IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 195
3118172

	BETWEEN	SHANE CLELAND Applicant
	AND	ATLAS CONCRETE LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Danny Gelb, advocate for the Applicant James Turner, counsel for the Respondent
Investigation Meeting:	3 March 2022 at Auckland
Submissions received:	16 March 2022 from Applicant 1 April 2022 from Respondent
Determination:	12 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Shane Cleland, was dismissed after he tested "non-negative" for cannabis in a random drug test. He raises claims of unjustifiable dismissal, primarily on the ground that the respondent (Atlas) did not comply with its own policies.

[2] Mr Cleland seeks remedies of underpaid wages relating to the reduction of his wages by Atlas during the first Level 4 lockdown; payment for the time he spent suspended without pay; holiday pay on these sums; a penalty for failure to pay holiday pay; compensation for lost wages as a result of his dismissal; compensation for hurt and humiliation; penalties for breach of good faith; interest; and costs.

[3] Atlas takes the view that it is required to dismiss any employees who return a "non-negative" test, and also points to its own policies in support of such a view. It denies that Mr Cleland's dismissal was unjustified, or that he is entitled to any remedies. Atlas raises a counter claim against Mr Cleland for the sum of $1,105.00 which it says is owing to it in respect of course fees.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Cleland, his partner Ms Lesley Crimmins; and Mr Reece Crimmins, as well as Mr Donavan Walker, Mr Greg Stewart, and Mr Shane Coutts for Atlas. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave legal submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

(a) Was Mr Cleland unjustifiably dismissed?

(b) If Atlas's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:

- Lost wages; and
- Compensation under s123(1)(c)(i) of the Act

(c) Is Mr Cleland due any wages relating to the period he was paid a reduced wage, from 24 March down to the date of dismissal;

(d) Is Mr Cleland due any wages for time spent on unpaid suspension;

(e) Should holiday pay be awarded on any unpaid monies;

(f) Should a penalty be awarded for failure to pay holiday pay;

(g) Should a penalty be awarded for breach of good faith;

(h) Should interest be awarded on unpaid monies;

(i) Should Mr Cleland be ordered to pay to Atlas the sum of $1,105; and

Background

[7] Mr Cleland was employed by Atlas as a despatcher, beginning on 8 December 2018. Mr Cleland's employment was uneventful, until the incident that led to the current proceedings.

[8] When New Zealand first entered Level 4 lockdown for the first time[1], Mr Cleland was sent home from work. His pay was reduced to 80%. He states he never agreed to this reduction.

[9] Mr Cleland says that being in lockdown was very stressful, because of both the financial impact on him and the personal impacts with loss of connection with family and friends. He freely admits that, during the lockdown period, he assaulted his partner. He then went to the near-by beach to take a break and calm down, and consumed a small amount of cannabis. He and his partner both gave evidence that this was on Sunday 19 April.

[10] When Mr Cleland returned to work, on 29 April 2020, the entire site was subject to a random drug test. This was described as a "blanket test" of all Atlas employees at all sites. Mr Cleland was tested, and was advised verbally that the result was "non-negative" for cannabis.

[11] Mr Cleland immediately went to speak with his manager, Mr Donavan Walker. He told Mr Walker that he had tested non-negative, and about the incident with his partner and consuming cannabis. He says Mr Walker then advised him of the usual process, which was that he would be sent home while an investigation occurred, and that usually there would be a "second chance" although he could not guarantee this. According to Mr Cleland, Mr Walker also mentioned Atlas had a policy of offering rehabilitation.

[12] Mr Cleland was not surprised by this, and gave evidence that during his time at Atlas, he had been aware that other employees had tested "non-negative" and had retained their employment.

[13] Mr Walker said he could give Mr Cleland a number to call for some counselling. However, he never provided that number to Mr Cleland.

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[1] On Monday 23 March 2020, New Zealand moved to Level 3. At 11.59 pm on 25 March 2020, New Zealand moved to Level 4.

[14] Mr Cleland went home. He then called Mr Walker to ask about pay. Mr Walker advised that this would be a paid absence as this was Atlas' normal process. Mr Cleland says that Mr Walker again mentioned that other employees had been given a second chance.

