those who use it. The presence of Cannabis in the system as evidenced by a urine drug screen, indicates the potential for impairment, which in a safety sensitive role may increase the risk of workplace accidents or incidents, and increase the risk of serious harm to the affected employee, other employees or members of the public. Studies done on driving and flying simulators demonstrate a measurable impairment on users of a single joint within 24 hours of undertaking driving/flying activities.

2. *What level of risk is someone placing themselves and/or others in if they are smoking with that frequency and are presenting for work at 4.00am to start their shift in a safety sensitive environment?*

There is not a definable level of risk that can be associated with a specific level of drug in the body. This is different to alcohol, which has a more easily definable relationship between intake, level, and impairment. It is generally accepted that any level of mood-altering drug present in the body above a threshold set by the testing laboratory may contribute to an increased risk in the workplace related to cognitive impairment. Chronic or regular use does not provide protection against these cognitive effects. Chronic use may provide an increased level of risk. In [Mr V]'s situation, use was declared openly within 24 hours of starting work. As outlined above, this has been demonstrated in previous studies to be within a timeframe to cause impairment.

3. *Are you able to provide expert opinion on [Mr V]'s medical fitness to return to work and if [Mr V] is to continue to be employed, what sort of rehabilitation programme should be put in place e.g frequency and duration of ongoing testing, monitoring of external support meetings etc.*

In our opinion, [Mr V] is not currently fit to return to a safety sensitive role. As part of the medical investigation that took place in relation to the positive result. [Mr V] was assessed by two Air NZ Medical Review Officers, and an independent Chemical Dependency Councillor. The results of this assessment were that a rehabilitation program was recommended to treat chemical dependency, which requires abstinence from all mood altering substances. [Mr V] has discussed the results of the assessment reports with you, and our understanding from that discussion, and our discussions with [Mr V] is that at this stage, he does not believe that he needs to abstain from all mood altering substances. This would include alcohol. [Mr V] has expressed a willingness to seek treatment for cannabis dependency. It is our recommendation that treatment is sought and there is abstinence from both cannabis and alcohol in order to make treatment for this condition (chemical dependency) effective. A rehabilitation programme would generally recommend a return to work when appropriate to a non-safety sensitive role until such time that the AirNZ Medical Review Officer and [Mr V]'s primary treatment provider were satisfied that [Mr V] was fit to resume a safety sensitive role. A rehabilitation agreement would be commenced with [Mr V] to:-

- comply with all aspects of his treatment
- comply with required follow up
- comply with random testing at a frequency determined by the MRO

This document would need to be agreed to by [Mr V], his manager, and the MRO

I hope this is helpful to you in determining the action to be taken regarding [Mr V].

[23] There was a further meeting on 17 November 2006 with the same participants. Mr Ward read a statement which concluded that Air New Zealand was considering terminating Mr V's employment. Mr V accepts the Minutes of this meeting are accurate.

[24] There was a further meeting on 20 November 2006 with the same participants. Mr V was advised he was dismissed. Mr V accepts the Minutes of this meeting are accurate.

[25] A letter of termination dated 22 November 2006 was provided to Mr V.

[26] A petition calling for Mr V's reinstatement was signed by other employees of Air New Zealand, advisedly over half of the employees in the Cargo department.

[27] By letter dated 7 December 2006, Mr V's union raised a personal grievance on Mr V's behalf and requested the reasons for Mr V's dismissal.

[28] By letter dated 21 December 2006 Air New Zealand advised the reasons for Mr V's dismissal as follows:-

In respect of the request for an explanation of the reasons for Mr V's dismissal, Mr V was dismissed for serious misconduct involving a breach of the company's Alcohol and other Drugs policy, after returning a positive test for cannabis, and following a full and fair investigation in which Mr V acknowledged his daily use of cannabis for an extended period, and his subsequently attending work after this use. Extensive consideration was given to matters raised by Mr V and these considerations and the company's findings are set out in the enclosed documents.

The merits

[29] As advised, Mr V was dismissed for serious misconduct involving a breach of the company's Alcohol and other Drugs policy after he returned a positive test for cannabis and following a full and fair investigation in which Mr V acknowledged his daily use of cannabis for an extended period and his subsequent attendance at work after his use.

[30] That justification is to be assessed in terms of the statutory test of justification prescribed at section 103A of the Act:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 the dismissal or action occurred.

[31] There was never any doubt that Mr V was a regular user of cannabis. He used it daily. He explained he used it to relieve him of emotional discomfort over the previous year particularly around nursing his very ill mother. I find that Mr V as soon

as he met Dr Powell disclosed that he had been using cannabis on a regular basis for some years in the evenings. He said he did not believe that it would impair his ability to work safely. He conceded he had a problem and said he believed he could stay clean on a permanent basis. This was always the situation put before Air New Zealand.

[32] By his submissions, Mr V's challenge of his dismissal is framed principally as an issue of impairment. I understand him to be essentially arguing his dismissal was unjustifiable because he was not impaired. It is submitted that at no time had Mr Ward considered Mr V to have been impaired or under the influence of drugs at work. It is also submitted that Mr Moyes who worked with Mr V on a daily basis, never had any concern about Mr V's fitness for work. It is submitted further that this must also have been the same perception by Mr V's other work colleagues given their support of him by the petition.

[33] Mr V submits the issue for determination is this. That he believed he had not been impaired at work from his recreational use of cannabis. It is said that he may have been mistaken about that but if so it was a genuine mistake, and the random drugs test did not show he was actually impaired "although it is recognised by the Court as indicating that impairment was possible". His position amounts to this "I am not drug free but I am ok to work". Mr V tells the Authority he did not think his conduct would lead to his dismissal.

[34] Air New Zealand responds that it is not for Mr V to assess himself as not impaired. It is simply enough that he was in breach of policy because he was not drug free while he was at work. It is argued that "there can be no doubt that in Mr V's circumstances, a fair and reasonable employer would have found turning up for work having recently ingested cannabis, and having done so daily for at least two years, and then achieving a positive test result as high as Mr V's, was serious misconduct".

[35] Air New Zealand implemented an alcohol and other drugs policy in its workplace. That policy is comprehensively set out in its Alcohol and Other Drugs Programme Manual dated 12 December 2005. There is also a brochure of the salient aspects of the policy noted as updated in December 2005. I shall refer to the Alcohol and Other Drugs policy hereafter as "the Policy". The Policy has been the subject of

analysis and comment by the Employment Court.

[36] This is the material aspect of the Policy for present purposes:-

1.1 Alcohol and Other Drugs Policy

Air New Zealand ("The Company") is committed to providing a safe and healthy workplace for all its employees and to ensuring the safety and security of the travelling public.

Employees are required to maintain a zero blood alcohol level and remain drug free at all times while at work. This includes the requirement for employees to be free from the negative effects of legal drugs.

Employees must not attend work, under any circumstances, under the influence of alcohol or any drugs because(sic) this will:

- *Affect the employee's ability to work in a completely safe manner.*
- *Affect the physical or psychological state of the employee such that there is a risk of unsafe work practices which might result in harm to themselves or to other employees or other persons, including members of the general public.*

I have added the emphasis. I find the effect of the Policy is in practical terms a direction to all employees to remain drug free while at work.

[37] In the meeting on 24 October 2006, Mr V confirmed he had been provided information about the Policy at the time it was introduced. He confirmed he was fully aware of the Policy. He confirmed he understood the Policy had been introduced to ensure the safety of all staff and passengers of Air New Zealand. He said he had read and fully understood the Policy. Significantly in my view, he confirmed he was aware that employees must not attend work under any circumstances while under the influence of alcohol or drugs and that this was for safety reasons. He was asked to confirm that he was aware of the requirement under the Policy for all employees to maintain a zero blood alcohol level and remain drug free at all times while at work. He confirmed too that the area he worked in was a safety sensitive role. He also confirmed he was aware of the provisions around random drug testing.

[38] He disclosed in this same session that he had been using cannabis continuously for the last two years but "off and on all [his] adult life". Following the random test he had ceased using cannabis. He explained:-

My health is better, my eyes are clearer, my lungs have improved in terms of getting more air, it has been very easy to give up. I have been asked that if I get terminated will I go back to smoking and I have said no because I feel so much healthier. I have not had a smoke since I was tested and I will not start up again.

[39] Mr V was asked to explain why he continued to "smoke" with the introduction of the Policy. He was asked whether there were issues outside of work that were causing him to feel stressed. He explained that he had a very ill mother who he looked after. I understand his mother has Parkinson's disease.

