IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 124
5330734

	BETWEEN	MATTHEW JAMES O'CONNELL Applicant
	A N D	CONSORTIUM CONSTRUCTION LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Tim Twomey, Counsel for Applicant Jackie Frampton, Counsel for Respondent
Investigation meeting:	28 October 2011 at Christchurch
Submissions Received	18 November & 1 December 2011 from the Applicant 28 November 2011 from the Respondent
Date of Determination:	21 June 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement

[1] Regrettably, the completion of this investigation has been delayed. Following the investigation meeting there has been a delay while I worked on other matters deferred or affected by the September 2010 and February 2011 earthquakes or which have been accorded priority. Preparation of the determination has also been affected by the issue referred to by the Chief of the Authority in his memorandum dated 7 May 2012.

[2] Since recently turning my attention to this matter, I have reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes

of the evidence and the parties' written submissions provided during the investigation meeting.

[3] I acknowledge the parties' patience and understanding and regret any difficulties caused by the delay.

Employment relationship problem

[4] Matthew O'Connell was employed full time by Consortium Construction Limited (CCL) as a carpenter from about 2006 until he was dismissed without notice in December 2010. CCL's letter dated 13 December 2010 states that: *Further to our investigation into drug usage on our building sites, you have been found to be using illegal drugs in our workplace, we hereby give you Matthew O'Connell notice of dismissal, as of 3.30pm Friday 10/12/ 2010.*

[5] Mr O'Connell says that there was no investigation. He also denies using any illegal drug (marijuana) at work. To remedy his grievance, Mr O'Connell is claiming compensation for lost remuneration and for distress.

[6] Danny Whiting is CCL's development manager. It was Mr Whiting who dismissed Mr O'Connell. There was a conflict in the evidence about what Mr Whiting did to investigate the allegation and what he said to Mr O'Connell during their several exchanges prior to the 13 December 2010 letter. I will need to explain the sequence of events and resolve those conflicts. Having done that I will consider whether CCL's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

CCL's investigation

[7] Jonathan Small was CCL's site foreman at a building site called Christina Tavern on the corner of Montreal Street and Moorhouse Avenue. The building was damaged in the September 2010 earthquake. CCL was working to reinforce the building and do other works for which there was scaffolding surrounding the building. At about 2.45pm on Thursday 9 December 2010 Mr Small, Matthew Murphy, James Owen and Mr O'Connell were working on the third level of the scaffolding. Mr Small says that he smelt cannabis and identified that it was coming from Mr O'Connell. Mr O'Connell was told to *put it out* and did so. Mr Small took no

further steps at that time. Work apparently stopped for a break. There was some discussion amongst the others that Mr O'Connell was not party to.

[8] At some point Mr Small reported this incident to Mr Whiting. Mr Whiting was not based on this work site. Mr Small's prepared evidence is that he tried to get hold of Mr Whiting that evening but was not able to speak to him about the incident until the Friday morning. However, when questioned, Mr Small said that they did have a brief discussion on the Thursday evening as a result of which he knew that Mr Whiting was going to get in touch with his lawyer.

[9] In his prepared statement Mr Whiting says that he was called by Mr Small on the Friday morning and told that Mr O'Connell had been seen and smelt smoking marijuana on the third level of the scaffold at the building site the previous afternoon. However, when questioned Mr Whiting said that he was rung on the Thursday evening and told by Mr Small that he and two others had witnessed Mr O'Connell smoking marijuana on the site while working on the third level of the scaffolding. Mr Small apparently told him that Mr O'Connell had grinned when questioned, admitted that it was something left over from the night before and treated it as something of a joke.

[10] Witnesses were excluded from the investigation meeting by agreement. Mr Whiting gave evidence before lunch while Mr Small and Mr Murphy gave evidence after lunch. When they gave their evidence both Mr Small and Mr Murphy were asked and admitted speaking with Mr Whiting during the lunch break. I cannot say whether Mr Small's change in evidence as to the timing of his discussion with Mr Whiting resulted from the lunchtime discussion. However, relying on Mr Whiting's oral evidence, I find that he probably first learned of the substance of the allegation on the Thursday night.