[15] On 1 May 2020, The Drug Detection Agency Limited wrote to Atlas, confirming that Mr Cleland had a non-negative result for cannabanoids. The report attached to this letter indicated that the "Quantitative Result" was 141 ng/ml, and the "Confirmation Cut off" was 15 ng/ml.

[16] On 1 May 2020, Mr Cleland received a letter inviting him to a meeting. The letter described this as an investigation meeting, stated that it was "an opportunity for you to explain your reasons why you have presented a non-negative sample", and stated that Mr Cleland was welcome to bring a support person.

[17] Mr Cleland attended the meeting alone as he understood it was an initial meeting, not a disciplinary one. Mr Walker and Atlas Chief Financial Officer, Mr Greg Stewart, were in attendance. Mr Stewart explained that in addition to his financial role he also performed many of Atlas' human resources functions.

[18] The meeting was short, with the meeting notes showing it lasted for only 10 minutes. Mr Walker asked Mr Cleland: "Can you explain?" Mr Cleland replied:

> Depression, fighting with partner, frustration not being able to see child in Australia, not having anyone to talk to and no support. Finances are stretched and I have borrowed I even feel like hurting myself.

[19] The meeting notes record that Mr Cleland also said: "I need help and I need someone to talk to", and "I would get help but not sure how to, I need help." Mr Stewart then said: "Sounds like you would need to take the steps to get help and counselling assistance". Mr Cleland replied: "Yes I do. Mr Walker said: "There is free counselling out there". The meeting then ended.

[20] At the investigation meeting, Atlas confirmed that the letter and test results from The Drug Detection Agency Limited were on the table between Mr Walker, Mr Stewart, and Mr Cleland. At no time were the results given to Mr Cleland. When asked why, Mr Walker and Mr Stewart explained it was because he didn't ask for them. Mr Cleland said he was not aware that the papers on the table between Mr Walker and Mr Stewart

were the test results, or that these were available to him on request. The documents were not mentioned or discussed in any way.

[21] On 5 May 2021, Mr Cleland was invited to a disciplinary meeting. The purpose of this meeting was to determine whether Mr Cleland's non-negative drug test result warranted disciplinary action, up to and including dismissal. The letter noted Mr Cleland was entitled to bring a representative or support person to the meeting.

[22] Mr Cleland again attended this meeting alone. Mr Walker and Mr Stewart were again in attendance. The meeting notes record that this meeting lasted for 11 minutes.

[23] Mr Walker told Mr Cleland that "Atlas is taking a zero stance to non-negative results". He asked if Mr Cleland had anything to add. Mr Cleland said "no", and that "it was a mistake on my behalf".

[24] Mr Stewart then said:

> The reality is Atlas are taking a hard line, and an option is dismissal is an option that Atlas can take. It leaves a mark on your record and makes it hard for future job prospects. If someone rings up and ask what the story with Shane was and we have to say actually we had to terminate him for failing a drugs test it's not going to be positive for how it looks for you. There are other options available for you in terms of how the employment can end.

[25] Mr Cleland asked if he could go home and take the day to think about resigning. Mr Walker then said that: If you did take that option the reference from me would be good.

[26] Mr Cleland asked about the possibility of a probationary period. Mr Stewart said:

> No the company is taking a hard line for this round of failed drug tests but you can put your own slant on how you leave the business…If you chose to resign then we can say Shane left for personal reasons.

[27] The parties then discussed the return of Mr Cleland's personal effects. Mr Walker then said he had a contact for some free counselling, and suggested he would provide this number if Mr Cleland contacted him after confirming his decision regarding resignation.

[28] Later that morning, Mr Walker emailed Mr Cleland, to confirm that Mr Cleland's suspension was unpaid, and that Atlas would deduct monies from Mr

Cleland's final pay in respect of a course of study if he resigned. Mr Cleland sought legal advice.

[29] On the following morning of 8 May 2020, Mr Cleland's representative emailed Mr Walker, asking for copies of relevant documents, including meeting notes, policies, employment agreement/s, and the laboratory reports for the drug test. Some thirteen minutes later, Mr Walker emailed Mr Cleland, stating "Atlas needs to know what your response is by 12 pm today."

[30] Mr Cleland forwarded this email to his representative, who promptly emailed Mr Walker, putting Atlas on notice of the potential for a personal grievance proceeding.

[31] At 12.10 pm on 8 May 2020, Mr Walker emailed Mr Cleland and his representative a notice of termination of employment. Relevantly, the letter provided:

> 3. Your employment agreement explicitly provides detail under clause.11 Consuming alcohol or non-prescribed drugs on the Employer's premises, client sites, or at any time during working hours. Attending for work whilst intoxicated or under the influence of alcohol or (non-prescribed) drugs.
>
> 4. Atlas has considered all the information and finds that your actions amount to serious misconduct.
>
> 5. After considering all of the circumstances Atlas has decided to terminate your employment effective immediately pursuant to clause 11. Sixth Schedule, Items for which the Penalty is Instant Dismissal of your employment agreement.
>
> 6. You will be paid your normal pay up to and including Monday 4th May 2020, and any annual leave entitlements owing. Deductions from your final pay will be made in respect of any monies owed to Atlas.

[32] Mr Cleland's representative replied, formally withdrawing any consent to make deductions from Mr Cleland's pay.

[33] Mr Walker replied indicating the matter would be referred to the debt collectors, and Atlas now makes a counter claim against Mr Cleland for the sum of $1,105.00 which it says is owing to him in respect of a training course it sent Mr Cleland on. Mr Cleland then raised a personal grievance claim leading to these proceedings.

Findings

[34] I will start by referring to Mr Cleland's employment agreement. This is the document that Atlas relies on to justify its dismissal of Mr Cleland, and its decision to suspend him without pay.

[35] Clause 10 is titled "Health and Safety House Matters. Clause 10.2 provides:

> The Employer as a condition of engagement may seek a medical report on drugs and alcohol use by the Employee. In the event of an accident, or evidence of intoxication at work, the Employer may also require an employee to submit to a drug test from a registered medical practitioner of its choice, and the Employee agrees to submit to such test.

[36] Clause 11 of Mr Cleland's individual employment agreement is titled "Termination and Disputes". Clause 11.2 provides:

> The Employer may terminate this Agreement immediately in the event of a serious breach by the Employee of this Agreement including as shown in Schedule Six.

[37] Clause 11.4 provides:

> If the Employer considers the Employee may have been guilty of misconduct, it may suspend him from work, on pay, pending and investigation.

[38] Clause 12.2 provides:

> This Agreement constitutes the entire agreement between the Employer and the Employee and supersedes all previous representations, negotiations, commitments and communications either written or oral between them.

[39] The Sixth Schedule is titled "Items for which the penalty is instant dismissal". Clause 11 provides:

> Consuming alcohol or (non prescribed drugs on the Employer's premises, client sites, or at any time during working hours. Attending for work whilst intoxicated or under the influence of alcohol or (non prescribed) drugs

[40] Mr Cleland signed both the employment agreement itself and the sixth schedule. At the investigation meeting, Mr Cleland was able to accurately and in his own words, explain and describe clause 11 of the sixth schedule. He believed this applied to him, and understood that it was his alleged breach of this clause that led to his dismissal, consistent with the letter dismissing him which said this was "pursuant to clause 11. Sixth Schedule, Items for which the Penalty is Instant Dismissal of your employment

agreement". While Mr Cleland has consistently accepted that he consumed cannabis on 19 April 2020, he gave evidence that he did not in fact believe he was in breach of the contractual requirements as he understood them. He points out that he didn't consume any alcohol or drugs during work time or on work premises, and nor did he attend work "intoxicated or under the influence".