[40] Mr V gives this very candid evidence to the Authority:-

I was aware that Air New Zealand had introduced a drug and alcohol policy and that there were booklets and pamphlets issued regarding this. I recall receiving a pamphlet which I read at the time. I was aware that there was a possibility of being selected at random to undergo a drug test. I believed that if I were to fail a test then I would need to discuss my situation with the Company and I may, at that time, need to stop using cannabis in order to continue my employment. Because I believed that I was not jeopardising my own safety or any of my colleagues' safety, I did not see any need to stop using cannabis unless that situation arose. I found it beneficial and considered it was harmless.

[41] Mr Ward tells the Authority that after receiving the responses from the medical professionals, he considered that there was the potential for impairment and an increased risk of serious harm to the affected employee and others, that the usage identified an increased risk in cognitive impairment and that the medical opinion was that Mr V was not then fit to return to a safety sensitive role.

[42] Mr Moyes did a very admirable job representing and supporting Mr V throughout the investigation and in particular, at the meeting held on 17 November 2006 after Mr Ward advised the outcome of Air New Zealand's investigation that Mr V's actions comprised serious misconduct.

[43] I mean no disrespect when I say that Mr V's principal argument is simplistic. In assessing the merits I extrapolate further issues from it. It must be that Mr V contends that notwithstanding his positive test, he was not impaired or incapable of performing his work and therefore his conduct was not misconduct. His argument suggests that a mere positive test without more is not of itself serious misconduct.

[44] Dr Powell tells the Authority critics of drug test results, including those for

cannabis metabolites, claim that positive test results cannot positively demonstrate impairment. Dr Powell says that strictly speaking, that is likely to be correct and, more accurately, what a positive result for the presence of cannabis metabolites does demonstrate is a relative likelihood of impairment. Dr Powell further informs the Authority that studies have demonstrated as little as one marijuana cigarette can impair performance for 24 hours after ingestion. Other studies have also demonstrated effects lasting as long as two days after smoking marijuana at slightly higher usage or potency.

[45] As concerns Mr V, Dr Powell gives his opinion to the Authority that Mr V would have been experiencing a level of impairment when he commenced work at 4.00am. As well, he says that his assessment would be that with nightly use there is good evidence Mr V was measurably impaired for a long period of time. Chronic or regular use does not provide protection against cognitive impairment and if anything, can result in an increased level of risk.

[46] I rather consider the contended argument for Mr V about no evidence of impairment misses the point. Mr Thompson makes the same submission. The policy is not that Mr V remain unimpaired, rather, it requires him to remain drug free at all times while at work. These are different issues.

[47] While Mr V argues that he was not impaired and if he was mistaken in that assessment he was genuinely mistaken, I do not accept this is the issue. Firstly, it is not for an employee to assess their level of impairment, for an impaired person is not competent to do so. But most significantly, the implemented policy is not focused on impairment, but rather and necessarily in my view, on remaining drug free.

[48] I agree that a mere positive test is not of itself serious misconduct. Nor does it mean that dismissal is automatic. Air New Zealand does not dismiss in all instances. The Policy itself at page 3.1.96 confirms that the investigation into the positive result could result in a finding of either misconduct or serious misconduct. Was Mr V's conduct serious misconduct? Conduct which justifies summary termination must be repudiatory in nature and go to the very heart of the relationship of confidence and trust. What is required is an assessment of the positive test in the context of all the attendant circumstances. I proceed to do that now.

[49] On the question of what will constitute serious misconduct, the Court of Appeal in *North Island Wholesale Groceries v Hewin*¹ has earlier said:-

Regard must be had to the nature and degree of the alleged misbehaviour and so to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment, the Court must weigh the question of conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response behaviour must go to the heart or root of the contract between them.”

[50] I find persuasive the legal principles set out in *Click Clack International Ltd v James*². The Employment Court in that decision adopted the observations of the Court of Appeal in *BP Oil NZ Ltd v Northern Distribution Workers Union*³ where Hardie Boys J said:-

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court’s judgment in BP Oil Ltd v Northern Distribution Workers Union [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances. (See also Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd [1990] 3 NZLR 549, 555.)

[51] Palmer J in *Click Clack* accepted a submission he said had compelling force, that while motive and intention on the part of the employee may be important factors in deciding serious misconduct, they are not conclusive of the matter. The essential issue is whether the actions may have undermined the necessary trust and confidence of the employer in the employee. The employee’s actions may be entirely well-intentioned. His Honour found equally compelling the submission that the nature of serious misconduct is that it is conduct which undermines the trust and confidence essential for the employment relationship to continue.

[52] I am guided by the above statements of legal principle in determining whether Mr V’s conduct constitutes serious misconduct.

¹ [1982] 2 NZLR 176 (CA)

² [1994] 1 ERNZ 15

³ [1992] 3 ERNZ 483 at page 487 (CA)

[53] I agree that Mr V's positive random test result constituted a breach of the policy. The policy **required** him to remain drug free at all times while at work. The test established he was not drug free. That was contrary to the policy and consequently in breach of the terms of his employment and in breach of his contractual obligations.

[54] Mr Ward gives evidence he gave consideration to these issues:-

- (i) Mr V's clear level of knowledge and awareness of Air New Zealand's policy concerning alcohol and drugs and the requirements of an employee to remain drug free at all times while at work;
- (ii) The level of risk that Mr V had chosen to place himself and others in as a result of his drug use;
- (iii) The extent and nature of Mr V's drug use and also the level of the positive drug test, which was about six hours after he had commenced work;
- (iv) The continuing lack of recognition by Mr V that his actions may have impacted on his ability to perform his job safely;
- (v) Mr V's failure to seek any assistance from Air New Zealand over a very lengthy period of time when those opportunities were clearly available to him.

[55] With the exception of (iv) above, I am satisfied that the other considerations were valid and appropriate. Mr Ward concluded that taking into account these considerations, that Mr V's actions constituted serious misconduct.

[56] It would be wrong to conclude that Mr V's positive test result on its own constituted serious misconduct. As a matter of fact and degree, it is his failure to remain drug free as he was obliged to do, on the day of the random test but more than that, on his own admission of sustained repeated failure to remain drug free over a prolonged period and carrying out a safety sensitive role that caused Air New Zealand to seriously doubt Mr V's faithful service. It was entitled to take the view his conduct

compromised the relationship of confidence it held in him.

[57] Having regard to the mandatory nature of the Policy requiring Mr V to remain drug free at all times and the contractual binding nature of this directive, Mr V's acceptance of the Policy, his admitted particular conduct and his admission of sustained repeated identical conduct in breach of the Policy, and the fact his role was a safety sensitive one, I find his conduct resulting in the positive random drugs test on 28 September 2006, constituted serious misconduct. **Considering matters objectively, I find the conclusion of serious misconduct by Air New Zealand was a finding that a fair and reasonable employer would have made.**

[58] I now consider, notwithstanding the finding of serious misconduct, whether summary dismissal was a decision a fair and reasonable employer would have made in all the circumstances. Air New Zealand understands and so do I, that this is the essential issue pursued by Mr V - that it is Air New Zealand's decision to dismiss rather than follow a different path that is challenged.

[59] Mr V was an employee of long standing with some seventeen years service with Air New Zealand. That evidences his faithful preceding service with his employer.

[60] At Part 3 of the Policy there are procedures. 3.4.5 deals with First positive tests as this was for Mr V. The relevant procedure in Mr V's case is set out on page 3.1.95. I regard this process as a code. The first phase concerns the medical review after a verified first positive test. The second phase details the manager's involvement. That phase is this:-

What does the employee's manager do after the employee has had a medical review?

- The manager and the MRO will discuss the significance of the positive test result.

- The manager may seek advice from the relevant HR Manager or his/her General Manager or Group General Manager about the management of an employee who has a first positive test result.

- The manager will:

▪ *Advise the employee that their behaviour has increased the risks of workplace incidents/accidents and injuries to themselves, their colleagues and the general public.*

▪ *Give the employee a copy of the Air New Zealand Alcohol and Other Drugs policy.*

- *Advise the employee that the Company may initiate an investigation of the positive result depending upon the circumstances of the testing. Any investigation will sensitively take into account contributing factors and whether there was self disclosure of alcohol or drug use, abuse or dependence, specifically prior to random testing. Such an investigation could result in a finding of misconduct, or serious misconduct.*
- *Following the outcome of an investigation, in the event that the employee's employment is not terminated, a range of options may be considered. These may include the Company attempting to find suitable alternative employment in a Non-Safety Sensitive role, depending upon availability.*
- *Advise the employee that, if recommended by the MRO, he/she may be required to undertake random breath and/or urine testing for up to 24 months from the time the first subsequent negative test result was obtained.*
- *Consider allowing the employee to return to work in a Safety Sensitive roles on a case by case basis. The manager will take into account further advice from a MRO and the assessed risks associated with the employee returning to work in a Safety Sensitive roles.*

What are the options for rehabilitation following a first positive test?

- Rehabilitation management for an employee after a first positive test is outlined in the 3.1.3 Rehabilitation procedure. A Rehabilitation Agreement may be established between the Company and the employee following a recommendation from a MRO, if employment is not terminated following an investigation.

[61] Part 3.1.3 deals with Rehabilitation. At page 3.1.9 of the policy there is this provision:-

When may a Rehabilitation Agreement be offered?

- *MROs will provide an opinion to the Company about appropriate rehabilitation for an employee following:-*
 - *Self referral*
 - *Structured intervention*
 - *An assessment when an employee has had a positive alcohol or other drugs test*
 - *Advice of an assessor or rehabilitation provider that an employee has alcohol or other drug abuse or dependency*
- *MROs may seek an opinion from an expert alcohol and other drug assessor, as well as from the employee's treating doctor with the written consent of the employee.*
- *The offer of a Rehabilitation Agreement to an employee will be at the discretion of the Company. The decision to offer the employee an agreement will be made after considering the circumstances of the discovery of alcohol or other drug use by the employee, the opinion from an MRO or Chief Medical Officer, and the outcome of any Company investigation.*

[62] While Air New Zealand relies on a breach of the Policy in justification of Mr V's dismissal, it too must demonstrate compliance with its own Policy.

[63] I expressed to these parties my concern that the very comprehensive policy did not contain any reference or caveat in relation to what is the detection of criminal

conduct in respect of illicit drug use. The policy sets out quite prescriptive procedures but it does not on my reading contain any reference to the prospect of criminal sanctions. I apprehended the lawyers likely considered my concern merely peripheral. It is conceivable that an employee resolute to provide full co-operation and wholly desirous of rehabilitation rather than dismissal, runs the risk of making full and no doubt earnest admissions without appreciating the peril of other purposes. I accept the authorities suggest such a risk must be real and appreciable. But I am not convinced Air New Zealand could resist intervention by the authorities. The lawyers being unconcerned, I say no more about the matter.

[64] I do say however, that I am inclined to consider this is the very position Mr V found himself in. I mean by that that he preferred rehabilitation over termination and I find that he did in fact conduct himself with that preference in mind by being open, candid and upfront with his employer about his private conduct. This candour is corroborated by Dr Powell's evidence and in particular his email of 10 October 2006 where he reports Mr V "had been very open and co-operative at every stage". So too does Mr Green report that Mr V's manner was "appropriate to the occasion" and he "was quite candid about his use of cannabis". On 20 October 2006 Dr Powell writes that Mr V "one again, I believe he has been open and honest". I read the Minutes of the meetings of 24 October 2006 and 26 October 2006 as evidencing the same openness. Mr V told me he cooperated with company policy and he wanted to keep things out in the open because it was better for him and the company to proceed that way.

[65] I accept that Mr V believed that he was participating in a process directed towards rehabilitation as opposed to dismissal as from his first contact with Dr Powell. He was entitled to have Air New Zealand sensitively take into account contributing factors to his misconduct.

[66] Having concluded serious misconduct, Air New Zealand then considered whether disciplinary action was appropriate or whether a rehabilitation programme was appropriate or a combination of both. Rehabilitation is a prominent feature of the Policy and Air New Zealand's employees are entitled to interpret the Policy as providing rehabilitation as a legitimate outcome. Indeed rehabilitation is far more a feature than summary dismissal. Dismissal and rehabilitation are obviously mutually

exclusive. But the scope for rehabilitation demonstrates that a positive test result for drugs or alcohol does not render dismissal automatic. The Authority is advised some 11 Air New Zealand employees have been referred to rehabilitation. Air New Zealand does not dismiss automatically.

[67] I consider that Dr Powell's referral of Mr V to Mr Green was permitted as a reference for specialist assessment to assist in determining the significance of the positive test result. But the MRO is obliged I say because the word "will" is used, to provide the manager with an opinion about the significance of the test result.

[68] Notwithstanding Mr Green's report, Dr Powell wrote to Mr Ward by email on 20 October 2006 (when he received the report) and stated this:-

...
Myself, I am unsure whether he is chemically dependent and I believe that only time will test. I do note that he appears to be in a positive frame of mind and well-motivated.
...

[69] Mr V did not agree with Mr Green's assessment about his being chemically dependency. In the meeting held on 26 October 2006 Mr V said:-

If you read the report it makes me sound like an alcoholic and I passed the test for alcohol and I do not understand why there is so much in there on drinking. The only depending I think I have on drinking is maybe in a social situation when I go and might feel I need to loosen up. I also acknowledge that my drinking may increase with me stopping smoking but that is another reason why I need to understand why I needed to smoke every day so that I can make sure that does not happen. I can not predict the future - no one can but I am aware it is a possibility and I am not disputing that. I know my own head and I am definitely not going to start smoking again.

[70] Mr Moyes said he and Mr V could not understand why so much focus had been placed on the alcohol assessment when Mr V had not tested positive for any alcohol and that the issue was only about cannabis.

[71] The employer's medical professionals were asked to provide assistance in the form of answers to discrete questions. On the matter of rehabilitation as to the nature of it but not the appropriateness or otherwise of it Dr Souter and Dr Powell jointly said this:-

As part of the medical investigation that took place in relation to the positive result. [Mr V] was assessed by two Air NZ Medical Review Officers, and an independent Chemical Dependency Councillor. The results of this assessment were that a rehabilitation program was recommended to treat chemical dependency, which requires abstinence from all mood altering substances.

[72] So while Dr Powell was on 20 October 2006 unsure whether Mr V was chemically dependent, by 3 November 2006 he was jointly more certain that Mr V was. The revised view is not explained to my satisfaction. The advice was material because Mr Ward had regard to it when he was deciding Mr V's fate.

[73] Mr Ward gives evidence that at the meeting held on 26 October 2006 he had a particular concern about Mr V's "unwillingness ... to accept that there was a problem of any concern and/or non-acceptance by [him] that his own actions put himself and others at risk". In addition, he also says in relation to recommendations for assistance from external counsellors, that while Mr V said he would follow this up, he "did not believe this was a result of any acceptance on [Mr V]'s part that he needed to do so but instead that this was part of a process he should agree to in order to protect his employment". Mr Ward does not persuade me of any foundation for his views. It is obvious of course that Mr V would wish to preserve his employment. I consider Mr Ward's views are unreasonably held.

[74] I contrast Mr Ward's now expressed views with those actually expressed in the session as apparent from the record. At the conclusion of that very same meeting, Ms Gibbons made a point of acknowledging how co-operative and honest Mr V had been during the investigation and he was thanked for his attitude during the process. This I regard as corroborative of my view that there is no foundation for Mr Ward's adverse view of Mr V.

[75] Mr Ward concluded that a rehabilitation programme was not appropriate for Mr V. He gives these reasons for that decision:-

- (i) He did not believe that Mr V genuinely believed in the need for a rehabilitation programme. He says that Mr V was instead signalling a willingness to participate in it for the purpose of saving his employment;

(ii) He was of the view that Mr V refused to accept that anything he had done had put himself or others at any level of increased risk;

(iii) He considered the risk that Mr V had exposed himself and others and the business to had gone on for a sustained period of time and Mr V's positive test result was more than a "slight" positive;

(iv) He considered Mr V had every opportunity prior to selection for random testing to disclose an issue to Mr Ward or to Air New Zealand's medical team but he had chosen not to. He says in other words Mr V was only signalling a preparedness to involve himself in a rehabilitation programme after Air New Zealand itself had discovered the issue;

(v) He relied on the medical advice Mr V was not fit to return to work in any event and that there was no non safety sensitive roles available or appropriate for Mr V;

(vi) He concluded Mr V was not prepared to give up alcohol use, despite the medical team statement this would have been a requirement. He also referred to Mr V's own view that he did not believe it appropriate to give up his use of alcohol.

[76] I accept that Mr Ward was entitled to consider the risk that Mr V had exposed himself, others and the business to, had gone on for a sustained period of time and Mr V's positive test result was more than a "slight" positive. So too I accept that Mr V had every opportunity to self-disclose prior to being detected.

[77] But I do not accept that there is any foundation for Mr Ward's view that Mr V did not genuinely believe in the need for a rehabilitation programme. As well, if this was Mr Ward's view, he never put this to Mr V for Mr V to offer a response. Mr Ward acknowledged this when questioned. It was not fair to Mr V.

[78] I do not understand Mr V ever explicitly expressing a view he did not accept that anything he had done had put himself or others at any level of increased risk. More than that I do not appreciate any refusal by him to accept the same. I accept he

did not offer any express statement that he had put himself or others at any level of increased risk, which is how Mr Ward explains the matter, but that is as high as I can put it. Holding these views, Mr Ward did not put them to Mr V for respond to. Mr Ward also acknowledged this when questioned. It was not fair to Mr V either.

[79] It is true that Mr Ward relied on the medical professional's advice. Dr Powell gives evidence to the Authority that it was reasonably clear to him that Mr V's willingness to participate in ongoing monitoring or rehabilitation programme was not because he saw any need for this to occur but that it would satisfy his manager and make it more likely that he could save his employment. This view is apparently based on Mr V's maintained view that despite his drug use he was not impaired and that if Air New Zealand required it, he would be prepared to submit himself to further monitoring and/or rehabilitation. I do not appreciate Dr Powell expressing this view prior to the Authority's investigation. I do not discern the view from any of his written correspondence. I do not appreciate Mr V was insincere. I remain unconvinced of it. Dr Powell tells me he doubts whether he specifically communicated his unfavourable views of Mr V to Mr V. But Dr Powell did communicate his view after 3 November, as his opinion to Mr Ward. Mr Ward relied on that professional opinion. As I have said, he did not raise the matter with Mr V either.

[80] The policy on rehabilitation does not specify any pre-requisite for a non safety sensitive role being available. It was wrong to rely on this ground.

[81] It ought to be apparent now that the discussion with Mr V about rehabilitation was deficient. Seriously so. This is what the notes of the final meeting held on 20 November 2006 say of the matter after Mr V was informed of Air New Zealand's decision to summarily dismiss him:-

Mr V *When does rehabilitation get considered? Why was this not considered?*

MG *It was considered as one of the options. We had to take things into consideration such as whether you were deemed medically fit to come back to work, the safety sensitive environment and role that you worked it(sic), was there other work for you to be able to do if not deemed fit to work in that role while going through rehabilitation. At the end of the day all these things were considered by John before he decided termination of employment was the outcome.*

[82] This excerpt is corroborative of my view Air New Zealand's enquiry as to

whether Mr V was an appropriate candidate for rehabilitation was deficient. Ms Gibbons advice is to be contrasted with what she told Mr V at the meeting on 26 October 2006:-

There are a range of options for the coming(sic) to consider as an outcome and all the information needs to be taken into account. Whether [Mr V] is terminated or not, the company will also look at what options are available in terms of offering [Mr V] ongoing help to support him to remain drug free. Also of concern is how to help [Mr V] manage stress so that should he find himself in stressful situations inside or outside of the work environment in the future that he will not turn to drugs and that he does not find himself in a similar situation.

[83] Mr V should as a matter of fairness had the opportunity to respond to Mr Ward's and Dr Powell's undisclosed adverse views. So too he ought to have had the opportunity to challenge with Mr Green those matters he considered Mr Green had misunderstood. He is critical of Mr Green's report in terms of a failure to distinguish between youthful experiences some twenty or more years ago and Mr V's current behaviour.

[84] Unfortunately there was no discussion with Mr V about the things Mr Ward had advisedly considered. I have outlined them above. Principally however, there was no discussion with Mr V at the critical point about his alcohol use. This aspect of matters was significant for Dr Powell. He says he could not have supported a rehabilitation programme on the basis there would have been little value in it if Mr V would not accept the need to stop drinking also. This significant issue ought to have been put to Mr V for him to deal with. It was not and that was unfair to Mr V.

[85] Mr V also submits that he had stopped using cannabis and there is no evidence that this was not accepted by Air New Zealand. Mr V had committed to remaining cannabis free and to taking part in monitoring. Mr Ward did not act on Mr Green's advice that Mr V be referred to a counsellor to develop a rehabilitation plan.

[86] I am satisfied too that Air New Zealand did not give proper consideration to other alternatives to rehabilitation such as for example standing Mr V down for a period of time.

[87] I conclude Mr V was not treated sensitively in respect of whether he was a worthy candidate for rehabilitation rather than summary dismissal. These failures are

not minor or mere technicalities. Having ventured down the path of a consideration of rehabilitation and by virtue of the Policy's clear indication of rehabilitation as an outcome, Air New Zealand was obliged to conduct as rigorous an assessment of Mr V's prospects for rehabilitation as it was in relation to whether he had committed serious misconduct. It was obliged to do so by virtue of the duty of good faith it owed as well against the backdrop of his seventeen years of faithful and apparently unblemished previous service.

[88] So I find that Air New Zealand gave consideration to rehabilitation but drew conclusions adverse to Mr V as to his suitability for it. It never involved him in the assessment. It never advised him of its adverse views of him and it never provided him an opportunity to address those adverse views. That was a breach of natural justice and of the duty of good faith. Its adverse conclusions led it to consider rehabilitation was inappropriate for Mr V and so his termination was somewhat inevitable as a result. While it involved him in its investigation of whether his conduct amounted to serious misconduct, it failed to involve him in its assessment of what action it should take about his serious misconduct. That was all unfair to Mr V.

[89] It is argued for Mr V that he has been treated disparately. Mr V's situation is very different, involving a clear and sustained breach of the Policy that he remain drug free at all times. I therefore reject the arguments made on Mr V's behalf in this regard.

The determination

[90] Accordingly, considering matters objectively, I find that Air New Zealand's actions and how it acted in deciding that that Mr V was not a suitable candidate for rehabilitation and thereby avoiding dismissal, were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. **I therefore find Mr V's summary termination was unjustifiable. He has a personal grievance for unjustifiable dismissal.**

[91] Nothing in this finding is to be taken to condone illicit drug use by an employee nor is it to be regarded as minimising Air New Zealand's entirely appropriate and proper concerns for the safety of its operations.

The resolution

[92] Mr V is entitled to formal orders by way of resolution of the personal grievance I have found. Mr V does not seek reinstatement. So what is his loss?

[93] I consider that Mr V lost the chance for rehabilitation. I say chance because it is by no means certain that Air New Zealand would have exercised its discretion in Mr V's favour that way. If he had been offered rehabilitation, he would have continued his employment and maintained his income stream. Mr V now not seeking reinstatement, has lost the income stream. He lost the chance of a continuing income stream because of the unfair decision and the way that Air New Zealand decided he was not suitable for rehabilitation.

[94] So Mr V lost the chance at rehabilitation and consequently the income stream from continuing employment. It is notoriously difficult to value a loss of a chance. Mr V may or may not have countered the adverse views of him that were never disclosed to him. He may have persuaded Mr Green to revise his report. He may have prevailed upon his employer to give him a chance at rehabilitation. I expect he would have been particularly persuasive in rebutting the adverse views of him had he know of them. I assess Mr V's chances of rehabilitation at 75%.

[95] It is accepted that Mr V earned weekly gross wages of \$808.00. He claims lost remuneration from 20 November 2006 until 25 June 2007. That is a period of 32 weeks. Taking into account his earnings in that period from other sources he claims about \$20,000.00 as lost wages.

[96] I am satisfied that Mr V took steps to mitigate his losses by obtaining other income. I also accept he was entitled to hold himself in readiness for reinstatement as he initially sought. But I also accept that eventually Mr V may have left the employment to care for his ill mother. Having regard to these matters, I am prepared to accept that his claim of \$20,000.00 represents his loss of income. I apply my assessment of his chances of succeeding to rehabilitation of 75% to this sum of \$20,000.00. I conclude his loss of earnings is the sum of \$15,000.00. **I order Air New Zealand Limited to pay to Mr V the gross sum of \$15,000.00 as reimbursement.**

[97] I am bound by section 124 of the Act to consider the extent to which Mr V's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[98] I have no doubt that Mr V's actions were seriously blameworthy. His actions require a reduction in the remedies to be awarded to him. I therefore reduce the nature of the remedies to be awarded to him. He shall have the reimbursement I have ordered **but he shall have no orders for compensation or in relation to his superannuation.**

Costs

[99] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms McNally is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Thompson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority