Employment Court of New Zealand

Concrete Structures (NZ) Limited v Rottier [2021] NZEmpC 95 (30 June 2021)

Last Updated: 5 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 95
EMPC 376/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Plaintiff
AND	ADRIAN ROTTIER Defendant

Hearing:	17 and 18 May 2020 (Heard at Rotorua)
Appearances:	K A Badcock and L Badcock, counsel for plaintiff J Wynyard, counsel for defendant
Judgment:	30 June 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Adrian Rottier brought unjustified disadvantage and dismissal grievances against Concrete Structures (NZ) Ltd (CSL), which were upheld in the Employment Relations Authority.1 CSL now challenges the Authority's determination by way of a hearing de novo.

[2] CSL asked Mr Rottier to resume employment with them in May 2019, having worked for the company on previous occasions. After working some two hours only, there was a brief and heated exchange between him and a manager who believed

1 *Rottier v Concrete Structures (NZ) Ltd* [2020] NZERA 446 (Member Arthur).

Mr Rottier was demonstrating agitated behaviour as a result of taking drugs or alcohol. Mr Rottier was asked if he would undergo a drug test. He said there was no point in doing this. He was subsequently directed to leave the workplace to be tested.

[3] He believed his employment had been terminated. The company considered he had been suspended while he obtained a clean test. He raised a personal grievance and sought a mediation date. However, in the meantime, CSL concluded that when he did not undergo a drug test, he had abandoned his employment.

[4] The issues in the challenge centre on whether the steps taken, both at the time of the request for a drug test and thereafter, were actions which a fair and reasonable employer could have taken in all the circumstances; and if not, what remedies were appropriate, particularly in light of Mr Rottier's pre-existing health circumstances.

Essential facts

[5] There is a measure of agreement between the parties as to what occurred, particularly as to the precipitating event. That is perhaps unsurprising, since the incident was confined to about two minutes. However, it became heated and confrontational, and this has affected the description of some of the finer details by both participants. As is not unusual in such circumstances, neither party is completely correct in their recall.

Background

[6] Mr Rottier was employed as a concrete finisher over some 14 years up to 2018, either as an employee to CSL, or as an employee of a sub-contractor to CSL, Kiwi Concrete Services Ltd (KCS).

[7] In late February 2019, he completed an application for employment for CSL.

[8] By early May 2019, the company was in need of a concrete finisher and contacted Mr Rottier, asking him if he still wanted a job. He said he was keen. As a result, an individual employment agreement (IEA) was forwarded to him on 2 May 2019 for completion prior to starting work on 6 May 2019. Mr Rottier signed the IEA and returned it promptly.

Events of 6 May 2019

[9] Mr Rottier arrived for work at 10.30 am. He said he worked in CSL's factory from his arrival time. Mr Rottier said that around mid-day, he was asked by Mr Brett Nicholas, Factory Manager, to sign a workplace induction checklist. As he was already familiar with CSL documentation, that process was fairly rudimentary. He ticked a number of boxes which confirmed his familiarity with a number of CSL's operations and procedures, including several which related to health and safety. A formal induction procedure was not undertaken.

[10] By contrast, Mr Nicholas, in his evidence, said this process took place upon his arrival at 10.30 am and it took about half an hour. He said that as factory manager, he was responsible for completing all inductions for factory workers, and he recalled doing this before Mr Rottier commenced work. I find it is more likely than not that he did so on this occasion, when Mr Rottier arrived at the workplace.

[11] Towards the late morning, Mr Paul Henderson, Precast Manager, was in his office adjacent to the factory. He saw a KCS truck drive onto CSL premises and move to an area adjacent to the factory. No approval for coming on site was sought. He thought that KCS workers turning up was odd because he had been trying to contact them for some time to undertake finishing work; and he had not heard from them.

[12] Upon seeing the KCS truck drive into CSL's premises, without following the company's health and safety procedures, Mr Henderson left his office to tell the occupants that they could not drive into the factory area without following those procedures, as may have happened previously. It was his position that he had no problem with KCS coming on to the site, but the workers needed to sign in since they were not regularly engaged to work for CSL.

[13] Mr Henderson says that he went into the factory towards table five, where Mr Rottier had been working. Mr Rottier was talking to a KCS employee, Mr Bernie Gillespie, about some stolen tools. Mr Henderson waited until there was a break in the conversation, after which he told Mr Gillespie that KCS employees could not wander onto the site anymore and needed to sign in. The KCS employees left.

[14] Mr Henderson said he then asked Mr Rottier to come with him to table one to have a word. He said he did so because this was a quieter part of the factory.

[15] For his part, Mr Rottier acknowledged he had been speaking with Mr Gillespie near table five and that Mr Henderson had asked him to go with him to table one. In contrast to Mr Henderson's evidence, however, he says he was returning to the area at which he had been working previously, that is, table one.

[16] With regard to the controversary as to whether he had been working at table one, the company produced records relating to its concrete pours that day, including from an external concrete supplier, Firth Industries. It is clear beyond doubt from that material that no concrete was delivered to table one that day. There is an irresistible inference therefore that no work had been done there that day either. Work at table one had most recently occurred on 3 May 2019. On the balance of probabilities, I accept the company's evidence on this point.

[17] The significance of the issue is that Mr Henderson then spoke to Mr Rottier about what he regarded as substandard finishing work on a pre-cast panel at table one. He said he needed to explain to Mr Rottier what the company's expectations of the finishing work would be. He said he was using the work undertaken on table one as an example to show him a finish that was not up to standard.

[18] Mr Rottier, however, understood Mr Henderson to be complaining about work which Mr Rottier himself had undertaken that morning. He said Mr Henderson addressed him in a degrading and aggressive manner and that his voice became louder as he became angrier.

[19] I find Mr Rottier's belief his work was being criticised is incorrect. However, I do not regard the dichotomy between the parties on this issue as being particularly significant, since it is what happened next that is important.

[20] It is common ground that Mr Henderson then told Mr Rottier that he was not permitted to invite people on site and that this would not be tolerated by the company. Mr Henderson said he made this statement because he believed Mr Rottier must have

invited the KCS employees on site, as he was friendly with one of them. He had not seen the subcontractors for months, even when they had been contacted to attend for work purposes.

[21] Mr Rottier agreed that he should not bring mates on site. However, he told Mr Henderson that he had not done so on this occasion and that if he wished to check this he could ask Mr Gillespie. Mr Henderson said he would not do this.

[22] Mr Henderson acknowledges he thought Mr Rottier was not telling the truth. I find it more likely than not that he told Mr Rottier, in no uncertain terms, that he thought he was lying. By this time, both men were angry and agitated. Mr Henderson was angry because he was being challenged by Mr Rottier who he thought was lying to him. Mr Rottier was angry because he considered he was being wrongly accused of allowing mates on site. Part of the heated exchange included a statement from Mr Henderson that when Mr Rottier last worked for CSL there was drama. He then said, "you are bloody lucky I have given you a second chance".

[23] Mr Henderson told the Court he thought Mr Rottier's reaction was odd because he was normally relatively calm, and he had become agitated quickly. He said Mr Rottier was by this time, sweating. He suspected Mr Rottier was high on drugs.

[24] He asked Mr Rottier if he would take a drug test. He said he also told Mr Rottier he would take him for a test at a nearby agency. In his recollection, Mr Rottier replied straight away that there was no point, as he would not pass a drug test.

[25] Mr Henderson did not enquire as to why Mr Rottier said, "there was no point" to taking a test, as he "would not pass". He took Mr Rottier's agitated behaviour, combined with the fact he was saying he would not pass, to mean Mr Rottier was under the influence of drugs.

[26] In cross-examination, Mr Henderson said that he did not know what sort of drugs had been involved. He said he did not think Mr Rottier had consumed alcohol. He did think Mr Rottier might have used illegal drugs. But he also said he could not rule out the taking of prescription drugs.

[27] Mr Henderson then accepted that when giving evidence to the Authority, he had said Mr Rottier might have consumed alcohol. Accordingly, on the question of whether he suspected alcohol use, his evidence was over time inconsistent.

[28] Returning to the narrative, Mr Henderson said he told Mr Rottier that if he could not pass a drug test, he could not be at work under CSL's health and safety provisions. He said Mr Rottier then became even more upset and said he did not need "this fucking job anyway" and that it was the company who had offered it. Mr Henderson said, "if you feel that way, you can fuck off if you want". He said Mr Rottier said he would "fuck off then" and he rounded up his tools and left.

[29] Mr Rottier agreed with some, but not all, of this sequence of events. He gave a different account as to the timing of the request to take a drugs test. He said there was a very robust exchange between the two of them over the question of whether he had invited mates on site and whether he was lying. He said that, if he was sweating, that this was due to recent exertion when working. At the end point of the conversation, Mr Henderson angrily told him to leave, pointing to a roller door of the factory. He said he understood he had been sacked. He collected his property and proceeded to depart. Before doing so, he told workmates they had better keep an eye on the concrete he had been working on otherwise it would deteriorate.

[30] Mr Rottier said that, a short time later, Mr Henderson noticed he was in the process of leaving the factory. He said Mr Henderson had been talking to another manager, Mr Chris Mackie, Plant and Health and Safety Manager. Mr Rottier recalled that Mr Henderson then strode towards him in an intimidating manner and started shouting "would you pass a drug test, come on, jump in the fucking truck, and I'll take you down there now". He said that in the heat of the moment his reaction was to refuse a drug test. He said that there was then a discussion to the effect that new employees

were required to undertake a pre-employment drug test, and this had not been arranged.

[31] When giving his evidence-in-chief in Court, Mr Rottier did not refer to the issue of whether he said he would not pass a

drug test, as had been asserted by Mr Henderson. However, when giving evidence to the Authority, he had acknowledged he said he "may" not pass a drug test, a fact he also confirmed in cross-examination.

[32] As to the timing of when Mr Rottier was asked to take a drug test, I prefer Mr Henderson's evidence. It is consistent with a somewhat brief and sanitised file note Mr Henderson prepared later in the day, which suggested that the issue relating to the taking of a drug test arose immediately after the argument about whether Mr Rottier had been lying. It contains reference to the response given by Mr Rottier, to the effect that there was no point in him taking a drug test as he would not pass it.

[33] I do not accept Mr Rottier's evidence that what caused him to leave the factory was a brief but heated exchange as to whether or not he wanted the job; or that the exchange about a drug test occurred at a later stage as he was leaving.

[34] Some time that afternoon, Mr Rottier telephoned Mr Henderson explaining he was unhappy with what had occurred in the workplace. He told Mr Henderson he was "going to the Ministry of Innovation". Mr Henderson said that Mr Rottier needed to take a drug test, and that he could return to work when he had a clean result.

Subsequent events

[35] Later that day, Mr Rottier did contact the Ministry of Business, Innovation and Employment (MBIE) to discuss the possibility of mediation. He also prepared a letter raising a personal grievance for unjustifiable action, bullying, harassment and discrimination. The letter asserted that a drug test had been unjustifiably initiated, contrary to his IEA. It stated that at no time had he been under the influence of drugs. Mr Rottier also said that statements made to him by Mr Henderson were unwarranted and that Mr Henderson had not acted in good faith. Mr Rottier alleged he had been discriminated against because he was pulled aside in circumstances where others were

not. He wanted his grievance to be addressed by an apology (formal and in writing) and wages lost due to the incident. He requested a response by 13 May 2019.

[36] On the morning of 8 May 2019, MBIE's Mediation Services sent an email to Mr Henderson stating that a request for mediation had been received from Mr Rottier, on the grounds there had been an "unjustifiable dismissal".

[37] On the same day, Mr Rottier consulted his General Practitioner, Dr Brons. Dr Brons recorded that he saw Mr Rottier in a very distressed state. He had referred to being dismissed two days previously after having been at work for a short period. He told Dr Brons he felt very humiliated and embarrassed and this had caused him a great deal of stress. He was diagnosed as having an acute anxiety episode in relation to an "unfair dismissal".

[38] On 12 May 2019, Mr Rottier wrote again to Mr Henderson stating he believed he had not provided all relevant information in his earlier letter raising a personal grievance. He said that, at the time of doing so, he had been under severe stress. His letter amended his claims to include both disadvantage and dismissal grievances.

[39] In describing his claims Mr Rottier: referred to the initial conversation which resulted in Mr Henderson telling him to "fuck off" while pointing at a roller door, as amounting to an unjustifiable dismissal; referred to the demand that he obtain a drug test as being an unjustifiable action; and, finally, asserted that conditions were imposed, after the signing of the contract, apparently a reference to what he regarded as an unjustified request for a drug test. He requested a response from the company by 20 May 2019.

[40] On 13 May 2019, Mr Henderson responded in a short email stating Mr Rottier had been asked to undergo a drug test which he had declined as he said he would not pass. He then said there had been no option but to stand Mr Rottier down under the company's health and safety policy until a "green test" was obtained. He asked Mr Rottier if he had obtained one yet.

[41] Mr Rottier replied by saying he had not been asked to undergo a pre-employment drug test and a post-employment drug test was not justified.

[42] No further response was received from Mr Henderson. However, later that day, there was a sequence of messages between Mr Rottier and Mr Paul Romanes, the company's General Manager at the time and a previous work colleague.

[43] Mr Romanes said he had learned about what had occurred on 13 May 2019 when Mr Henderson showed him Mr Rottier's amended personal grievance. Mr Romanes was concerned with what was going on and wanted to communicate with Mr Rottier. Eventually, a Facebook conversation took place between the two.

[44] In the course of a constructive exchange, Mr Rottier said he did not think there was a future for him at CSL. He said he had learned that another manager had asked Mr Henderson what Mr Rottier was doing there, and the manager had said that Mr Rottier should be sacked. Mr Rottier said it was clear in his mind that he was going to be sacked. He substantiated

this with reference to the fact that Mr Henderson started questioning him without following any kind of procedure or investigation.

[45] Mr Romanes said he understood Mr Rottier saying he did not want to return to CSL, but that he wished to meet and discuss the story so matters could be sorted out. If his staff were out of line then he needed to know so he could stop any repetition.

[46] Mr Rottier responded by saying he appreciated the exchange and that he would be in contact shortly about his documenting of the incident.

[47] On 21 May 2019, Mr Rottier saw Dr Palmer, a colleague of Dr Brons who practised at the same medical centre. He was diagnosed as having depression and was referred for counselling; he was also prescribed an anti-depressant. In a referral for counselling, which Dr Palmer prepared that day, he referred to a precipitating event having occurred at work, which had resulted in Mr Rottier "losing his job".

[48] He was seen again by Dr Brons on 30 May 2019 who recorded a continuation of Mr Rottier's earlier symptoms. By 10 June 2019, however, Dr Palmer noticed a big improvement in mood, although he was to continue with the anti-depressant.

[49] In a subsequent opinion, Dr Brons said that, in his opinion, Mr Rottier's "dismissal" after only three hours had resulted in an acute anxiety state.

[50] It is significant that the account given by Mr Rottier to his medical practitioners referred consistently to Mr Rottier's understanding that he had been dismissed, a point to which I will return shortly.

Legal issues

Provisions pertaining to alcohol and drugs tests

[51] There are three employment related documents which are potentially relevant to requests for drug testing by CSL.

[52] The first of these was Mr Rottier's application for employment, which included some health and safety questions. One of these questions asked whether the applicant agreed to undergo drug and alcohol testing prior to employment. Another question asked whether it was company policy to undertake periodic random drug and alcohol testing and then asked for agreement with this. Mr Rottier acknowledged yes, to both questions.

[53] Second, is Mr Rottier's IEA. It contained this provision as to health and safety:

13 Health and Safety

(a) Both the Employer and the Employee shall comply with their obligations under the Health and Safety at Work Act 2015. This includes the Employer taking all practicable steps to provide the Employee with a healthy and safe working environment. The Employee shall comply with all directions and instructions from the Employer regarding health and safety and shall also take all reasonable steps to ensure that in the performance of his/her employment he/she does not undermine his/her own health and safety or the health and safety of any other person.

(b) Where the Employer has reasonable grounds for suspecting that the Employee is under the influence of illegal drugs while at work, the

Employer may require the Employee to undergo a non-intrusive drug test (a urine test) which will be conducted by a registered medical professional. Upon receipt of a positive test the Employer shall discuss the results with the Employee and, whilst the failure of a drugs test is prima facie serious misconduct and justification for instant dismissal, the Employer may take into consideration any explanation received before any outcome is decided upon.

[54] Third, it transpired, by production to the Court of the witness statement provided by Mr Henderson to the Authority, that CSL had an established drug and alcohol policy.

[55] The version of the policy which was produced post-dated the events which are under review. No explanation was given by CSL as to why it did not initially produce the relevant policy to the Court, or why a policy which was not current at the relevant time was produced to the Authority for it to rely on.

[56] That said, the Court was told that the version of the policy which post-dated the events under review would have been very similar to previous versions of the policy. It was not suggested that the particular provisions which I shall describe shortly were modified.

[57] The drug and alcohol policy contained more detail about the company's expectations as to how its employees would work in a safe environment free of alcohol and drug use or abuse than did the IEA, even although it was not a particularly detailed policy. It also contained provisions relating to pre-employment testing, random drug testing, drug and alcohol testing where an accident or incident had occurred which may have been caused by drug or alcohol induced impairment and "Just Cause" testing. The clause relating to the last of these stated:

CSL also reserves the right to conduct "Just Cause" testing. Where behaviour is observed that causes concern that an individual could be a potential or actual safety hazard to himself or others due to the effects or after effects of drugs and/or alcohol the manager will be informed and the individual then interviewed to determine whether testing is required. It is the responsibility of all employees to identify concerns about any individual's immediate ability to perform their work and report such concerns promptly to management.

[58] As already noted, Mr Rottier's induction was brief. No express reference was made to this policy, although a copy of it was on a wall in the smoko room. The reason

Mr Rottier was not taken to either the terms of the policy, or other items on the checklist, which he signed was because it was considered he had worked for CSL for a number of years previously and it was assumed he would be familiar with this information. One of the acknowledgments ticked on the induction checklist related to CSL's standard operating procedures and referred to hazards and controls for his job. That may have been intended to include the alcohol and drug policy.

Legal framework

[59] Mr Badcock, counsel for CSL, did not rely on the terms of CSL's drug and alcohol policy. Rather, he emphasised cl 13(b) of the IEA, and the importance of health and safety obligations under the Health and Safety at Work Act 2015 (HSWA). He said that CSL was required to balance its obligations under the HSWA as well as its obligations to employees under the Employment Relations Act 2000 (the Act).

[60] He referred to dicta in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand*.2 He relied on a statement of the full Court when it discussed the obligations of the legislation which applied at the time – the Health and Safety in Employment Act 1992. After analysing that statute with regard to employer obligations the Court said:3

... it is not only reasonable but lawful and necessary for employers to identify the potential cause or source of harm that may be occasioned to employees and other persons if other employees come to work after taking alcohol which does impair performance and drugs which may impair performance. Employers are not only entitled but bound to monitor employees to see whether they come to work in an impaired condition. One form of impairment can be caused by the ingestion of alcohol or drugs.

[61] Mr Badcock also acknowledged the following statement of that Court:4

We wish to emphasise that the Court cannot determine in advance of any particular case the justification for the employer's actions following either a refusal to take a test or a positive test result. That is because even although a direction may be both lawful and reasonable and therefore an employee cannot resist it on legal grounds, disadvantage or dismissal that may ensue is tested not merely for lawfulness and reasonableness of the instruction but also on the fairness and reasonableness of the employer's actions in all the circumstances.

2. *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand* [2004] NZEmpC 32; [2004] 1 ERNZ 614 (NZEmpC) [*EPMU v Air NZ*].

3 At [143].

4 At [265].

Employees may have good reasons for either refusing tests or for returning positive tests that will mean that in spite of the direction to take the test being a lawful and reasonable instruction, such employees are not to be unjustifiably disadvantaged or even dismissed in all the circumstances.

[62] The statements in *EPMU v Air NZ* were made in the context of an assessment of whether an alcohol and drug policy was a lawful and reasonable instruction and one within the scope of the employment agreement. It is only if those tests are met that a policy may be enforced.

[63] The issue decided in *EPMU v Air NZ* does not arise in the present case. That is because Mr Rottier has not claimed that the policy was unlawful or unreasonable.5

[64] Mr Henderson was aware of the policy at the time of his exchange with Mr Rottier. The parts of the policy I have discussed were on foot at the relevant time. A fair and reasonable employer can be expected to comply with its own promulgated policies and procedures.6

Justification

[65] The test of justification is described in s 103A of the Act. It states:

103A Test of justification

(1) 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 applying the test in subsection (2).
(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

5. This distinction is explained in *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] NZEmpC 168; (2008) 8 NZELC 99,181, (2007) 5 NZELR 87 at [125]–[126].
6. *Hayllar v The Goodtime Food Co Ltd* [2012] NZEmpC 153, [2012] ERNZ 333 at [71]; *Li v Vice Chancellor of Auckland University of Technology* (2006) 3 NZELR 66 at [71].

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and
(b) did not result in the employee being treated unfairly.

[66] With regard to both an unjustified disadvantage grievance, and an unjustified dismissal grievance, the Court must be satisfied that the dismissal or action is substantially justified with reference to the statutory test.7 The dismissal or action must also be procedurally fair according to the criteria set out in ss 103A(3) and 103A(5) having regard to other factors under s 103A(4) where appropriate. A failure to meet any of the s 103A(3) requirements may result in a disadvantage or dismissal being found to be unjustified.8

[67] Whilst substantive and procedural fairness may be treated as separate issues, in practice, they often overlap.9 That is because the question of justification must be determined as a whole and in all the circumstances.10 If procedural fairness has not been maintained, the substantive conclusion may not be justified – unless any defects were minor and did not result in unfairness.

[68] Mr Badcock argued that s 37 of the HSWA was pivotal when considering justification. It requires a person conducting a business or undertaking (PCBU), such as CSL, to ensure that the workplace, or anything arising from it, is without risk to any person.

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

8 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26] (NZEmpC).

9 *T & L Harvey Ltd v Duncan* (2009) 7 NZLER 161 (NZEmpC).

10 At [31].

[69] If, by this submission, Mr Badcock meant that the Court should be slow to reach a conclusion that is contrary to that of an employer where safety issues under the HSWA are involved, that proposition is not controversial.11

[70] But if Mr Badcock meant that the obligations of a PCBU under the HSWA should override or take precedence over the obligation to act fairly which fall on an employer under the Act, I disagree. Whilst safety may well be a very significant

issue, the two statutes are plainly intended to be complimentary, as is evidenced for example by neutral cross-references in each statute to the other.12

[71] Justification has gone both ways in cases concerned with drug testing. For example, in *Hooper v Coca-Cola Amatil (NZ) Ltd*, a dismissal after an employee failed a urinary drugs test was held to be unjustified there being a "litany of procedural defects".13

[72] Fuiava v Air New Zealand Ltd, is an example of a case in which the opposite conclusion was reached.14 It is sometimes cited as an instance which demonstrates that safety can be an overriding consideration, justifying a dismissal.15 It is worth noting that whilst in that instance, the Court indeed found the employer was justified in concluding safety was an overriding consideration, it did so on the basis that a procedurally fair inquiry had been undertaken.16 The dismissal was accordingly justified.

[73] What these cases emphasise is the orthodox application of s 103A considerations, with the results inevitably being fact specific. On the facts, health and safety considerations may prove pivotal – but the analysis must take into account all the circumstances including any procedural issues.

11. *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 (NZEmpC) at 95, confirmed on appeal in *Samu v Air New Zealand Ltd* [1995] NZCA 504; [1995] 1 ERNZ 636 (CA).
12. Health and Safety at Work Act 2015, ss 16, 61(3)(g) and 97; Employment Relations Act 2000, ss 103(j)(ii) and 110A.

13 *Hooper v Coca-Cola Amatil (NZ) Ltd* [2012] NZEmpC 11, (2012) 9 NZELR 523 at [48]. See also

Hayllar, above n 6.

14 *Fuiava v Air New Zealand Ltd* [2006] ERNZ 806.

15 At [57].

16. At [55]. See also *Thorne v Kiwirail Ltd* [2015] NZEmpC 48, [2015] ERNZ 272; and *Willis v Fonterra Cooperative Group Ltd* [2010] NZEmpC 80 at [66].

First issue: disadvantage grievance

[74] I have found that there was a heated exchange between Mr Henderson and Mr Rottier, in which Mr Rottier felt he had been wrongly accused of lying, and which then led to the question of whether he would undergo a drug test, which he said he either would, or may not, pass. As a result, Mr Henderson told him he could not be at work under CSL's health and safety provisions. There was then a discussion about whether he wanted the job. At this point he was told to leave.

[75] I find the possibility of a drug test being taken was a statement plainly made in the heat of the moment by Mr Henderson and responded to by Mr Rottier in similar vein.

[76] The request was not well considered. When Mr Rottier said that he either would not or may not pass, Mr Henderson assumed without any further discussion that this was tantamount to an admission that he was affected by the taking of drugs.

[77] Clause 13(b) of Mr Rottier's IEA stipulated that the employer had to have "reasonable grounds for suspecting that the Employee is under the influence of illegal drugs while at work".

[78] The term "reasonable grounds" is not defined in the IEA. However, the drug and alcohol policy did contain a requirement in respect of just cause testing, that there needed to be an observation of behaviour causing concern that the individual would be a potential or actual safety hazard to himself, due to the effects or after-effects of drugs and/or alcohol. The policy referred to behaviour consistent with an immediate inability to perform work. It also indicated that the individual was to be interviewed to determine whether testing was required. This constitutes common-sense guidance for a manager as to whether reasonable grounds existed. As noted, Mr Henderson said he had it in mind.

[79] There was no evidence of behaviour consistent with an immediate inability to perform work in Mr Rottier's work activity that morning. Mr Nicholas, for example, told the Court there had been nothing about Mr Rottier's manner or behaviour to

suggest any health and safety concerns. Mr Henderson did not check this issue with him, or any of Mr Rottier's other work colleagues.

[80] It is also the case that Mr Henderson accepted, in substance, that his suspicions were not limited to illegal drugs, because he could not have ruled out the possibility of Mr Rottier having taken a prescription drug. Nor did his suspicions rule out alcohol. All of this suggested a lack of certainty.

[81] Contrary to the terms of the just cause requirements of the policy, Mr Rottier was not "interviewed" to determine whether testing was required. The use of that term suggests a constructive process of question and answer. This did not occur.

[82] These problems were compounded by the fact that the exchange on this topic occurred in the context of an altercation. A fair and reasonable employer could, in the circumstances which developed, be expected to allow a cooling off period, and discussion in a location away from the factory, for example, which would have facilitated constructive dialogue as required by the s 4 duty of good faith.

[83] In short, a knee-jerk response to a short but heated argument resulted in Mr Rottier being sent away from the workplace to have a drug test, when the need and justification for doing so had plainly not been investigated adequately. These were not the steps of a fair and reasonable employer in the circumstances.

[84] The company's position was that Mr Rottier was suspended when sent away from the workplace. Again, for such an option to be considered, a fair and reasonable employer could be expected to have put the proposal to suspend to Mr Rottier first. Not only was this step not taken, but it was not made clear to him at the time that he was in fact suspended and he could return to the workplace once a satisfactory result was obtained.

[85] When giving evidence, Mr Romanes said Mr Rottier was suspended on pay. This was the first time, as the Court understands it, such a concession has been made.

[86] Mr Henderson did not say that Mr Rottier was suspended on pay. It is not apparent that he gave the issue any thought. I find Mr Rottier was suspended without being told this was the case, or that he was being suspended on a paid basis.

[87] Again, these were not the steps of a fair and reasonable employer. Had there been prior consultation, the question of status and payment could have been discussed.

[88] The consequences of these unjustified steps were significant. Mr Rottier incorrectly concluded he had been dismissed in the heat of the moment, as he told his doctors and MBIE mediation services. The confusion over his status amounted to being a significant disadvantage.

[89] These various procedural defects lead to a clear conclusion that the steps taken were not justified. The disadvantage grievance is established.

Second issue: abandonment

[90] There is a live issue between the parties as to whether, and if so, how the employment relationship came to an end.

[91] When the Authority investigated the problem, it considered the possibility that there had been a constructive dismissal, on the basis of the evidence that was placed before it.

[92] Such a dismissal arises where an employee resigns, and then argues he or she was compelled to do so, and that they could not reasonably be expected to put up with breaches on the part of the employer which seriously damaged the employment relationship.17 However, Mr Rottier did not resign. Accordingly, I do not consider that possibility is relevant in this case.

[93] For the purposes of the challenge, CSL submits that following the Facebook exchange between Mr Romanes and Mr Rottier, there was an absence of any follow-up by Mr Rottier to his remark he would be in contact shortly with further information.

17. *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168 (CA) at 172.

As Mr Romanes put it, the company therefore assumed after the lapse of a further three days the employment agreement had ended due to abandonment.

[94] There was a clause in the IEA which dealt with this topic:

Abandonment of Employment

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, this Agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[95] From the company's perspective, through the operation of this clause, the employment relationship came to an end on

16 May 2019.

[96] However, the position was not so straightforward.

[97] From 8 May 2019, when Mediation Services contacted Mr Henderson, it was clear to CSL that Mr Rottier believed he had been unjustifiably dismissed; this was the given reason for seeking mediation.

[98] Mr Rottier's belief was reiterated when he forwarded his amended personal grievance on 12 May 2019. Again he made it clear that he believed he had been unjustifiably dismissed.

[99] This was not the company's belief. It considered Mr Rottier had been suspended on pay. Regrettably, the company had not advised him of this when sending him away.

[100] At the hearing, it was argued that no payment was made because the company had a right to forfeit any wages due in the event of a termination under the IEA.

[101] That was not a correct understanding of the legal position under the IEA. The right of forfeiture applied to a provision in the IEA which related to termination of employment. It did not relate to the provision that described abandonment of employment.

[102] In a situation where CSL had not clarified its position with regard to Mr Rottier's employment, who plainly thought he had been dismissed, the employer could be expected to have clarified the position both as to status and payment.

[103] Moreover, Mr Rottier had sought mediation from the outset, as it was his right to do both under the IEA and the Act. The company believed the IEA was still on foot, albeit Mr Rottier was suspended. It should not therefore have ignored the request for mediation as it did when concluding there was an abandonment.

[104] All of this was a far cry from an abandonment situation. It was one requiring clarification of the employment circumstances. To do so would have been a step which a fair and reasonable employer could be expected to take so as to maintain a productive employment relationship.18 Had CSL done so, it could not have concluded that Mr Rottier had abandoned his employment.

[105] As observed by the Court of Appeal in *EN Ramsbottom v Chambers*, the concept of dismissal is a broad one.19 The Court said this:

> [19] As observed in *Principal of Auckland College of Education v Hagg* ... "On an ordinary use of language 'dismissal' is a unilateral act by the employer which terminates the employment contract. 'To dismiss' is defined in the *Oxford English Dictionary* as: 'To send away or remove from office, employment or position; to discharge, discard, expel'."
>
> [20] And in the frequently cited decision in *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Assocs Employment Agency and Complete Fitness Centre)* ... Judge Williamson, delivering the judgment of the Arbitration Court, defined dismissal as "the termination of employment at the initiative of the employer", noting that such a definition covers dismissals both upon notice and without notice in dismissals both actual and constructive.

(citations omitted)

[106] Adopting that broad definition, the various failures on the part of CSL plainly led to it proceeding on the basis that the employment relationship was at an end, without justification. The relationship was thus terminated by the employer on 16 May 2020.

18 Employment Relations Act 2000, s 4(1A)(b).

19 *EN Ramsbottom v Chambers* [2000] NZCA 183; [2000] 2 ERNZ 97.

[107] I conclude that Mr Rottier was unjustifiably dismissed.

Third issue: remedies

[108] Mr Rottier has established both his disadvantage grievance and his dismissal grievance.

Compensation

[109] Mr Rottier sought compensation for humiliation, loss of dignity and injury to feelings.

[110] On the face of it, he suffered each of these consequences following the events at CSL on 6 May 2019. This is evident

from his own evidence, in which he said he was humiliated and shocked by the way Mr Henderson treated him. That fact is confirmed by the two letters he sent to CSL soon after the subject events on 6 and 12 May 2019; and his exchange with Mr Romanes on 13 May 2019. It is also confirmed by his contemporaneous medical records as summarised earlier.20

[111] Dr Brons gave evidence to the Court verifying the observations he made at the time. Mr Badcock questioned the reliability of this evidence, asserting, in effect, that on the basis of brief consultations only, Dr Brons had not been in a position to assess Mr Rottier's state of mind accurately. I disagree. In fact, not only did Dr Brons see Mr Rottier on several occasions in the period following the incident, but his colleague, Dr Palmer, who had experience in psychiatry, did also. The observations made by each doctor are consistent with those made by the other. In addition, as Dr Brons accepted, to some extent a medical practitioner assessing a state of mind issue must consider the credibility of the patient's account. This is no doubt a regular occurrence for an experienced medical practitioner. I find Dr Brons' evidence as to his assessment is well able to be relied on.

[112] Mr Badcock submitted that the mental health issue suffered by Mr Rottier was simply a continuation of, or at worst, an exacerbation of, a pre-existing condition, for which CSL could not be liable.

20 Above at [37], [47]—[50].

[113] For the purposes of this point, Mr Badcock submitted the Court would be assisted by adopting the approach utilised under the Accident Compensation Act 2001 with regard to underlying or pre-existing mental health issues.21 The approach adopted with regard to statutory claims for cover and entitlements under the ACC regime is not of assistance in the present case. The provisions of that legislation are complex and different in purpose and kind from those relating to the award of remedies under s 123 of the Act.

[114] That all said, there is a live question which can be considered in the present case as to whether the deterioration of Mr Rottier's mental health in May 2019 was related in any way to pre-existing factors.

[115] It is necessary to discuss the medical evidence in more detail. It was known to Dr Brons and Dr Palmer that Mr Rottier had suffered from mild depression in the past, due to external events arising in his environment.

[116] When Dr Brons saw him on 8 May 2019, Mr Rottier was suffering what was described as "an acute anxiety episode". He was placed on a short course of medication to help settle that sudden anxiety.

[117] On 21 May 2019, Dr Palmer considered Mr Rottier's condition was something more than a situational crisis. He recognised that past events may have been playing a part. He diagnosed depression, referring him to counselling. He was recommenced on the anti-depressant used previously.

[118] Notwithstanding prior use of marijuana, of which Dr Brons also had knowledge, he did not consider this was a factor contributing to Mr Rottier's presentation in May 2019. I accept Dr Brons' opinion.

[119] I conclude from the medical evidence that the incident at CSL had a significant adverse effect on Mr Rottier's mental health.

21 For example as demonstrated by s 26 of the Accident Compensation Act 2001, and as discussed in *Hornby v Accident Compensation Corporation* [2009] NZCA 576, (2009) 9 NZELC 93,476 at [34].

[120] That said, there were factors in Mr Rottier's health history that must also be considered. Dr Brons said that at the time of the incident, Mr Rottier's mental health had stabilised. I accept this evidence and find that the sudden deterioration of Mr Rottier's mental health was triggered by the CSL incident. The event acted as a catalyst.

[121] I conclude on the basis of Mr Rottier's evidence and the medical evidence, that he suffered significant humiliation, loss of dignity and injury to feelings as a result of the CSL events.22

[122] Next, Mr Badcock submitted that the Court should follow previous authorities where an assessment of compensation has taken account of habitual recreational drug use in the knowledge that an employer has a drugs policy in place.23

[123] Mr Badcock argued that Mr Rottier submitted his application for employment at CSL in February 2019, in which he specifically acknowledged the possibility of drug testing. If he continued to use cannabis thereafter, he could not argue there was significant hurt and humiliation from being asked to take a drug test.

[124] For two reasons, I do not accept this submission. There had been no response to Mr Rottier's application for work for some three months. He was asked to return to CSL unexpectedly and on short notice. Moreover, there is no reliable evidence that after he was approached to work for CSL in early May 2019, he used cannabis.

[125] Second, compensation is justified in this case not because a drug test was requested per se, but because of the flawed way in which the request was made. Mr Rottier was sent away from the workplace on 6 May 2019. CSL considered he had been suspended. Mr Rottier believed he had been dismissed. Over the following two weeks, Mr Rottier's employment status

was neither clarified nor respected.

[126] The cases relied on relate to wholly different circumstances.

22 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352 at [105]—[107].

23 For example *Hayllar*, above n 6, at [86].

[127] The Authority considered an appropriate award was $12,000. Mr Wynyard, counsel for Mr Rottier, said his client considered that sum to be appropriate.

[128] This sum is just over the threshold of Band 1 (low level loss), and at the lower end of Band 2 (mid-level loss).24

[129] In my view, $12,000 is at the lower end of a fair award, in the particular circumstances. I conclude CSL should pay that sum as compensation for humiliation, loss of dignity and injury to feelings.

Lost wages

[130] CSL conceded Mr Rottier did not receive wages for the period of suspension. It said this amounted to being 72 hours at a rate of $20 per hour, $1,440. This amount should be paid.

[131] No submissions were made for CSL in respect of Mr Rottier's post-dismissal claim for lost wages.

[132] Mr Wynyard relied on the reasoning adopted by the Authority for the reimbursement of lost wages.

[133] The Authority accepted that for health reasons, Mr Rottier was not reasonably able to seek work for many weeks after May 2019. It noted, however, that by October 2019, Dr Brons had assessed Mr Rottier as "doing well" and, with the assistance of his ongoing medication, his depression was well controlled. From September 2019, he began making reasonable efforts to find further employment, by making multiple job applications.25

[134] The Authority considered that in those circumstances the period of loss arising from the personal grievance should be assessed as having lasted four months, which included an additional one-month over the minimum period of three months under

24 See *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].

25 *Rottier v Concrete Structures (NZ) Ltd*, above n 1, at [47].

s 128(2) of the Act, to account for the limits on his ability to mitigate his loss for the duration of that period.

[135] It went on to find that a longer period was not appropriate because there was a mitigation step which Mr Rottier could have taken. Reference was made to credible evidence given by Mr Romanes that if Mr Rottier had indeed met with him as had been discussed on 13 May 2019, he would have considered arranging for Mr Rottier to work at a different site. The Authority concluded that there was a prospect of Mr Rottier thereby being able to mitigate his subsequent loss of wages, if that option had been pursued. This factor meant that any period greater than four months was not appropriate.

[136] In the absence of any submissions or evidence to the contrary, I accept the Authority's reasoning. It is consistent with the evidence placed before the Court.

[137] There being no dispute as to the amount which would be payable for that period, the sum involved is $13,864.

[138] In total, the sum to be paid for lost wages is therefore $15,304.

Contribution

[139] Mr Badcock submitted that a contributory conduct reduction of 50 per cent should be made under s 124 of the Act.

[140] This was because Mr Rottier had, it was argued, contributed significantly to the events which occurred. Mr Badcock referred to what he described as Mr Rottier's erratic and agitated behaviour. He said that this had led to Mr Henderson requesting the taking of a drug test, and a subsequent refusal to do so when Mr Rottier said that he would not/may not pass that test. This refusal was in the face of a reasonable and lawful instruction. The final contributory factor was, it was submitted, that Mr Rottier did not follow up the discussions which were commenced with Mr Romanes; rather, he abandoned his employment.

[141] In response, Mr Wynyard submitted that what occurred on 6 May 2019 was entirely due to incorrect assumptions

made by Mr Henderson regarding Mr Rottier, without proper inquiry. He also submitted that after Mr Rottier left the workplace, CSL incorrectly placed an onus on Mr Rottier to pass a drug test. He argued that in addition, there was no evidence that the company provided any information to him regarding where or how he should obtain a drug test, contrary to the obligations of cl 13(b) of Mr Rottier's IEA. Nor was this an abandonment situation.

[142] Under s 124 of the Act, when considering remedies, the Court must consider "the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance", and "if those actions so require", the remedies are to be reduced accordingly. In *Ark Aviation Ltd v Newton*, the Court of Appeal made it clear the discretion is broad in scope.26

[143] My earlier analysis of the CSL incident reveals multiple breaches on the part of the company.

[144] The first aspect of the relationship problem concerns the heated exchange which gave rise to the request for a drug test. I have found that Mr Rottier was provoked by an unwarranted assertion that he had lied to Mr Henderson. Notwithstanding Mr Rottier's response that he had not invited the KCS employees on site, Mr Henderson disbelieved him without checking the facts. The conversation deteriorated. It was submitted Mr Rottier's behaviour was "erratic and agitated". He was undoubtedly angry, but he was provoked. As he put it, he began to defend himself, doing so using just the same robust language as Mr Henderson was using. In this context, Mr Henderson did not apply the provisions of the IEA and drug and alcohol policy correctly.

[145] The second aspect is that Mr Rottier's employment status was not clarified. There was a complete misunderstanding as to whether or not his employment had been terminated as from 6 May 2019. Ultimately, the company unjustifiably assumed that

26 *Ark Aviation Ltd v Newton* [2001] NZCA 350; [2002] 2 NZLR 145, [2001] ERNZ 133 at [36] and [40]; this point was affirmed in *Salt v Governor of Pitcairn and Associated Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 (CA) at [57].

he had abandoned his employment. Nor were any wages paid for the period of suspension up to 16 May 2019.

[146] In my view, the only aspect of this chronology which falls for consideration under s 124, is the manner in which Mr Rottier responded at the time of the incident.

[147] It was perhaps regrettable that in the heat of the moment he stated he would not/may not pass a drug test without any greater elaboration. But that factor contributed to the company's numerous subsequent flaws in a modest way because the employer did not seek any clarification of a statement that required it. An appropriate reduction under s 124 is 10 per cent.

[148] The two remedies are to be reduced accordingly.

Conclusion

[149] I have reached the same conclusions as did the Authority, except in two relatively minor respects, relating to wages during the suspension period, and as to contributory conduct. Given that circumstance, however, and the requirements of s 183(2) of the Act, this judgment replaces the Authority's determination.

[150] Both Mr Rottier's personal grievances are made out. CSL's challenge is dismissed.

[151] Remedies are to be awarded as follows:

a. Compensation for humiliation, loss of dignity and injury to feelings in the sum of $10.800.
b. Lost wages in the sum of $13,773.60.

c. Both sums have been reduced by 10 per cent to reflect contributory conduct.

[152] CSL paid $12,000 into Court pursuant to a direction for stay granted by the Court, by consent. Having regard to a partial payment to Mr Rottier of the Authority's awards, the Registrar is to pay from this fund:

a. the sum of $10,706.60 to Mr Rottier, being the remaining sum now due for payment; and
b. the balance, including accrued interest, to CSL.

[153] Finally, I deal with costs. Mr Rottier has largely succeeded. He is entitled to costs which should be assessed in light of the factors identified in Category 2B of the Court's Guideline Scale as to Costs.27 I would expect counsel to be able to agree this issue. If there are, however, any difficulties, an appropriate application may be made within 14 days of this judgment, with a response given 14 days thereafter.

B A Corkill Judge

27. <https://www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court- Practice-Directions.pdf>