[41] Although Atlas' own documentation explicitly states that Mr Cleland was dismissed pursuant to clause 11 of the Sixth Schedule of his employment agreement, Atlas argued that Mr Cleland was dismissed pursuant to a separate drug and alcohol policy. Atlas says this was introduced in around 2018, at a toolbox meeting, and this binds Mr Cleland. Mr Cleland rejects this. He says that he recalls the toolbox meeting to which Atlas referred, and this was the meeting at which Atlas introduced a policy of random drug testing. Atlas agrees that random drug testing was part of that policy, but that the policy was wider than this. Atlas goes further and says that it sent the policy to Mr Cleland by email and he may or may not have signed it, however, it was unable to produce any such emails.

[42] Atlas has produced a copy of this policy document. The policy contains provision for random testing at schedule 4. Schedule 4 provides that in the event of a non-negative urine specimen, the employee shall be removed from site on full pay while waiting on the confirmed test results. If the result is positive, then the next step is to "refer employee to the rehabilitation programme"[2].

[43] Schedule Five on the following page provides that: "Current employees returning a positive test, who want to continue employment, are required to join the company's supported drug and alcohol rehabilitation programme". The policy then goes on to detail what this programme is. It is a formal programme, including an initial assessment by a substance abuse professional, up to 6 sessions with a drugs and alcohol substance abuse specialists, up to 6 unannounced follow up tests per year for 1 year, and the employee must sign a contract agreeing to the programme and follow up testing[3].

[44] It is common ground that Mr Cleland was not offered anything of this nature before being dismissed. Upon questioning, Mr Walker and Mr Stewart both explained

[2] Schedule 4, page 17 of the Atlas Resources Limited Group – Alcohol & Drugs Policy.
[3] Schedule 5, page 18 of the Atlas Resources Limited Group – Alcohol & Drugs Policy.

to me that the parts of this policy that applied to employees, specifically, the parts providing for random testing and dismissal, were always applied strictly, but that I needed to realise that the parts of the policy that provided for rehabilitation were "discretionary". They then also explained to me that Atlas' practice was that if an employee returned a non-negative test, then Atlas would dismiss, because it took health and safety seriously. Both Mr Walker and Mr Stewart gave evidence to the effect that they could not think of any situation where an employee provided a non-negative test and would not be dismissed. When asked why the policy provided for rehabilitation if it was not used in practice, they both said that having the policy made the company look fair.

[45] Mr Coutts supported this evidence. All three witnesses for Atlas also gave evidence that any level of "non-negative" test result would result in dismissal. Although in submissions it was denied that this was a "zero tolerance" approach, taken overall, it was made clear by all three witnesses for the company, that in practice, Atlas operated a strict "zero tolerance" policy off the back of routine random drug tests. The provisions in its own policy that provided otherwise were ignored, on the basis that this was at the company's discretion.

[46] I now turn to consider Mr Cleland's situation. Although Mr Walker advised him by email that he was suspended without pay from the date of his non-negative test on 29 April 2020 through to the date of his dismissal on 8 May 2020, the pay records show that from 5 May until his summary dismissal on 8 May, Mr Cleland was unpaid. Mr Cleland's employment agreement[4] (and also what Atlas says is the relevant policy[5]) provides for suspension on a paid basis. Therefore, Mr Cleland needs to be paid for the last 4 days of his employment as required Atlas' own employment documentation. For the purposes of assessing this claim[6], and again referring to the pay records provided by Atlas which indicate that a "standard" day for Mr Cleland was 8 hours, and his hourly rate was $27.00, four days' pay is therefore $864.00 gross. Holiday pay is payable in addition to this at the rate of 8%, being $69.12 gross.

[47] I must now consider if Mr Cleland's dismissal was consistent with the obligations of Atlas to act in good faith, and to act in a fair manner.

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[4] At clause 11.4 quoted above.
[5] At Schedule 4 of that policy also referred to above.
[6] There is a further claim by Mr Cleland for an underpayment of wages from 24 March 2020 onwards which is dealt with separately below.

[48] The test of justification is set out at paragraph 103A of the Act. The test is whether Atlas' actions, and how Atlas acted in terminating Mr Cleland's employment, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[49] In reaching my conclusion, I must consider:

a. did Atlas sufficiently investigate before taking action;
b. did Atlas raise any concerns that it had with Mr Cleland before taking action;
c. did Mr Cleland have a reasonable opportunity to respond;
d. did Atlas genuinely consider Mr Cleland's position.

[50] I may also take into account any other factors I think are appropriate.

[51] Throughout, Atlas has not acted in accordance with its own employment agreement and policy documents. It suspended Mr Cleland on a partially unpaid basis, when its own documents provided for suspension on a paid basis. It subjected Mr Cleland to a random drug test, when its own agreement with him provided for tests to occur in the event of an accident, or evidence of intoxication at work[7], neither of which occurred here. It dismissed Mr Cleland in reliance on a clause in one of the schedules of his employment agreement (clause 11 of the sixth schedule) which arguably he had not breached – eg, that clause defines a breach as consuming alcohol or non-prescribed drugs on employer's premises or during working hours, and attending for work whilst intoxicated, none of which Mr Cleland was alleged to have done.

[52] I must also consider the impact of the policy document which Atlas referred me to. Atlas strongly argued that this policy document bound Mr Cleland, and enabled the termination of his employment. However, I do not accept that this is the reality of the situation. There is no evidence that Atlas promulgated the policy document in its entirety, or that Atlas secured Mr Cleland's agreement to it. Atlas relies on the notes of a toolbox meeting to demonstrate that it promulgated this policy to all staff. The notes record health and safety matters were discussed, but simply do not include details

[7] See Clause 10.2 of Mr Cleland's employment agreement quoted above.

about the policy that Atlas says was promulgated. Mr Cleland says that he recalls these discussions were about a somewhat different topic, that is, the introduction of random drug tests. In addition, Mr Walker says that the policy was emailed to Mr Cleland, but he is unable to produce any such email, or any response from Mr Cleland. Mr Cleland says he does not recall receiving such a document. In the absence of supporting records, I prefer Mr Cleland's recollection.

[53] When Mr Cleland's representative first contacted Atlas asking for copies of relevant documentation, this document was never provided. In addition, I note that the letter from Atlas terminating Mr Cleland's employment referred only to that agreement and its schedules (with no reference to the policy document), suggesting that Atlas' understanding at the time of Mr Cleland's dismissal was that the rules binding Mr Cleland were those set out in the employment agreement and attached schedules.

[54] I find that the applicable agreement at the time of Mr Cleland's dismissal was his signed employment agreement, and not the drug and alcohol policy to which Atlas later refers.

[55] Finally, I pause to note that the drug and alcohol policy places specific obligations on Atlas to provide Mr Cleland with the opportunity to enter into the company's supported drug and alcohol rehabilitation programme, which it did not do. Mr Cleland states that he would have been willing to abide by such a programme, and was aware of other staff who had provided non-negative tests over the years, who had continued in employment with Atlas (consistent with such a programme). Mr Walker was evasive when asked about this, and emphasised that in the time he had been manager, he had not allowed staff entry to such a programme, although it was reluctantly accepted by him and Mr Stewart that this is something that Atlas previously did.

[56] When asked why this was not offered to Mr Cleland, Mr Walker provided various explanations. He first denied that there was a policy providing for rehabilitation. When shown the policy, he said that the part of the policy that benefited employees were discretionary to the company, despite the use of mandatory wording throughout the policy including: "All employees will be offered the opportunity to voluntarily join the Company's supported drug and alcohol rehabilitation programme" and "Current employees returning a positive test, who want to continue employment are required to

join the Company's supported drug and alcohol programme…", and "if the result is positive for drug or alcohol, or the specimen has been deliberately adulterated, refer employee to the rehabilitation programme". He said that Mr Cleland was not only a despatcher but was a "trainee leader", and thus should be held to a higher standard justifying dismissal, and that in accepting employment with Atlas, Mr Cleland had made a promise "not to imbibe" at all, although he was not able to point to any documentation supporting such comments.

[57] When asked why he had not provided Mr Cleland a telephone number to access counselling (which was described as being a type of Employee Assistance Programme), Mr Walker explained that he wanted Mr Cleland to come to him, accept he was at fault, and ask him [Mr Walker] for help, after which Mr Walker would have felt that Mr Cleland had exhibited the proper demeanour to have deserved access to the free counselling sessions. Although as I have already noted, Mr Cleland had repeatedly asked for help in the investigatory meeting held on 4 May 2020, Mr Walker did not consider this sufficient to entitle Mr Cleland to be given a phone number to access any help or support, without more.

[58] This adverse view of Mr Cleland, coupled with the undisclosed "zero tolerance" policy that was in conflict with the provisions in the employment agreement and what the company said was its written policy, led to Mr Cleland's dismissal.

[59] The court has stated that:

> Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly[8].

[60] This did not occur. In terms of the tests of justification that Atlas is required to meet, Atlas did take some (passive) steps to investigate before dismissing Mr Cleland, in that they asked him for his explanations and waited to receive written notification of the non-negative test results from the testing agency. They did not provide all relevant information to Mr Cleland, or discuss this with him. It is not sufficient for Atlas to have placed the documents relating to Mr Cleland's test results on the table during the investigation meeting, without referring to them or providing them to Mr Cleland. The

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

employer must provide relevant information to the employee, rather than expecting the employee to guess what might be available for discussion, as required by section 4 of the Act. It is not clear that Atlas fairly raised any concerns that it had with Mr Cleland – certainly, it was not made clear to Mr Cleland that there were both counselling as well as drug and alcohol rehabilitation programmes which the company made available, and what he needed to do to access these. Nor did Atlas genuinely consider Mr Cleland's explanation. Mr Cleland explained that he consumed cannabis on one occasion outside of work time, he had found the lockdown required by Level 4 stressful, and this was exacerbated by the financial stress he was under due to Atlas' decision to reduce his pay, and that he was missing his family in Australia. Atlas did not take any of these factors into account or weigh these unusual circumstances against Mr Cleland's previous good service as an employee when making the decision to dismiss.

[61] Both Mr Walker and Mr Stewart said that there was nothing that Mr Cleland could have done that would have convinced them to provide him with rehabilitation rather than dismissal. This, coupled with the "zero tolerance" policy which had not applied in the past, indicates that Atlas did not approach matters with an open mind.

[62] Taking all this into account, it is my view that Mr Cleland's dismissal was unjustified.

[63] He is therefore entitled to remedies.

[64] Mr Cleland has claimed for 1 week's lost remuneration, being $1,080.00, as set out in the statement of problem. There was some question raised at the investigation meeting about the timing of when Mr Cleland started new employment, but the evidence provided by Mr Cleland's partner supports this claim.

[65] Accordingly, I order Atlas to pay Mr Cleland the sum of $1,080.00 gross in lost wages, plus holiday pay on this sum at the rate of 8%, being $86.40 gross.

[66] Mr Cleland has claimed compensation for hurt and humiliation resulting from his unjustified dismissal and the way it was carried out. I accept that Mr Cleland suffered hurt and humiliation as a result of both the dismissal and the way it was carried out, including a separation from his partner. I also take into account that Atlas encouraged Mr Cleland to resign rather than be dismissed. This is recognised as an

action which can amount to constructive dismissal[9]. In the present case, there is no doubt that Mr Cleland was dismissed by Atlas, but it is significant that it was suggested to Mr Cleland that it would be better for him if he resigned, on the grounds that this would mean future employers would not be told he had been dismissed for failing a drug test. At the investigation meeting, Mr Walker said that if Mr Cleland had resigned, and he was later asked for a reference check, he would have needed to be honest about the reason why Mr Cleland's employment ended. In addition, Mr Walker indicated that Mr Cleland's resignation would have made it easier for Atlas to pursue the recovery of course fees from Mr Cleland. Under these circumstances, it is hard to see how it would have been better for Mr Cleland if he had resigned, and the encouragement from Atlas to do so appears misleading.

[67] Taking all the circumstances into account, I award Mr Cleland the sum of $12,000 in compensation for hurt and humiliation. In doing so, I must take into account his admitted actions, which undoubtedly contributed to the situation that gave rise to the grievance[10], as well as the company's actions throughout this process, which have caused me some concern as I have already expressed.

[68] In making this award, I note that in order to be taken into account as contributing behaviour, the actions of the employee must be both causative of the outcome, and blameworthy[11]. I find that this is the case here – Mr Cleland's admitted conduct in consuming cannabis clearly led directly to his dismissal. However, Mr Cleland's conduct did not contribute to the failures of Atlas to abide by its own documentation or to provide him with a fair process and to keep an open mind towards the difficulties that he described facing at the time. My view is that an award of compensation for hurt and humiliation is appropriate, in say the sum of $15,000 but that this should be reduced as a matter of proportionality and justice[12], to the sum of $12,000.

[69] I now need to consider the counter-claim raised by Atlas, that Mr Cleland should repay the sum of $1,105.00 which Atlas incurred when Mr Cleland attended the

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[9] See for example, *McDonald v Bayliss Sharr & Hansen Chartered Accountants*, ERA Christchurch CA98/05, 19 July 2005

[10] Section 124 of the Act requires that I must consider the extext to which the ations of the employee contributed towards the situation that gave rise to the personal grievance, and also that if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[11] *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

[12] *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson*, [1994] ERNZ 920.

BCITO National Certificate in Concrete Production course. Atlas has produced an invoice showing the cost of this course in support of its claim against Mr Cleland.

[70] Mr Cleland signed a formal application for Training/Development document relating to his attendance on this course. The application form included an "Employee Acknowledgement" where Mr Cleland agreed that:

> If I resign from Atlas Concrete within 12 months of completion of the course of study/training, and or the payment by the Atlas Concrete for the course (whichever is earlier), I understand that there is a requirement to prepay all the costs that the organisation has incurred…

[71] Mr Cleland and his manager both signed this form on 19 March 2019. The invoice for the course is dated 3 May 2019.

[72] Mr Cleland is not required to repay Atlas for the cost of this course. The agreement provides that repayment will only be required where Mr Cleland resigns within 12 months of the completion of the course or training. Mr Cleland did not resign from his employment, and in any event, the date of the invoice indicates that the required 12 months had already elapsed by the time Atlas terminated Mr Cleland's employment. (And if it has not, this would be by a short period of time caused by a delay in the date of payment compared to the date of the invoice, which date Atlas has not provided in evidence.)

[73] Atlas' claim against Mr Cleland for the payment of $1,105.00 is dismissed.

[74] Mr Cleland raises a further claim for underpaid wages, resulting from Atlas' decision to reduce his wages to 80%. Mr Cleland says he never agreed to this reduction, it was unilaterally imposed on him. Both parties point to a one page document from Atlas dated 24 March 2020, to all staff, which states "During the 4 week lockdown period, we have made the decision to pay all staff 80% of their normal income." This document was promulgated to staff on our about 24 March 2020, and promptly implemented. Atlas accepts that Mr Cleland was never asked to convey his agreement formally, but says that his attendance at the meeting where this was announced, followed by his failure to raise any concerns and his acceptance of the wages that were paid, is consent. The difficulty is that the document (and the meeting to announce it to staff) simply records the decision that had already been made by senior management. Mr Stewart accepted that this was so.

[75] Mr Cleland says that his average hours prior to lockdown were 49.81 hours per week. In the six weeks of his employment after 24 March through to his termination, he calculates he was paid 41.71 less hours than he would on average have expected to work. At his hourly rate of $27.00, this equates to $1,126.17 gross.

[76] In the absence of agreement by Mr Cleland, Atlas is not able to reduce his wages[13]. The Wages Protection Act 1983 provides that such consent must be in writing. This did not occur. Atlas' actions in failing to pay Mr Cleland his normal wages when due are therefore in breach of the Wages Protection Act 1983. Accordingly, Atlas is ordered to pay to Mr Cleland the sum of $1,126.17 gross in unpaid wages, plus holiday pay on this sum calculated at the rate of 8%, being $90.09 gross.

[77] Mr Cleland has suggested that Atlas' failure to pay holiday pay on this sum (as well as on the wages that should have been paid while Mr Cleland was on unpaid suspension) is a breach of the Holidays Act 2003 sufficient to render Atlas liable for a penalty of up to $20,000.

[78] No particular reason is advanced as to why Atlas should be rendered liable for a penalty in circumstances where Atlas did not pay Mr Cleland holiday pay in respect of wages that Atlas did not believe were due to Mr Cleland. In circumstances where there is a dispute between the parties as to what wages are properly due, I do not accept that a failure to pay holiday pay on such disputed wages is a breach of statute that properly renders Atlas liable to penalties. Penalties are to deter and punish where an employer has committed wanton breaches[14]. Failure to pay subsequent entitlements where there is a dispute as to what is properly owed does not meet these tests. No penalties are awarded in respect of failure to pay holiday pay in respect of unpaid wages, noting that I have already awarded holiday pay on the wage amounts I have found to be owing.

[79] Mr Cleland has also claimed for a penalty for breaches of the duty of good faith by Atlas. The statement of problem does not identify what actions of the employer are

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[13] See the provisions of the Wages Protection Act 1983. Section 4 provides that an employer must pay the entire amount of wages to an employee when those wages become due. Section 5 provides that deductions from wages may only be made with the written consent of the employee.

[14] *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited,* [2016] NZEmpC 143, at [50] and [51] where the court describes penalties as being primarily penal, and punitive.

said to be a breach of the employer's duties. The legal submissions filed on Mr Cleland's behalf identified Atlas' actions in regard to asking Mr Cleland to repay the course fees as being in breach of good faith.

[80] I have found that Atlas was not entitled to repayment of the course fees by Mr Cleland. However, as with the claim for penalties in respect of underpayment of holiday pay above, Atlas believed that it had a right to reclaim these fees. The matter was in dispute. Although this dispute has been resolved in favour of Mr Cleland, I do not consider it of sufficient weight to be appropriate for a penalty claim.

[81] Looking at the matter overall, I do not consider that penalties should be imposed for a breach of good faith on the basis of a general pleading without more. In so far as it is possible to infer an argument around Atlas's failure to meet its statutory obligations in respect of fair process, I have already found that the employer's actions overall resulted in the unjustified dismissal of Mr Cleland. Remedies have been awarded accordingly, and it is not appropriate to make additional awards.

[82] Mr Cleland has also claimed for interest on unpaid monies.

[83] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[84] The amount of interest owing is to be calculated in accordance with that Act[15], and an interest site calculator is provided for the purposes of calculation[16], known as the Civil Debt Interest Calculator.

[85] Mr Cleland should have been paid his wages and holiday pay on or immediately after his dismissal on 8 May 2020. These outstanding amounts total $3,315.78. This sum attracts interest until paid.

[86] The pay records provided by Atlas show that Mr Cleland received his final pay on 12 May 2020. Giving Atlas the benefit of the doubt for the purposes of being able to practically make such a payment after the ending of Mr Cleland's employment, it is appropriate to calculate interest owing starting from 12 May 2020.

[15] See section 12 of the Interest on Money Claims Act 2016.
[16] See section 13 of the Interest on Money Claims Act 2016.

[87] The amount of interest owing up to the date of this determination is $99.07. This sum is also to be paid to Mr Cleland, in recognition of his loss of the use of the monies that should have been paid to him.

Summary of Orders

[88] Atlas Concrete Limited is to pay to Mr Cleland within 28 days:

a. Unpaid wages for the period of unpaid suspension, being $864.00 gross;

b. Holiday pay on this at the rate of 8%, being $69.12 gross;

c. Lost remuneration for the week of unemployment following Mr Cleland's dismissal, being $1,080.00 gross;

d. Holiday pay on this at the rate of 8%, being $86.40 gross;

e. Compensation for hurt and humiliation being $12,000 payable without deduction;

f. A further $1,126.17 gross in unpaid wages, being short paid wages from 24 Mach 2020 down to the date of dismissal;

g. Holiday pay on this at the rate of 8%, being $90.09 gross; and

h. Interest, being $99.07.

Costs

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

[90] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[91] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[17]

Claire English
Member of the Employment Relations Authority

[17] https://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1