



after returning a non-negative screening result. Womersley refutes the claims and remedies sought.

### **How did the Authority investigate?<sup>1</sup>**

[3] I held an investigation meeting on 11 June 2024 to hear evidence. Under oath or affirmation, I heard from Mr Meeking, then Ms McLelland for Womersley. I heard oral submissions at the investigation meeting and received further written submissions.

### **What were the issues?**

[4] The issues requiring investigation and determination were:

- (a) Did Womersley unjustifiably dismiss Mr Meeking?
- (b) If Womersley unjustifiably dismissed Mr Meeking, what remedies should be awarded such as:
  - (i) Payment of compensation under s 123(1)(c)(i) of the Act; and
  - (ii) Reimbursement of wages lost as a result of the grievance?
- (c) Has Womersley breached obligations warranting a penalty for:
  - (i) Failing to negotiate an employment agreement in good faith under s 63A of the Act;
  - (ii) Breaching the employment agreement (by breaching policy) under s 134 of the Act;
  - (iii) Breaching the duty of good faith under s 4 of the Act;
  - (iv) Failing to promptly provide records under s 130 of the Act; and
  - (v) Delaying payment of final annual holiday pay under s 27(1)(b) of the Holidays Act 2003 (**Holidays Act**)?<sup>2</sup>

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<sup>1</sup> As permitted by s 174E of the Employment Relations Act 2000 (**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.

<sup>2</sup> See s 75 of the Holidays Act in relation to a penalty for non-compliance with s 27.

## **Did Womersley unjustifiably dismiss Mr Meeking?**

[5] Womersley says it justifiably dismissed Mr Meeking summarily for serious misconduct after he returned a non-negative screening result for THC in breach of its drug testing policy. Whether or not Womersley can justify that decision depends on whether it can show it fairly and reasonably dismissed Mr Meeking both substantively and procedurally. I must consider all the circumstances of the dismissal.<sup>3</sup> Relevant aspects include what the employment agreement, policy, process and reason relating to Womersley's decision to dismiss were.

### *The Agreement*

[6] After approaching Womersley's owner and director, Gerald Taege, sometime in April 2022, Mr Meeking accepted a role as an Engineer working in Womersley's Oxford engineering workshop. Mr Meeking wanted to work for Womersley because he lived nearby and could reduce his work commute.

[7] Womersley employed Mr Meeking as an Engineer with 38 years of relevant experience. He was one of their only employees during his time working at Womersley – the other workers primarily being owners Ms McLelland and Mr Taege. Womersley successfully relied on a small team to service its rural based business.

[8] Womersley operates an engineering workshop business that requires staff to work with heavy machinery, welding and cutting equipment and chemicals. It seemed to be common ground that Womersley operated, and Mr Meeking worked in, a safety sensitive working environment. As Mr Meeking put it: "You have to have your wits about you."

[9] Womersley says it provided an employment agreement to Mr Meeking on his first day of work, 18 May 2022. Mr Meeking claims he never got an agreement prior to the one handed to him in February 2023. Ms McLelland recalls the lengthy process of updating the employment agreement template for the business, making it memorable when she gave Mr Meeking his first employment agreement on his first day. It is likely

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<sup>3</sup> Act, s 103A.

Ms McLelland gave Mr Meeking his first employment agreement as she recalls, but Mr Meeking did not sign it nor return it before being given an updated version.

[10] Both parties agree Womersley gave Mr Meeking an updated individual employment agreement (**Agreement**) in February 2023 along with a copy of their new drug and alcohol testing policy (**Policy**).

[11] A payslip dated 8 February 2023 contained a private message to Mr Meeking reminding him to return his Agreement by Friday 10 February 2023. A note attached to the Agreement asked Mr Meeking to "... sign in appropriate spaces & initial each page retrospect start date 18<sup>th</sup> May 2022 – please return by Fri 10.2.23" The copy of the Agreement provided to the Authority had a date 18 May 2022 on the front. The parties had initialled each page, and later dated it as having signed on 10 February 2023. Before signing, Mr Meeking negotiated a reduction of the notice period from four to two weeks.<sup>4</sup>

[12] Given this background, it is likely Mr Meeking had at least a few days to consider the Agreement - enough time to negotiate notice. Mr Meeking signed a declaration he had been advised of the right to seek independent advice and had a reasonable time to do so.<sup>5</sup>

[13] The Agreement recorded mutual health and safety obligations under the Health and Safety at Work Act 2015.<sup>6</sup> Mr Meeking was required to comply with all directions and instructions regarding health and safety and to ensure his own health and safety at work. The Agreement recorded that Womersley operated a safety sensitive workplace and because of this a zero-tolerance drug policy was required. Clause 10.2 noted that Mr Meeking must ensure he had familiarity with Womersley's health and safety policies and any modifications introduced.

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<sup>4</sup> Clause 13.1. Four weeks was crossed out and two weeks written in by hand.

<sup>5</sup> Page 26 of the Agreement. In addition, clause 15.6 contained an acknowledgement by Mr Meeking that he had been advised of his right to take independent advice on the terms of the Agreement, that he had been provided with a reasonable opportunity to take advice, that he had read the terms and understood them and agreed to be bound by them and policies as implemented from time to time.

<sup>6</sup> Clause 10.

[14] Clause 10.5 of the Agreement described drug testing:<sup>7</sup>

Due to the safety sensitive work environment Womersley Group Ltd maintains a zero tolerance drug policy, additional information of which can consequently be found in Appendix 1 of this agreement. The Employer may under any circumstance request the Employee to undergo a drug or alcohol test which will be conducted by a medical professional in accordance with the relevant AS/NZS Testing Standards. Furthermore, the Employer reserves the right to action an instant dismissal in termination of the Employment agreement should drugs or excess alcohol levels be found to maintain the wellbeing of others in a safety sensitive workplace.

[15] Womersley agreed to advise Mr Meeking of any changes to company policies and seek his acknowledgement of any changes. Mr Meeking was responsible for regularly reviewing any known company policies to ensure his actions and intentions fully complied with policies.<sup>8</sup>

[16] Clause 13.2 provided for summary termination for serious misconduct which included:

- (a) “Serious or blatant breach of company policies such as Health and Safety, workplace behaviour or ethics or any other specific policies.”
- (b) “Refusal to undertake, or positive result of, required drug testing.”

[17] Clause 13.3 provided for suspension if Womersley wanted to investigate any alleged misconduct.

### *The Policy*

[18] The Policy provided for workplace drug and alcohol testing. It included clauses that:

- (a) Reiterated the safety sensitive nature of the workplace.

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<sup>7</sup> Clause 10.5. Although clause 10.5 refers to Appendix 1, the Agreement contained a job description as Appendix 1. The Workplace Drug and Alcohol Policy was separate to the Agreement although provided at the same time.

<sup>8</sup> Clause 11.6.

- (b) Defined serious misconduct to include “Having any banned substances in the body and confirmed by a positive drugs test conducted in accordance with NZ standards.”
- (c) Said summary dismissal could result “Where, after a full and fair enquiry, serious misconduct is found to have occurred.”
- (d) Allowed for unannounced random testing for all employees who worked in safety sensitive areas.
- (e) Required testing to be carried out by a NZQA qualified collector in accordance with appropriate standards – AS/NZS 4308:2008 governing procedure for specimen collection and the detection and quantification of drugs through urinalysis.
- (f) In the event of a non-negative screening result, Womersley could suspend or stand Mr Meeking down, pending investigation of the matter.
- (g) If, after a fair investigation, Womersley concluded the policy had been breached, then it could impose whatever disciplinary action was seen as appropriate which could include instant dismissal and a request to leave the workplace immediately.

### *The Drug Test*

[19] Early on a Monday morning, 20 February 2023, The Drug Detection Agency for Canterbury (**TDDA**), showed up for random testing at Womersley’s workshop. Aside from Ms McLelland and Mr Taeye, Mr Meeking was the only person onsite subject to the Policy and the only employee.

[20] Ms McLelland felt surprised when the TDDA showed up unannounced - she had not yet finalised her online account application although had discussed a pencil booking by phone. She directed the TDDA to Mr Meeking as the only employee who could be tested. Mr Meeking told Ms McLelland he would not pass because he had been a “stoner” all his life. Mr Meeking accepted this was a comment he probably made. Ms McLelland recalled feeling shocked by Mr Meeking’s admission.

[21] The TDDA completed their testing. Mr Meeking's screening test returned a non-negative result for THC, requiring further analysis. Further testing confirmed a positive result but Womersley obtained this information after Mr Meeking's dismissal.

### *The Dismissal*

[22] After being told of the non-negative result, Mr Meeking told Ms McLelland: "that was a non negative, so what happens now, is that it do I just go?" to which she replied "yes." Mr Meeking went to talk to Mr Taege about his work, then packed his tools and left. Ms McLelland accepted the discussion amounted to a dismissal of Mr Meeking, who never returned to work.

[23] Mr Meeking says he had previously spoken to Mr Taege about his moderate cannabis use for medicinal and pain relief purposes. Mr Taege did not give evidence. Ms McLelland says she did not know Mr Meeking used cannabis until he told her he would not pass a drug test and was a stoner.

[24] Although Mr Meeking acknowledges signing the Agreement he received along with a copy of the Policy that allowed for testing, he says he believed his performance gave Womersley no need for concern so would not test.

### *Justified?*

[25] As well having a good reason for dismissing someone (like serious misconduct), an employer must follow a fair process before concluding serious misconduct has occurred justifying dismissal. Failing to do so can cause a dismissal to be unfair. So too, can failing to follow your own policy. Although safety considerations are important, they are complementary to, and not more important than, employment law obligations.<sup>9</sup>

[26] The Policy allowed for disciplinary action after a fair process and a positive result – up to and including summary dismissal for serious misconduct. However, at the time of dismissing Mr Meeking, Womersley had a non-negative screening result – it

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<sup>9</sup> *Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95 at [64] and [70].

did not yet have a positive result (that came later). Womersley acted prematurely to say it had to dismiss Meeking for health and safety reasons - it could have taken steps to suspend Mr Meeking instead, to allow it to follow a fair (and full) process as required by the Policy. It did not. These are not the actions of a fair and reasonable employer.

[27] Although Womersley had limited resources, it did not meet the minimum standards required for justifying a dismissal. For example:

- (a) It did not investigate the allegation of serious misconduct before dismissing Mr Meeking.
- (b) Womersley did not raise the concerns with Mr Meeking before dismissing him.
- (c) It did not give Mr Meeking a reasonable opportunity to respond to any concerns.
- (d) Womersley did not genuinely consider any explanation Mr Meeking might have been able to provide before dismissing.

[28] These procedural errors were more than minor. Mr Meeking's dismissal was unjustified. He has a personal grievance for unjustified dismissal. Mr Meeking is entitled to a consideration of remedies.

### **What remedies should be awarded?**

[29] Mr Meeking claims \$15,000 compensation under s 123(1)(c)(i) of the Act for his unjustified dismissal. Mr Meeking says being dismissed on the spot made him feel "absolutely terrible."<sup>10</sup> He says the whole experience left him "bewildered, humiliated, embarrassed, disheartened and dismayed." As a single parent of a teenager, he was suddenly left without an income, a looming mortgage and household expenses which were immediately unaffordable. This was exacerbated when he did not receive his holiday pay. At the investigation meeting, he described feeling "pretty upset" and his dismissal was a "huge blow."

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<sup>10</sup> Mr Meeking's statement of evidence, at [21] to [24].

[30] Mr Meeking acknowledged having attended interviews for alternative employment prior to his dismissal. He successfully took up a position soon after his dismissal (three weeks later) on a higher hourly rate.

[31] After considering the evidence, what has been awarded in other cases and trends generally,<sup>11</sup> an amount of compensation is warranted of \$12,000 under s 123(1)(c)(i).

[32] Mr Meeking claims an amount under s 123(1)(b) totalling three weeks wages: \$4,284.00 (gross). This amount is also awarded.

[33] In deciding the nature and extent of remedies for any personal grievance, the Authority must consider the extent to which Mr Meeking acted in a way that contributed to the situation that gave rise to his grievance.<sup>12</sup>

[34] The Employment Court has summarised key principles relating to contribution:<sup>13</sup>

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (c) Third, what is a fair assessment of the extent of the contribution?
- (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[35] The Employment Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.<sup>14</sup>

[36] Under the Policy, if Womersley had followed a full and fair process, Mr Meeking may have been able to be justifiably dismissed for his positive result for THC.

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<sup>11</sup> Such as *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162].

<sup>12</sup> Act, s 124.

<sup>13</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [73].

<sup>14</sup> *Xtreme Dining Limited trading as Think Steel v Dewar* [2016] NZEmpC 136 at [217] to [222].

He was aware of this possibility at the time of the Policy being introduced and did not from when the Policy was introduced the day of his test, come to Womersley to say he would not pass and suggest alternatives like rehabilitation. In all the circumstances, a reduction in remedies is warranted, of 10 percent.

**Did Womersley breach minimum entitlement provisions warranting penalties?**

*Penalty for breaching s 63A of the Act?*

[37] Mr Meeking claims a penalty for a failure to negotiate in good faith under s 63A of the Act. The evidence shows that Womersley did the following things:

- (a) Provided Mr Meeking with a copy of the intended agreement under discussion;
- (b) Advised Mr Meeking he was entitled to seek independent advice about it;
- (c) Gave Mr Meeking a reasonable opportunity to seek that advice; and
- (d) Considered any issues Mr Meeking raised and responded to them (including agreeing to a reduced notice period).

[38] There has been no breach of s 63A.

*Penalty for breaching an employment agreement?*

[39] Mr Meeking claims Womersley failed to follow the Policy and should be penalised under s 134 (for breaching an employment agreement). The Policy was not part of the Agreement. This claim is unsuccessful.

*Penalty for breaching the duty of good faith?*

[40] Mr Meeking claims a penalty of a breach of good faith under s 4 of the Act. He says he felt unfairly targeted by Womersley. He points to the requirement to be active and constructive in establishing and maintaining a productive employment relationship. He says he was not afforded an opportunity to comment or discuss alternatives to dismissal.

[41] Mr Meeking has not referred to if and how he claims Womersley may have met the threshold s 4A of the Act sets for penalising for a particular type of good faith breach. Whilst Womersley breached aspects of the duty of good faith,<sup>15</sup> not every breach of good faith attracts a penalty. This claim is unsuccessful.

*Penalty for breaching s 130 of the Act?*

[42] Mr Meeking claims a penalty for a failure to comply with his request for a copy of his time and wage records under s 130 of the Act. Mr Meeking requested records through his representative.<sup>16</sup> Ms McLelland emailed Mr Meeking's representative the next day, on 14 March 2023, saying among other things, that Mr Meeking had access to all of his payroll information via ipayroll which was used during his employment and was still available to him. His representative responded soon after saying they would ensure Mr Meeking was aware he still had access. It was not until lodging the statement of problem that Mr Meeking's representative then said "No such records have ever been provided" and then asked for copies of "complete time, wage and leave records" with the statement in reply. Womersley then provided this with the statement in reply.

[43] No penalty is warranted.

*Penalty for annual holiday pay delay?*

[44] In a payslip dated 22 February 2023, Womersley included a private message to Mr Meeking that said: "No annual leave is applicable as you have not completed 12 months of employment. We have made the decision not to recoup annual leave paid in advance."

[45] Mr Meeking's representative referred to the unpaid annual leave when raising a personal grievance in a letter on 13 March 2023.<sup>17</sup> Womersley responded to the

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<sup>15</sup> Such as s 4(1A).

<sup>16</sup> At [20], letter from Sacked Kiwi to Womersley dated 13 March 2023.

<sup>17</sup> At [17], letter from Sacked Kiwi to Womersley dated 13 March 2023.

grievance and acknowledged it should have paid Mr Meeking his accrued annual holidays.<sup>18</sup>

[46] Womersley accepts it paid Mr Meeking's final annual holiday pay late. Ms McLelland explained she made a mistake about Womersley's obligation (or lack of obligation) to pay out accrued annual holiday pay upon termination. Once this was brought to her attention, she promptly paid the amount owing and apologised.

[47] Mr Meeking claims a penalty for Womersley breaching s 27 of the Holidays Act which requires payment of a final holiday pay in the pay period to which the final period of employment relates. An employer is liable to a penalty of up to \$20,000 if it breaches provisions in the Holidays Act, including s 27.

[48] When determining an appropriate penalty under the Holidays Act, the Authority must have regard to all relevant matters including the purpose in s 3 of the Holidays Act (and to the extent relevant the object in s 3 of the Act), along with the matters referred to in s 133A(b) to (g) of the Act.<sup>19</sup> Section 133A sets out compulsory considerations when determining an appropriate penalty. These include the nature and extent of any breach, whether it was intentional, inadvertent or negligent, the nature and extent of any loss or damage suffered by any person, whether the person in breach paid compensation, reparation, restitution or took other steps to avoid or mitigate any actual potential adverse effects of the breach, and the overall circumstances of the breach, including the vulnerability of the employee and any prior offences. This is a non-exhaustive list of considerations that are potentially relevant when determining an appropriate penalty for any breach.

[49] The Employment Court has summarised relevant steps in setting penalties:<sup>20</sup>

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of the stepped approach.

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<sup>18</sup> At [21], letter from Womersley to Sacked Kiwi dated 1 March 2013 (likely to be an incorrect date given it refers to the letter from Sacked Kiwi dated 13 March 2023).

<sup>19</sup> Holidays Act, s 76A.

<sup>20</sup> *A Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143 at [151].

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[50] Womersley is liable for one penalty only. Relevant factors include that the purpose of the Holidays Act aims to provide employees with minimum entitlements that include annual holidays. This is not a case of Mr Meeking's annual holiday not being paid. It was a matter of weeks between when Womersley should have paid Mr Meeking his final holiday pay and when it paid him after being made aware of its breach. The breach was isolated and unprecedented for Womersley and Mr Meeking. Although deliberately delayed, Womersley did so based on a misunderstanding of its obligations. Once notified of their mistake they corrected it and apologised. Despite that, the breach impacted on Mr Meeking who was relying on his income for meeting financial commitments he struggled with for three weeks.

[51] A penalty of \$1,000 is warranted, with 50% paid to the Crown, and the other 50% paid to Mr Meeking.<sup>21</sup>

### **Summary of Orders**

[52] Womersley unjustifiably dismissed Mr Meeking. It is ordered to pay:

- (a) Mr Meeking \$12,000 compensation, less 10 percent, totalling \$10,800;
- (b) Mr Meeking \$4,284.00 (gross) remuneration lost, less 10 percent, \$3,855.60 (gross); and
- (c) A penalty of \$1,000, with 50% paid to Mr Meeking and the other 50% paid to the Crown.

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<sup>21</sup> Applying s 76(6) of the Holidays Act.

## Costs

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

[54] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Meeking may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Womersley will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[55] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>22</sup>

Lucia Vincent  
Member of the Employment Relations Authority

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<sup>22</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)