[11] There is conflicting evidence about what Mr Whiting did to investigate the allegation. Immediately after giving the oral evidence about his brief discussion with Mr Whiting on the Thursday night Mr Small told me (my emphasis):

> *<u>Next I knew</u>, Danny has spoken to the lawyer. It was going to be instant dismissal for smoking illegal substances. He told me this sometime on the Friday.*

[12] Mr Small's evidence, which I accept, is that he had no further discussion with Mr Whiting until Mr Whiting called on the Friday afternoon to make arrangements to speak with Mr O'Connell on site and for Mr Small to witness that discussion.

[13] Mr Whiting in his prepared statement says that he spoke to the three employees who had witnessed the incident, all who confirmed the report. When questioned Mr Whiting said that he spoke by telephone with Mr Murphy on the Friday. However, Mr Murphy when questioned said he did not talk to Mr Whiting about the matter. Then he went on to say that possibly in passing he did speak to Mr Whiting but not directly like Mr Small had. Later again, Mr Murphy said that if he had spoken to Mr Whiting it would have been in person by the container (on site) either on the Thursday or the Friday afternoon. However, as Mr Whiting did not learn about the allegation until the Thursday evening it must have been on the Friday after the dismissal. I note that counsel both made submissions about Mr Murphy's evidence. The foregoing record reflects the notes I made as Mr Murphy responded to questions during the investigation meeting.

[14] Mr Murphy's and Mr Small's evidence leads me to reject Mr Whiting's evidence that he investigated the allegation by speaking to the three employees who witnessed the incident. I am left to conclude that Mr Whiting spoke only with Mr Small, at least prior to the dismissal.

[15] At some point on the Friday Mr Whiting spoke to his lawyer. Mention was made of the provision in the employment agreement that allows for suspension. However Mr Whiting decided not to do that. His evidence is that his lawyer told him it was justifiable for him to do what he *wanted to do.* The context in which Mr Whiting gave this evidence suggested that Mr Whiting wanted to dismiss Mr O'Connell.

Dismissal

[16] Shortly before knock off time on the Friday, Mr Whiting spoke by telephone to Mr Small. He told Mr Small to keep Mr O'Connell on site until he got there and that he wanted Mr Small to be present as well. There is no reason to doubt Mr Small's evidence just described, or as follows. Mr Whiting arrived on site soon after this call. Mr Whiting told Mr O'Connell that there was an issue to discuss, that he had been smoking cannabis on site and that his employment would end.

Mr O'Connell asked who had said this. He said what he did in his own time was his own business. Mr Whiting did not identify the source of the information but told Mr O'Connell what he did in company time was his (Mr Whiting's) business. Mr Small told me that Mr O'Connell then stormed off saying that he would *clean out* the company. Mr Small's evidence is that he was standing nearby and overheard this discussion and there was no mention of drug testing during this exchange.

[17] There was a second exchange between Mr O'Connell and Mr Whiting shortly after this first exchange. Mr Small's evidence, which I accept, is that he did not hear the second exchange. There is some conflict about precisely where this second exchange took place but that is unimportant. Both Mr O'Connell and Mr Whiting have given evidence about them talking about Mr O'Connell getting a blood test to prove there was no marijuana in his system in order to retain his job. As mentioned, Mr Small did not hear this said. Accordingly it must have been said during the second exchange between Mr Whiting and Mr O'Connell. This sequence better fits the dismissal letter which refers to the dismissal as at 3.30pm on Friday 10 December 2010. It also better fits Mr Whiting's evidence when questioned *that he knew what he had to do by 3.30pm on the Friday.*

[18] The clear picture that emerges from this evidence is that Mr Whiting came to the work site on the Friday afternoon in order to dismiss Mr O'Connell. That is what he did during their first exchange. During their second exchange there was some discussion about Mr O'Connell getting a drug test in order to prove that there was no marijuana in his system in which case he might be retained. That left Mr O'Connell thinking that he would be dismissed if he did not agree to get a drug test, rather than that he had been dismissed.

[19] It is common ground that the two men had a brief discussion by telephone the next day on the Saturday. There is some dispute about what was said but the important aspect for present purposes is that Mr O'Connell declined to get a drug test, having been advised that his employer could not compel him to undergo a drug test. Nothing conclusive was said about continuing employment.

[20] Notwithstanding the events of the Friday, Mr O'Connell arrived at work on the Monday morning. He asked Mr Small if he still had a job. Mr Small told him that as far as he knew he did not but he would have to speak to Mr Whiting about that. Mr O'Connell rang Mr Whiting to get the dismissal put in writing. Sometime later

Mr Whiting came to the site. Mr O'Connell was waiting nearby. Mr Whiting gave Mr O'Connell the letter dated Monday 13 December 2010 confirming the dismissal as of 3.30 pm on Friday 10 December 2010.

Justification

[21] To justify the dismissal CCL must show that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[22] The employment agreement includes the following provisions at clause 3 and clause 17.1.2 respectively:

> *We will act in good faith, providing fair and proper treatment in all aspects of your employment.*
>
> *...*
>
> *In the event of proven serious misconduct or gross negligence by you, termination without notice will occur. We may suspend you on pay pending an investigation into any suspected serious misconduct or gross negligence involving you.*

[23] S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment on that information before making the decision. That is part of the statutory duty of good faith.

[24] A fair and reasonable employer would always comply with their statutory obligations. In *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 the Employment Court held:

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[25] On the evidence provided to the Authority Mr Whiting heard the allegation, obtained legal advice apparently confirming that it would be justifiable to do what he wanted to do, decided to dismiss Mr O'Connell, went to the work site and attempted to do just that without giving Mr O'Connell any opportunity to respond. Nothing about the circumstances meant that the matter had to be handled in that manner. It left

Mr O'Connell thinking that he needed to get a drug test to clear himself. He declined to do so, CCL having no documented policy about drugs or drug testing. Mr Whiting then provided written confirmation of the dismissal. When dismissing him Mr Whiting did not tell Mr O'Connell any of the details of the allegation or its source and did not give him any opportunity to comment, refute or explain prior to dismissing him. In particular Mr O'Connell had no opportunity at that time to mitigate his conduct as accidental or by reference to his employment history. He had no opportunity to distinguish his conduct from that of some sub-contractors 4 years earlier who he knew Mr Whiting had dismissed for smoking marijuana on a work site. He had no opportunity to respond to Mr Whiting's view that his conduct had exposed CCL to prosecution under the Health and Safety in Employment Act 1992. The dismissal, being in breach of both s.4(1A) of the Employment Relations Act 2000 and the employment agreement, was unjustified.

[26] Mr O'Connell has established a personal grievance.

Remedies

[27] I must assess the extent to which Mr O'Connell contributed in a blameworthy manner to the situation giving rise to the personal grievance and, if there was such a contribution, reduce remedies accordingly. The submission for CCL is that there should be a 100% reduction because Mr O'Connell smoked marijuana at work putting himself and his co-workers at risk and putting CCL in jeopardy and in potential breach of the Health and Safety in Employment Act 1992. In particular Mr O'Connell was working on an earthquake damaged building on scaffolding when there was a significant risk of aftershocks. Being under the influence of marijuana in such circumstances created an unacceptable safety risk, requiring a 100% reduction in any remedies.

[28] For present purposes I must determine to a standard of probability whether Mr O'Connell smoked or was under the influence of marijuana at work.

[29] Mr O'Connell's denies smoking marijuana at work. His evidence is that he smokes tobacco while working depending on the job. He sometimes smokes roll-your-owns but did not on Thursday 9 December 2010. He says that Mr Small (not Mr Murphy) said something to him about the smell of his smoke to which he replied *You must be bloody joking!* He says that as best he can recall there was no discussion

between him and Mr Murphy about the matter. Mr O'Connell denies telling Mr Small that he rolled a bud into his roll-your-own by mistake.

[30] Mr Small's prepared evidence is that he was working about 5-7 metres away from Mr O'Connell when he smelt marijuana smoke. He looked around and saw Mr O'Connell grinning and smoking a roll-your-own cigarette. Mr Small and the others he was with were shocked. He then told Mr O'Connell to put it out. Mr O'Connell told him that he had rolled a bud into his tobacco. When questioned, Mr Small said that it was Mr Murphy who said *If that's you put it out!* and that Mr O'Connell said that he accidentally rolled the bud in with his tobacco.

[31] Mr Murphy's prepared evidence is that he noticed the smell of marijuana, looked around, saw that others had noticed the smell, then looked towards Mr O'Connell who was grinning and smoking a roll-your-own. Mr Murphy asked Mr O'Connell if he was smoking marijuana. Mr O'Connell at first denied it but then said that he had rolled a bud into his tobacco. When questioned, Mr Murphy confirmed that he asked Mr O'Connell if he was smoking but could not recall the response. Other than that he did nothing about it. He said that he did not discuss the smell of marijuana with anyone else that day. Later he said that he could not recall but it would have been discussed. Mr Murphy also said that no-one else was smoking at the time of the incident.

[32] Mr O'Connell admits being challenged about what he was smoking. That would not have happened unless the challenger noticed something such as the smell of marijuana. I accept the evidence of Mr Small and Mr Murphy that they are able to recognise the distinctive smell of marijuana. I am satisfied from their evidence that they both recognised that smell at about 2.45 pm on Thursday 9 December 2010 while they were working on scaffolding near Mr O'Connell who was also working, that they identified Mr O'Connell's roll-your-own which he was smoking as the source of the marijuana smell and that one of them told him to put it out which he did. I also accept the evidence that Mr O'Connell said at the time that he had accidentally rolled a bud into his tobacco cigarette. There is nothing to indicate that Mr O'Connell was in fact impaired by marijuana while he was working. From this I find that Mr O'Connell's blameworthy contribution involved taking marijuana to work, carelessly incorporating some into his roll-your-own cigarette with the tobacco and briefly smoking that

cigarette until challenged by Mr Small and/or Mr Murphy, all while working in high risk circumstances.

[33] Mr O'Connell was not responsible for CCL's complete failure to investigate the allegation or the failure to comply with the company's good faith obligations.

[34] Overall I consider that each party has contributed equally but in different ways to the circumstances giving rise to the grievance. As a result I will reduce the remedies awarded by 50%.

[35] There is a claim for compensation for lost remuneration for the 3 months following the dismissal, a total of $13,520.00. Mr O'Connell's hourly rate at the time was $26.00. I accept that Mr O'Connell lost $13,520.00 despite taking reasonable steps to mitigate the loss. Subject to the reduction for contribution I will order CCL to compensate Mr O'Connell for this loss.

[36] There is a claim for $20,000.00 compensation for distress. There is evidence from Mr O'Connell's doctor, which I accept, that Mr O'Connell suffered from increasing stress and low mood impacting on his physical health as a result of the dismissal. Mr O'Connell's partner (Ms Moloney) also gave evidence, which I accept, about how Mr O'Connell was affected by the inability to promptly secure replacement employment and the financial stress resulting from the dismissal. These problems were exacerbated by CCL's conduct over Mr O'Connell's final pay, more of which shortly. I consider that the appropriate sum of compensation to restore Mr O'Connell is $12,000.00, subject to reduction for contribution.

Arrears - Unlawful deductions

[37] On 14 December 2010 Mr O'Connell's lawyer wrote to Mr Whiting raising a grievance and requesting time and wages records pursuant to s.130(2) of the Employment Relations Act 2000. On 16 December 2010 the lawyer wrote again pointing out that any deductions from Mr O'Connell's final wages required written consent and asking for a copy of such consent (if in existence) failing which CCL was required to pay Mr O'Connell's final pay without deduction.

[38] Mr O'Connell was paid $319.47 on 15 December 2010. He was not provided with any reconciliation of this amount at the time but in August 2011 he received a pay slip showing holiday pay calculations, net wages for time worked in the final

week and a deduction of $432.79 for *money owed for tools*. That reconciles with the net amount paid to Mr O'Connell.

[39] By letter dated 9 February 2011 CCL's lawyer responded to the request for time and wage records by sending a sheet showing gross wages paid to Mr O'Connell from January 2005 until December 2010 monthly or half-monthly. The source of this information is not explained. I note that there are two figures given for 30 June 2005 while no separate figure has been given for November 2010. Gross earnings for 15 December 2010 are recorded as $6,246.50.

[40] Mr O'Connell's evidence is that he never received $$6,246.50 for his final pay. He is claiming that sum less the amount actually paid to him.

[41] The issues about wages and deductions were not resolved prior to the investigation meeting. During the investigation meeting on 28 October 2011 I directed CCL to provide a copy of Mr O'Connell's time and wage records (or an explanation for their absence) within 14 days. On 21 November 2011 the Authority received a copy of Mr O'Connell's time sheets for the period 23 April 2008 to 15 December 2010 and an explanation that some of the time and wage records had been lost in the demolition of CCL's offices following the February 2011 earthquake. There was no explanation for the delay in responding to the Authority's direction.

[42] I have endeavoured to reconcile the February 2011 list showing gross wages for 15 December 2010 by adding the hours from the time sheets for November and December 2010, multiplying by the hourly rate and adding in the holiday pay. Most of these timesheets have hand written wages calculations on them so I separately added these amounts and adjusted for the sheets without these calculations. Neither total reconciles with the February 2011 list but the difference is reasonably small.

[43] Despite the lack of complete reconciliation, I am satisfied that the 15 December 2010 gross figure in the February 2011 list probably includes the gross wages paid during November 2010 as well as December 2010. Mr O'Connell's claim is based on a lack of adequate explanation, poor records or incomplete disclosure rather than any actual underpayment. I have not been able to identify any underpayment of wages or holiday pay so that part of the claim is dismissed.

[44] In his statement of problem Mr O'Connell seeks the imposition of a penalty on CCL for a breach of his employment agreement pursuant to s.134 of the Employment

Relations Act 2000. The breach alleged is the deduction without written authority from Mr O'Connell's final pay of $432.79 for *money owed for tools*. However, counsel's written submissions ask for the imposition of a penalty under s.13 of the Wages Protection Act 1983 as well as a penalty under s.134 of the Employment Relations Act 2000.

[45] It is common ground that Mr O'Connell, with CCL's approval, purchased tools on several occasions using CCL's account on the understanding that CCL would deduct the money owed from his wages at $50.00 or $100.00 per week. Mr O'Connell has no record of the deductions and CCL has not provided documentation to support Mr Whiting's evidence that $432.79 was owed prior to the final pay.

[46] I have been given an unsigned document said by CCL to be Mr O'Connell's employment Agreement. Clause 5 includes the following provisions:

> *...Any other deductions, other than statutory matters such as Income Tax debts, will require your specific written approval.*
>
> *On termination we will pay you any outstanding monies and holiday pay without undue delay. If you owe us anything at that time you agree that we can deduct it from any final pay or holiday pay owing.*

[47] There are difficulties with some parts of the penalty claim despite the unsatisfactory way CCL handled these issues.

[48] While CCL's deduction was in breach of the Wages Protection 1983 the claim for a penalty did not arise until after the investigation meeting. I would not impose a penalty in that circumstance. Penalty claims should be properly set out in the statement of problem as lodged or as amended so that the other party has a proper opportunity to provide evidence and otherwise respond.

[49] CCL did not provide time and wage records in a timely manner, contrary to the obligations in the Employment Relations Act 2000. My attempt at reconciliation of figures above demonstrates the inadequate state of CCL's record keeping or disclosure. That does not appear to have been caused by earthquake disruption. However, I have not been asked to impose a penalty in relation to this. CCL's handling of the time and wage records issue can be considered as part of dealing with any cost issues.

[50] There is a claim for a penalty for breach of the employment agreement properly before the Authority. I have set out the relevant part of the employment agreement above. I accept that CCL breached clause 5 by making the deduction without Mr O'Connell's written authority to do so. The only authority that CCL had was the verbal agreement to deduct either $50.00 or $100.00 on a weekly basis from Mr O'Connell's wages so the deduction of $432.79 was even in breach of that understanding. It is clear from Mr Whiting's evidence that he was not prepared to risk any difficulty later recovering the balance owing from Mr O'Connell when he was no longer an employee. The payment was made into Mr O'Connell's bank account on 17 December 2009. Before then, Mr Whiting had received Mr O'Connell's solicitor's letter requiring payment of the final wages without deduction in the absence of any written consent. When that was raised with Mr Whiting in cross examination he said:

> *I ignored the instruction not to deduct. You don't act for me!*

[51] I take this as indicating that CCL wilfully breached its employment agreement.

[52] The deduction caused Mr O'Connell added financial difficulty. It deprived him of the right, recognised by his employment agreement, to control how he spent his wages.

[53] In these circumstances it is appropriate to impose a penalty but at a modest level. The maximum penalty at the time for any breach by a company was $10,000.00. I impose a penalty of $1,000.00 on CCL. Pursuant to s.136(2) of the Employment Relations Act 2000 the whole of the penalty is to be paid to Mr O'Connell.

Summary and orders

[54] Mr O'Connell was unjustifiably dismissed.

[55] Consortium Construction Limited must pay Mr O'Connell compensation of $6,760.00 pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000.

[56] Consortium Construction Limited must pay Mr O'Connell compensation of $6,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[57] Pursuant to s.134 of the Employment Relations Act 2000 I impose a penalty of $1,000.00 on Consortium Construction Limited which must be paid to Mr O'Connell.

[58] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a memorandum within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority