

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 248
3014212

BETWEEN A
 Applicant

A N D N Limited
 Respondent

Member of Authority: Rachel Larmer

Representatives: Scott McKenna, Counsel for Applicant
 Blair Shepherd and Christine Goodspeed, Counsel for
 Respondents

Investigation Meeting: 01 May 2018 at Hamilton

Submissions Received: 04 May 2018 from Applicant
 14 May 2018 from Respondent
 15 May 2018 from Applicant

Date of Determination: 10 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

N Limited's workplace

[1] N Limited owns and operates a farm. Mr and Mrs C are N Limited's directors and they live on the farm with their four children. In addition to the family residence the farm also has two farm cottages on it which N Limited's farm workers use for on-site accommodation.

[2] In 2016 N Limited employed two workers as "Farm Assistants".

[3] As part of their employment, each Farm Assistant lived in their own individual farm cottage on the farm. The farm cottages were defined in the employment agreements as forming part of their workplace.

[4] The first Farm Assistant was the applicant, Ms A, who started work on or about 12 September 2016, when she was 28 years old. The second Farm Assistant, Mr J, started work on or around 26 October 2016, when he was 17 years old.

Relationship between the Farm Assistants

[5] Shortly after Mr J started work for N Limited he and Ms A entered into a romantic relationship. Mr and Mrs C were aware of and supportive of the relationship.

[6] From the outset Ms A and Mr J appeared to have ongoing difficulties in terms of how they related to each other which sometimes adversely impacted on their work for N Limited.

Deterioration in Ms A's and Mr J's relationship

[7] The problems between Ms A and Mr J became more pronounced in January 2017 after Ms A discovered she was pregnant. Mr J denied paternity and accused Ms A of infidelity, which she denied. Ms A identified Mr J as being the father of her second child but Mr J maintained he was not the father.¹

[8] As their relationship deteriorated they each continued to blame the other for inappropriate behaviour. Mr and Mrs C continued trying to support Ms A and Mr J, who would often complain about each other to Mr and Mrs C.

[9] Mr C gave Ms A and Mr J jobs on different parts of the farm in an attempt to reduce the conflict between them. However Ms A and Mr J had to continue milking together twice a day because both farm assistants had to be present for the duration of milking.

[10] On one occasion Ms A walked out of the cowshed when she was supposed to be milking with Mr J. Ms A accepted that she should not have left work early. Ms A's

¹ Mr J still denies paternity. No paternity testing has been done.

explanation for leaving was that she had argued with Mr J so felt she had to get away from him.

[11] Ms A and Mr J each had various grievances against the other. Ms A was angry about Mr J's approach to her pregnancy and related matters. Mr J was angry and upset at the way Ms A treated him and over how Ms A would turn up at his farm accommodation uninvited and unannounced.

[12] The problems came to a head during an incident that occurred on 21 February 2017. Ms A and Mr J each blamed the other for the incident. Regardless of blame, it was clear that the incident was very upsetting to both of them.

Mr J's 21 February allegations of drug use

[13] Shortly after the 21 February 2017 incident, Mr J, who was still upset and crying, called Mr C and asked to meet immediately. Mr J was still distressed when he met Mr C at the cowshed later that evening.² Mr J told Mr C that he (Mr J) wanted to resign because he would not work with Ms A anymore.

[14] Mr C talked Mr J out of resigning. Mr C suggested that Mr J get a trespass order against Ms A to stop her from going to his farm cottage. Mr J subsequently did that and made it clear to Ms A that their romantic relationship was definitely over.

[15] During their conversation in the cowshed Mr J discussed his problems with Ms A. Mr J also told Mr C that since he (Mr J) started work Ms A had smoked cannabis in her farm cottage almost every night and she had also occasionally smoked cannabis during her lunch break then had returned to work.

[16] Mr J admitted he had occasionally had a few puffs of cannabis with Ms A while she was smoking it at her farm cottage after work but that he had never smoked cannabis during the day.

[17] Mr C did not take any notes or make a record of Mr J's disclosure but he (Mr C) did tell Mrs C about it.

² Mr J and Mr C arranged to meet at the cowshed so that Ms A would not know that they had met.

Typed statement alleging drug use

[18] Sometime in the week or so after their cowshed meeting³ Mr C told Mr J that if he stood by his drug use allegations about Ms A then he (Mr J) would have to sign a statement saying that. Mr J agreed to do so.

[19] Mr J then went to Mr and Mrs C's family home where Mrs C typed up a note which Mr J then signed. The note stated that Mr J had:

“seen [Ms A] consuming drugs on a regular basis and confirmed that she was using them every day while we were together. Also while she is pregnant. Also having a few puffs during lunch breaks. As you informed us she had smoked drugs before coming down to [Mr and Mrs C] to let them know she was pregnant. I consent to this information and I have told is all correct” (sic)

[20] Mr J's statement did not record that the reference to “*drugs*” was to cannabis. Nor did it record that Mr J had admitted to Mr C on 21 February that he (Mr J) had occasionally smoked cannabis after work in the farm cottages with Ms A.⁴

[21] Mrs C did not ask Mr J any questions about the information in the note. No investigation was undertaken into Mr J's claims about Ms A's drug use.

[22] At some unknown time⁵ someone added the date “*21 February 2017*” to Mr J's typed note. This was added in a different font and pen than Mr J had used to sign the typed note. Everyone agreed that the note was not made on 21 February but was probably made some time in the week following that.

Mr J's witness statement to the Authority

[23] Mr J's written witness statement to the Authority included adverse comments about Ms A, her alleged actions and their relationship. There appeared to be considerable animosity remaining between Ms A and Mr J.

[24] Ms A's lawyer told the Authority that the content of Mr J's witness statement to the Authority was so adverse that he (Ms A's lawyer) decided not to show it to Ms A to save her unnecessary distress, given she believed Mr J was the father of her child.

³ The actual date is not known.

⁴ Mr J has not been drug tested or disciplined by N Limited about his admitted drug use.

⁵ No-one could say when the date had been added to the note or who had added it or why.

[25] This meant while everyone else saw the full contents of Mr J's statement, upon legal advice, Ms A did not. The relevant parts of Mr J's statement were read aloud to Ms A during the investigation meeting so she could respond to them. I am satisfied that Ms A had an opportunity to respond to all of the relevant evidence about her in Mr J's statement.

Drug and alcohol policy in employment agreement

[26] Both Ms A and Mr J were employed under written employment agreements which N Limited had purchased from Federated Farmers. Ms A's individual employment agreement was dated 23 September 2016 and it included at schedule 5 a "drug and alcohol policy" which Ms A signed.

[27] The drug and alcohol policy designated N Limited's farm as a safety sensitive area and made it clear that attending work, which included being in the farm cottages, under the influence would not be tolerated.

[28] The drug and alcohol policy prevented drug and alcohol use at work because of the health and safety risks it presented. The employment agreement stated that drug use would be viewed as serious misconduct which could result in dismissal.

[29] The drug and alcohol policy identified five circumstances in which an employee could be drug and/or alcohol tested. The material one in Ms A's case is item 2 which related to 'reasonable cause' drug testing. This stated that a drug/alcohol test could be required; "*if there is reasonable cause to suspect an employee's fitness for work is affected by the consumption of alcohol or drugs*".

[30] The drug and alcohol policy stated "*when we initiate testing it shall be in accordance with a drug and alcohol and testing policy (which may be introduced by us at any time) or according to the testing policy of an independent agency engaged to carry out the testing*".

[31] The drug and alcohol policy also stated that an employee could be disciplined if they exhibited signs of drug/alcohol impairment and there was reasonable cause to believe that the employee's impaired behaviour was due to drug and/or alcohol use.

[32] The drug and alcohol policy set out sixteen symptoms of potential drug and/or alcohol impairment. It also noted that the employer needed to consider whether the

symptoms of impairment could also be related to something else, such as a medical condition.

09 March – information request from Ms A’s lawyer

[33] On 09 March 2017 Ms A’s then lawyer (not Mr McKenna) wrote to N Limited and asked for her wage and time records and “*a copy of any information*” N Limited had about Ms A’s employment.

[34] Mrs C was taken aback by this request because she felt Ms A should have approached her (Mrs C) first before instructing a lawyer. Ms A’s information request and Mr J’s drug use allegations lead Mrs C to approach Federated Farmers for advice. She specifically asked about how N Limited could drug test Ms A.

Federated Farmers’ advice about drug testing Ms A

[35] Mrs C was not sure what date she first contacted Federated Farmers but she said she recalled the advice she was given.

[36] Mrs C said Federated Farmers told her N Limited could;

- (a) offer Ms A the Federated Farmers’ standard “*workplace drug and alcohol testing policy*” (the testing policy); and
- (b) give her 24 hours to consider the testing policy, then drug test Ms A under it; or
- (c) ask Ms A to undergo a drug test by an external testing provider, using that agency’s testing policy.

[37] Mrs C purchased the Federated Farmers testing policy for \$100 but to save money she only purchased one copy of the testing policy. Federated Farmers prohibited employers from copying its testing policy and instead required an employer to purchase any extra copies of the testing policy to give to its employees.

[38] Mrs C was not told she had to consult Ms A about the testing policy before drug testing Ms A under it. Mrs C said Federated Farmers’ advice lead her to believe that all she had to do was give Ms A 24 hours to read the testing policy before N Limited could use it to drug test Ms A.

Implementation of new testing policy

[39] On 13 March 2017 Mrs C handed Ms A the 45 page testing policy to read overnight. Ms A said she had prior commitments that evening so did not read it.

[40] When Ms A got to work the next day Mrs C asked Ms A for the signed testing policy back. Mrs C also told Ms A that N Limited was going to drug test her using the new testing policy. Ms A handed the testing policy back but said she wanted to get legal advice before she signed it.

[41] N Limited's letter to Ms A on 14 March 2017 stated that it didn't know why she needed legal advice because her employment agreement allowed it to do random drug testing. Ms A was instructed to attend a meeting at 10am on 15 March to sign the testing policy and advised that failure to sign would be serious misconduct.

Ms A's request for copy of testing policy

[42] Ms A asked N Limited to give her a physical copy of its new testing policy so she could give it to her lawyer so she could get legal advice on it. Instead of purchasing another testing policy and giving it to Ms A, Mrs C told Ms A to purchase her own copy of the testing policy from Federated Farmers.

[43] Ms A did not want to spend her own money to buy N Limited's new testing policy so she did not purchase a copy of it from Federated Farmers.

Ms A's lawyer's involvement

[44] Ms A lived and worked on the farm which was an approximately 30-40 minute drive away from her lawyer's office. Ms A said she tried to get legal advice on 14 March 2017 but her lawyer was in Court that day so could not speak with her.

[45] Ms A's lawyer's letter to N Limited on 15 March 2017 asked for a response to his information request from 09 March. He also asked N Limited why it wanted to drug test Ms A.

[46] Ms A's lawyer said it was inappropriate for N Limited to have expected Ms A to have read the new testing policy overnight. He said Ms A hadn't been able to take advice on the testing policy so was reluctant to consent to a drug test before she had been able to do so.

[47] Ms A's lawyer said Ms A had not refused to be drug tested so he suggested that the drug test be done by her own doctor because N Limited's testing policy was not yet in place.

N Limited's response to Ms A's lawyer

[48] N Limited responded to Ms A's lawyer on 15 March 2017. N Limited said it could still drug test Ms A even if she had not signed the new testing policy because she had already agreed to 'reasonable cause' drug testing in her employment agreement.

[49] N Limited said that if Ms A did not want to sign the testing policy then N Limited would get a registered testing agency to come out to the farm and test Ms A using that agency's drug testing policy.⁶

[50] N Limited said it had "*reasonable cause*" to drug test Ms A because of "*behavioural change*" it had noticed since December 2016 which involved;

- Swearing
- Aggression
- Fighting or arguing in the workplace and significant attitude change
- Information from a reliable source
- Lack of/short attention span
- Problem with short term memory.

[51] No specific incidents, events or information was disclosed in support of these examples of behavioural change. These behavioural change concerns had not been raised with Ms A at the time they occurred. N Limited failed to disclose that the "*reliable source*" it had referred to was Mr J.

[52] No mention was made of the allegations Mr J had made to Mr C on 21 February or of the note Mr J had signed in the week following his drug use disclosure to Mr C.

⁶ They did that the next day.

Drug test request on 16 March

[53] On the morning of 16 March 2017 Ms A advised Mr C that she had suffered an injury at work after a horizontal pipe in the cowshed fell on her wrist.

[54] Shortly after Ms A's hand injury occurred a representative from Resultz Group New Zealand Limited (Resultz) turned up at the farm to conduct an onsite urine drug test on her.

[55] Ms A was permitted to speak with her lawyer by telephone before she gave her consent to the drug test. Ms A then reported back to Mrs C and the Resultz tester that her (Ms A's) lawyer had advised her not to consent to the drug test.

[56] Mrs C and the Resultz tester both informed Ms A that her failure to consent to the drug test would be serious misconduct which could result in her dismissal.

[57] Despite those warnings Ms A still refused to give her consent. She also asked Resultz to record on the testing form that her (Ms A's) consent had been withheld based on her lawyer's advice.

[58] After Ms A refused to consent to the drug test Mrs C sent Ms A home on the grounds her refusal to be drug tested presented an acceptable health and safety risk in the workplace.

Disciplinary letter

[59] On 17 March 2017 Mrs C emailed Ms A's lawyer and advised that Ms A's refusal to consent to a drug test the previous day was serious misconduct. Ms A was told to attend a disciplinary meeting on 20 March 2017 which could result in her dismissal.

[60] The disciplinary letter stated "*we are testing for reasonable cause as have noticed concerning behaviour change in the workplace. We requested the drug test to rule out any drugs causing a change.*

- *Mood swings or changes in personality*
- *Erratic, unusual or dangerous behaviour out of character of the employee*
- *Violent behaviour or outbursts of anger/aggression".*

[61] N Limited did not give specific details or information regarding the allegations it made about Ms A's behavioural changes and it failed to disclose the information Mr J had given.

Drug test on 17 March

[62] After receiving the disciplinary letter Ms A went to her doctor on the afternoon of 17 March about her hand injury. Ms A asked her doctor to do a urine drug test on her because her employer had expressed concern that she had been using drugs.

[63] Ms A's doctor did a urine drug test which came back negative for any of the drugs tested. That meant Ms A was recorded as having "*passed*" her drug test. Ms A's lawyer sent N Limited a copy of her drug test.

[64] N Limited did not accept the validity of this drug test because of the time delay between Ms A being told on 14 March that she would be drug tested and the drug test being done on 17 March. Resultz advised that such a delay would have given Ms A enough time to take steps that undermined the accuracy of the drug test, which was why it was considered an unreliable result.

Involvement of N Limited's lawyer

[65] The 20 March disciplinary meeting was rescheduled to 27 March. However the meeting did not occur because Ms A was unwell and had been unable to arrange a support person. N Limited became concerned that Ms A was trying to delay its process so it instructed its own lawyer.

[66] N Limited's lawyer sent Ms A's lawyer a copy of the testing policy on 28 March 2017. There is some confusion over whether or not this was the first time Ms A's lawyer received a physical copy of the testing policy.⁷

[67] Ms A currently has a different lawyer who did not know whether or not the emailed testing policy on 28 March was the first time Ms A's original lawyer (Mr Scott) had seen the testing policy.

⁷ Ms A's mother thought she had dropped a copy of the testing policy to Ms A's lawyer but was unclear as to when that occurred.

[68] N Limited's lawyer's letter of 28 March 2017 stated that Ms A's failure to consent to the drug test by Resultz "*constituted serious misconduct*" and she was instructed to attend a disciplinary meeting 03 April 2017.

[69] N Limited's lawyer's also advised Ms A's lawyer that N Limited had no further information about Ms A other than what had been disclosed. That was incorrect because N Limited had still not disclosed the information it had received from Mr J.

Information subsequently provided by N Limited

[70] On 31 March 2017 Ms A's lawyer reiterated (among other concerns) his requests for disclosure of all relevant information about the basis for Ms A's 'reasonable cause' drug test.

[71] N Limited's lawyers responded on 03 April 2017 saying it had reasonable cause for drug testing Ms A and had complied with its obligations because it had:

- (a) Received a verbal report from another employee that Ms A was acting in a way that suggested she was under the influence and which caused concern;
- (b) Undertaken a fair and reasonable investigation that did not require an interview of Ms A;
- (c) Informed Ms A that her behaviour was inconsistent with its policies, practices and disciplinary procedures but there was no requirement that it ask Ms A if she had taken drugs and therefore no requirement to consider any response she may have given;
- (d) Sufficient reason to test Ms A which was why she was required to undergo a drug test, which she had refused to do.

[72] N Limited stated that the information it received about Ms A's behaviour was given on a confidential basis so the identity of the person who had given it was irrelevant. The content of the 'confidential' information was not disclosed.

Ms A's further information request

[73] Ms A's lawyer responded asking when, where and who advised Ms A that her behaviour was inconsistent with N Limited's policies, practices and disciplinary procedures as per clause 6.2.3 of the testing policy because Ms A said no such concerns had been raised with her.

[74] Ms A's lawyer also asked who had undertaken the investigation into Ms A's behaviour and what information had been provided to Ms A about the concerns that had been expressed to N Limited about her. Ms A's lawyer reiterated his previous requests for disclosure of all relevant information.

N Limited's response to concerns raised by Ms A's lawyer

[75] N Limited's lawyers responded on 07 April 2017. They stated that the reason for the drug test was that Ms A had been seen acting in a manner which suggested she may have been under the influence of drugs. Further details of that were not provided.

[76] N Limited wanted to hold a disciplinary meeting with Ms A to discuss her refusal to consent to the drug test on 16 March. However Ms A refused to meet with N Limited while she was off work on ACC due to her hand injury on the morning of 16 March.

Written questions from N Limited

[77] N Limited was frustrated that Ms A's would not agree to meet with it while she was on ACC.

[78] N Limited wanted to conclude its disciplinary process so it suggested that Ms A responded to its written questions instead of attending a disciplinary meeting. Ms A agreed, so on 21 March 2017 N Limited posed eight written questions to Ms A via her lawyer.

Ms A's response to N Limited's questions

[79] Ms A's lawyer responded on 04 May 2017. He restated his concerns about the manner in which the testing policy had been introduced. He noted that the 45 page testing policy had not been given to Ms A to retain so she didn't have time to read the

entire policy in depth or to seek advice about it before she had been required to sign it and undergo a drug test.

[80] Ms A's lawyer identified six ways in which he claimed the Resultz's tester's report was inaccurate. He also claimed that N Limited did not follow its own testing policy.

[81] Ms A's lawyer pointed out that Ms A had passed a drug test at her doctor's office the day after she had been asked to undergo a drug test on the farm by N Limited. He also noted that a nurse had been present while Ms A provided her urine sample.

Serious misconduct finding

[82] N Limited concluded that Ms A's written responses did not adequately address its concerns. On 05 May N Limited wrote to Ms A notifying her of its finding of serious misconduct and inviting her to provide her views on the disciplinary sanction. It indicated it was considering summary dismissal.

[83] Ms A's lawyer responded saying a personal grievance claim would be pursued if she was dismissed. He further noted that N Limited had failed to respond to his previous queries and had failed to provide relevant information he had previously requested.

Summary dismissal

[84] In a second letter dated 05 May 2017 N Limited summarily dismissed Ms A for serious misconduct. N Limited told Ms A to leave her farm cottage accommodation by 19 May 2017.

Issues

[85] The following issues are to be determined:

- (i) Was N Limited required to consult Ms A before implementing its new testing policy?
- (ii) If so, did N Limited consult Ms A before implementing its new testing policy?

- (iii) If not, was N Limited entitled to rely on the Resultz policy to drug test Ms A on 16 March 2017?
- (iv) Was N Limited's dismissal of Ms A justified?
- (v) If not, what if any remedies should be awarded?
- (vi) What if any costs should be awarded?

Was N Limited required to consult with Ms A before implementing its new testing policy?

[86] The right to introduce the testing policy and the way it is to be introduced are two separate issues. There is no dispute that N Limited was legally entitled to introduce a testing policy.

[87] N Limited said it could do so without consulting Ms A because her employment agreement allowed it to introduce a testing policy "*at any time*". Ms A said she had to be consulted because the new testing policy would become a binding term and condition of her employment.

[88] Ms A is correct. N Limited did have to consult her about the new testing policy because it would have formed part of her terms and conditions of employment. This is explained below.

Drug & alcohol policy is contractual term

[89] It is important to recognise that the "Drug and Alcohol Policy" (the D&A policy) is different and separate from the "Workplace Drug and Alcohol Testing Policy" (which has been referred to in this determination as the "testing policy").

[90] The D&A policy formed part of the Federated Farmers' standard individual employment agreement template. When entering into an employment relationship parties had the option of deciding whether or not to include the D&A policy as a term and condition of the employment.

[91] If the parties decided to make the D&A policy a contractual term of employment they both then signed the D&A policy in appendix 5 of the employment

agreement. Once it was signed the D&A policy became a contractual term of the employment.

[92] That is what occurred here. The parties agreed to include the D&A policy so once it was signed it then became a contractual term of Ms A's employment.

Use of a drug testing policy

[93] The D&A policy allowed N Limited to do drug testing in principle. However the way in which N Limited was required to actually do its drug testing was governed by a separate testing policy.

[94] N Limited had three options regarding the use of a testing policy. It could;

- (a) Use the testing policy of the independent drug testing agency;
- (b) Use its own drug testing policy - if it already had one in place;
- (c) Introduce a new testing policy before the drug test occurred if it didn't already have its own testing policy in place.

[95] These three testing options meant that N Limited could still do a drug test on an employee even if it didn't already have its own testing policy in place.

[96] If N Limited wanted to introduce its own testing policy it could do so but it had to consult with Ms A about it.

[97] Consultation was required because clause 7 of Ms A's employment agreement said that N Limited's policies, rules, manuals or handbooks were enforceable and binding because they formed part of the employment agreement.

[98] Clause 7 meant that N Limited's testing policy would therefore become a term and condition of Ms A's employment.

[99] The Employment Court in *Maritime Union of NZ Inc v Tolefa and Others*⁸ recognised that good faith obligations in s.4(5) of the Act extended to the intended unilateral introduction of a policy affecting an employee at work.

⁸ EC, 21 December 2017 ARC 34/07.

[100] The new testing policy affected Ms A because it required her to provide a urine sample which she was not already required to do under the existing terms of her employment agreement.

[101] Because the new testing policy was a contractual term that impinged on Ms A's rights, including her right to privacy, N Limited was required to consult with her about it.

[102] The bargaining provisions in the Employment Relations Act 2000 (the Act) also applied to the introduction of the new testing policy because an employer cannot unilaterally impose new contractual terms or variations to an existing employment agreement on an employee.

[103] Section 4(4)(ba) and (bb) of the Act applied the good faith obligations in s.4(1) of the Act to the introduction of N Limited's testing policy. Section s.63A of the Act also applied to the introduction of N Limited's new testing policy because it would become a term and condition of Ms A's employment.

[104] When introducing the new testing policy s.63A(2) of the Act required N Limited to;

- (a) Provide Ms A with a copy of the intended testing policy;
- (b) Advise Ms A of her right to take legal advice;
- (c) Give Ms A a reasonable opportunity to seek advice;
- (d) Consider any issues Ms A raised and respond to them.

Did N Limited consult with Ms A before implementing its new testing policy?

[105] Consultation did not require N Limited to obtain Ms A's agreement to the new testing policy but it did require her to have a good faith opportunity to take advice so she could provide her views and feedback on the testing policy before it became a term of her employment.

[106] The consultation that occurred here was inadequate and failed to meet the good faith requirements under s.4 of the Act or the bargaining requirements under

s.63A of the Act. That is not surprising because N Limited believed consultation was not required.⁹

[107] N Limited failed to meet its consultation obligations because Ms A was not given her physical copy of the testing policy to give to her lawyer to review until 28 March.

[108] Although Ms A was allowed to have the testing policy overnight on the evenings of 13 and 14 March that was insufficient time to enable reasonable consultation to occur because her lawyer was not available outside of normal business hours.

[109] N Limited's actions appeared to be perfunctory in terms of providing Ms A with a copy of the policy and then requiring her to sign it. It presented the testing policy to Ms A as a fait accompli.

[110] N Limited was not open minded in terms of consultation because it did not appear to genuinely consider the issues Ms A raised and it failed to adequately respond to her specific concerns.

[111] N Limited's failure to adequately consult Ms A about the new testing policy meant it was not justified in using it to drug test her on 16 March.

Was N Limited entitled to rely on the Resultz Group's testing policy to drug test Ms A on 16 March 2017?

[112] Mr J's disclosure about Ms A's drug use gave N Limited reasonable cause for drug testing Ms A.

[113] N Limited advised Ms A on 15 March that if she didn't sign the new testing policy she would be drug tested by an independent testing agency in accordance with that agency's testing policy.

[114] Ms A didn't sign the new policy so on 16 March an independent testing agency attended the farm to drug test Ms A, in accordance with what she had been told the day before.

⁹ If Federated Farmers is not already advising its members that they must consult over the introduction of a testing policy that the employer wants to introduce during the employment relationship then it should do so to ensure employers are not misled about the legal obligations on them when they are introducing a new testing policy.

[115] At that point there was no existing testing policy in place. N Limited had tried to implement one but had not been able to do so because of the issues raised by Ms A and her lawyer.

[116] That left N Limited with the option of engaging an independent testing agency to do a drug test in accordance with that agency's testing policy, which is what occurred.

[117] N Limited was not required to consult Ms A about the independent agency's testing policy because testing by an external agency using that agency's testing policy was already a contractual term of Ms A's employment agreement.

[118] It was clear to Ms A that the drug test on 16 March was to be carried out by Resultz under its testing policy, not N Limited's testing policy.

[119] Ms A was also on notice that refusing to consent to the Resultz test using the Resultz testing policy would be serious misconduct. Ms A had an opportunity to take legal advice about her rights regarding the Resultz drug test and she did so by telephone.

[120] N Limited was legally entitled to rely on the Result testing policy to drug test Ms A on 16 March 2017.

Was N Limited's dismissal of Ms A justified?

Justification test

[121] N Limited bears the onus of establishing on the balance of probabilities that its summary dismissal of Ms A for serious misconduct was justified. The serious misconduct Ms A was dismissed for was her refusal to consent to the Resultz drug test on 16 March, which was to be conducted in accordance with the Resultz testing policy.

[122] Ms A's lawyer made a number of criticisms about N Limited's compliance with its own testing policy. However, I do not need to discuss those because Ms A's drug test did not occur under N Limited's testing policy which as at 16 March was not yet in place.

[123] Criticisms of the new testing policy are therefore not relevant to an assessment of N Limited's response to Ms A's refusal to be drug tested under the Resultz testing policy.

[124] Justification is to be assessed in accordance with the justification test in s.103A of the Act. The justification test requires the Authority to objectively assess whether N Limited's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms A was dismissed.¹⁰

[125] There are two elements to the justification test;

- (a) substantive justification which means the employer must genuinely believe on reasonable grounds that serious misconduct occurred;
- (b) procedural justification which means the employer followed a fair and proper process before deciding to dismiss the employee.

Compliance with good faith obligations

[126] Section 4(1A) of the Act required N Limited to give Ms A access to all relevant information and an opportunity to comment on it before she was dismissed. That did not occur.

[127] On 15 March N Limited told Ms A it had information from a "*reliable source*" that supported reasonable cause drug testing of her. On 24 March, facing increasing pressure from Ms A's lawyer, N Limited identified the reliable source as "*another staff member concerned with the change of behaviour.*"

[128] On 03 April 2017 N Limited said it had a "*verbal report from another employee that your client was acting in a way that was suggesting she appeared to be under the influence [...].*" On 07 April 2017 N Limited said Ms A had been "*seen acting in a manner which suggested that she may have been under the influence of drugs*".

[129] However that was not an accurate reflection of Mr J's claims. Mr J had not reported behaviour that suggested drug use, he had reported actual drug use by Ms A.

¹⁰ Section 103A(2) of the Act.

[130] The limited information N Limited disclosed to Ms A about Mr J's allegations and about its concerns regarding "*behavioural changes*" was inadequate to meet its s.4(1A) obligations.

[131] N Limited failed to explain what specific behaviour was of concern, or why, or when the alleged behaviour had occurred, or been reported to N Limited, or the circumstances in which the alleged 'concerns' had been raised by the staff member.

[132] N Limited also failed to provide specific information (such as times, dates, incidents/events) about the potentially drug related behavioural changes in Ms A that it claimed to have observed since December 2016.

[133] Because Ms A had no information about these alleged behavioural changes, due to N Limited's failure to raise these concerns with her at the time they occurred, she was deprived of an opportunity to respond to them.

[134] N Limited breached its s.4(1A) good faith obligations because it inaccurately and misleadingly advised Ms A's lawyer that all relevant information has been disclosed when that had not occurred;

- (a) Mrs C's email of 20 March said Ms A's lawyer had been sent all of the information N Limited had;
- (b) Mrs C's email of 24 March letter stated "*I have no other documents regarding [Ms A]*"
- (c) On 28 March 2017 N Limited wrote to Ms A's lawyer to say it had "*no other information*".

[135] N Limited's submissions that it was not required to disclose Mr J's allegations about Ms A because it was "*confidential information*" in terms of s 4(1B) of the Act does not succeed.

[136] There was no statutory requirement for N Limited to maintain confidentiality of Mr J's disclosure. There was no good reason to maintain the confidentiality of Ms J's disclosures and fairness required that information be disclosed to Ms A so she could respond to it.

[137] Mr J had not asked for confidentiality when making the initial allegations or when he signed the note recording his allegations about Ms A. There was no evidence provided that N Limited had told Mr J that the information he provided about Ms A would be kept confidential so he could not have had a reasonable expectation of confidentiality.

[138] Mr J's disclosure was a significant factor which led to the Resultz drug test and to N Limited's decision to discipline, then dismiss, Ms A for refusing to consent to it. It was therefore misleading and deceptive for N Limited to suggest that there was some other (less serious) basis for the drug test and/or that Mr J's information did not exist.

[139] N Limited's breaches of good faith fundamentally undermined its ability to establish that Ms A's dismissal was procedurally justified.

Compliance with s.103A(3) procedural fairness tests

[140] Section s.103A(3) of the Act sets out four minimum procedural fairness tests an employer is required to meet to ensure a fair and reasonable disciplinary process occurs. N Limited failed to establish on the balance of probabilities that it complied with any of these four procedural fairness tests.

[141] N Limited breached s.103A(3)(a) of the Act because it failed to sufficiently investigate its concerns because it did not put Mr J's information to Ms A. That should have occurred because Mr J's disclosure adversely affected N Limited's view of Ms A's refusal to be drug tested on 16 March.

[142] N Limited breached s.103A(3)(b) of the Act because it failed to raise its concerns that Ms A's refusal to consent to drug test on 16 March was to cover up her alleged regular cannabis use with her before it dismissed her.

[143] N Limited breached s.103A(3)(c) of the Act because it failed to give Ms A a reasonable opportunity to respond to its concerns that she had refused to undergo a drug test on 16 March because she was a regular cannabis user before it dismissed her.

[144] N Limited also failed to give Ms A an opportunity to respond to its view that she had been evasive and had deliberately avoided answering its written disciplinary

questions. That failure deprived Ms A of an opportunity to respond to such concerns before she was dismissed. That was a significant omission.

[145] Ms A was medically cleared to return to work on reduced duties from 01 May. Ms A's written responses to the disciplinary questions were dated 04 May.

[146] N Limited could and should have instructed Ms A to attend a disciplinary meeting to discuss its view that she had been deliberately evasive to ensure there no miscommunication or misunderstanding had arisen from the exchange of written communications.

[147] N Limited breached s.103A(3)(d) of the Act because it failed to genuinely consider Ms A's explanation that her refusal to consent to the 16 March drug test was (in part) due to her belief that she had not been given all relevant information about why N Limited believed it had 'reasonable cause' to drug test her.

[148] N Limited's two letters dated 05 May also both failed to address Ms A's explanation to the disciplinary concerns.

Section 103A(4) – other appropriate factors

[149] N Limited suggested that any process errors should be overlooked due to the urgency of the situation arising from the health and safety issues drug use on the farm created.

[150] Drug use in a farm environment is a very serious matter. It puts not only the drug user at risk but also others around them and potentially also livestock. This determination does not seek to minimise the very real danger drug use presents.

[151] While an employer is required to prevent harm occurring in its workplace, it is also required to treat its employees fairly and reasonably when addressing health and safety concerns at work. It must also adhere to its good faith obligations.

[152] N Limited could and should have suspended Ms A after it received Mr J's allegations on 21 February. N Limited's failure to suspend Ms A until 16 March fundamentally undermined its claims that urgency caused the process defects to occur.

Section 103A(5)

[153] Section 103A(5) of the Act prevents the Authority from finding that Ms A was unjustifiably dismissed solely because of minor process defects that did not result in her being treated unfairly.

[154] The failure by N Limited to comply with its good faith obligations or with any of the four minimum procedural fairness tests in the Act cannot be viewed as minor process errors. They also resulted in Ms A being treated unfairly.

Procedurally unjustified dismissal

[155] The manner in which N Limited conducted its disciplinary investigation, disciplinary process and summary dismissal of Ms A breached good faith and was procedurally unfair. These process errors made N Limited's dismissal of Ms A procedurally unjustified.

Substantive justification

[156] An employer may still have a good reason for dismissing an employee even if the process it used to do so was procedurally unfair. That is the case here.

[157] Mr J's allegations against Ms A gave N Limited reasonable cause under the terms of her employment agreement to drug test her. N Limited also had the contractual right to require Ms A to undergo a drug test by Resultz on 16 March using Resultz's testing policy.

[158] N Limited was therefore legally entitled to exercise its contractual rights in the way it did on 16 March.

[159] Ms A's failure to consent to the Resultz drug test was defined in her employment agreement as serious misconduct. Ms A was also advised that failure to consent to the drug test on 16 March would be treated as serious misconduct.

[160] Ms A had an opportunity to take legal advice before she confirmed her decision not to consent to the drug test.

[161] This is one of those relatively rare situations where I consider that a fair and proper process would not have made any difference to N Limited's decision to drug test Ms A or to discipline, then dismiss her for refusing to consent to the drug test.

[162] The farm was a designated safety sensitive area. Mr J had alleged actual drug use by Ms A so regardless of what Ms A may have had to say about Mr J's allegations, it was fair and reasonable in all the circumstances for N Limited to have drug tested Ms A. Her employment agreement set out the likely consequences of refusing a drug test.

[163] N Limited's conclusion that Ms A had engaged in serious misconduct was therefore a decision that was available to it based on the facts it had at the time that decision was made.

[164] N Limited's decision to summarily dismiss Ms A was also within the range of responses available to a fair and reasonable employer in all the circumstances.

[165] N Limited has therefore discharged its onus of establishing on the balance of probabilities that Ms A's dismissal for refusing the Resultz drug test on 16 March was substantively justified.

Outcome of dismissal grievance

[166] N Limited's dismissal of Ms A for refusing to consent to a drug test on 16 March was substantively justified but procedurally unjustified because of the process errors and breaches of good faith that occurred.

What if any remedies should be awarded?

Mitigation of loss

[167] Because Ms A's dismissal was substantively justified she is unable to recover lost remuneration so the issue of mitigation does not arise.

Lost remuneration

[168] Ms A cannot recover lost remuneration because N Limited had a good reason for dismissing her. Her remedies are therefore limited to distress compensation to recognise the procedural unfairness that occurred.

Distress compensation

[169] Ms A described how it felt to be dismissed and how she had to rely on a benefit while pregnant with her second child. Ms A was evicted from her farm accommodation on two weeks' notice so was forced to relocate to a new home without a job while pregnant. Ms A described how these employment issues adversely impacted on her ability to enjoy her pregnancy.

[170] Ms A also said her prospects of gaining permanent full time employment or employment to immediately replace her lost income were low given she was pregnant and expected to take maternity leave in the near future. It is to her credit that she found short term alternative employment so quickly.

[171] Ms A says she feels she has been left with a gap in her work history, which she will need to explain to all future prospective employers.

[172] Ms A denied drug use while working for N Limited. Ms A said she was accused of drug use at work by her child's father while they were going through an acrimonious break up of their volatile relationship.

[173] Ms A said she was not just accused of using drugs but also of using drugs almost daily while pregnant, which she says unfairly accused her not only of disregard for the law but of disregard for her unborn child's health and well-being.

[174] Ms A says that she felt that Mr and Mrs C assumed that she was dishonest because they did not ask her any questions about her alleged drug use after Mr J's allegations or in relation to the behaviour they say had caused them to be concerned that she was using drugs.

[175] Ms A's lawyer pointed out that Ms A has been subjected to irrelevant and unnecessarily nasty personal attacks by the accusations Mr J made in his witness statement.

[176] N Limited is ordered to pay Ms A \$10,000 under s 123(1)(c)(ii) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her procedural defects that occurred in relation to her dismissal.

Contribution

[177] Having determined that Ms A has a dismissal grievance, s.124 of the Act required the Authority to assess the extent to which Ms A contributed to the situation which gave rise to her grievance.

[178] Contribution denotes blameworthy conduct which is proven on the balance of probabilities.

[179] The allegations that Ms A was a regular cannabis smoker who had also occasionally smoked cannabis during her lunch break then returned to work under the influence of drugs was not proven on the balance of probabilities.

[180] The animosity and relationship issues between Mr J and Ms A and N Limited's failure to appropriately investigate Mr J's allegations meant that Ms A's alleged drug use was not proven to the required standard.

[181] N Limited's claims that Ms A engaged in blameworthy conduct because she failed to engage with it regarding its disciplinary concerns was also not established.

[182] It is clear from the correspondence exchanged between the parties' lawyers that Ms A was engaging via her lawyer by asking for information and identifying her specific concerns. Ms A's lawyer's failure to agree with N Limited's lawyer's position on key issues did not mean Ms A had not engaged appropriately with N Limited.

[183] Ms A did engage in blameworthy conduct by allowing her relationship problems and volatility with Mr J to adversely affect her work. Instead of keeping their relationship separate and outside the workplace both Ms A and Mr J allowed their personal/relationship problems to become workplace problems for N Limited.

[184] That is blameworthy conduct that contributed to the situation that gave rise to Ms A's dismissal grievance so it required a reduction in remedies.

[185] Ms A also unreasonably refused to attend a disciplinary meeting in person while she was on ACC. Ms A had a hand injury and was living on the farm so did not need to drive to a meeting. There is no good reason why she could not have attended a disciplinary meeting in person.

[186] Ms A's failure to attend a disciplinary meeting while on ACC led N Limited to form an adverse view of her, so it can be said to have contributed to the situation that resulted in her dismissal grievance. It was therefore blameworthy conduct that required a reduction in remedies.

[187] Ms A's distress compensation should be reduced to 10% to reflect her blameworthy conduct which contributed to the situation that gave rise to her procedurally unjustified dismissal.

[188] N Limited is ordered to pay Ms A \$9,000 under s.123(1)(c)(i) of the Act (being \$10,000 she was awarded less \$1,000 being the 10% reduction for contribution).

Rent arrears claimed by N Limited

[189] Clause 12.4.2 of Ms A's employment agreement allowed N Limited to deduct \$280 per week from Ms A's salary, being the market value of her farm accommodation, on a weekly basis during any period she was not receiving a wages/salary from it. This covered the period from 24 March¹¹ to 05 May 2017 while Ms A was off work on ACC due to her hand injury.

[190] N Limited is entitled to recover \$1,680 from Ms A under clause 12.4.2 of her employment agreement as rent arrears. That amount should be deducted from the \$9,000 remedies N Limited was ordered to pay Ms A, leaving a total balance payable to Ms A of \$7,320.

Outcome

[191] Although N Limited's dismissal of Ms A was substantively justified on the grounds of serious misconduct, N Limited's disciplinary process was conducted in a manner that was procedurally unjustified.

[192] Ms A is awarded \$10,000 distress compensation in total for the humiliation, loss of dignity and injury to feelings these process defects and disadvantage grievance caused her.

¹¹ That is the date Ms A transitioned from paid sick leave to ACC compensation payments.

[193] Ms A's award of distress compensation is to be reduced by 10% to reflect the contribution she had towards the situation that gave rise to her dismissal and disadvantage grievances.

[194] N Limited is also entitled to recover rent arrears of \$1,680 from Ms A.

[195] After all adjustments have been made, N Limited is ordered to pay Ms A \$7,320 (being \$10,000 distress compensation less \$1,000 being 10% for contribution less \$1,680 rent arrears).

[196] N Limited is order to pay Ms A \$7,320 within 28 days of the date of this determination.

What if any costs should be awarded?

[197] The parties are invited to resolve costs by agreement. If agreement is not reached Ms A has fourteen days within which to file costs submissions with N Limited having fourteen days within which to respond. Ms A may file reply costs submissions within three working days after receiving N Limited's costs submissions.

[198] This timetable will be strictly enforced and any departure from it requires prior written authorisation of the Authority.

[199] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are invited to identify any factors which they say should warrant adjustments being made to the notional starting daily tariff which is currently \$4,500 for the first day of an investigation meeting.

Rachel Larmer
Member of the Employment Relations Authority