IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 446
3078833

	BETWEEN	ADRIAN ROTTIER Applicant
	AND	CONCRETE STRUCTURES (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Jim Wynyard, counsel for the Applicant Kevin Badcock, counsel for the Respondent
Investigation Meeting:	15 July 2020 in Rotorua
Submissions:	From the Applicant on 23 July 2020, from the Respondent on 31 July 2020 and, in reply, from the Applicant on 5 August 2020
Determination:	30 October 2020

DETERMINATION OF THE AUTHORITY

A. Adrian Rottier was unjustifiably suspended and unjustifiably dismissed by Concrete Structures (NZ) Limited.

B. Within 28 days of the date of this determination Concrete Structures (NZ) Limited must pay Mr Rottier the following sums as remedies for his personal grievance:

(i) $13,864 as lost wages; and

(ii) $12,000 as compensation for humiliation, loss of dignity and injury to his feelings.

C. Costs are reserved with a timetable set for parties to lodge memoranda if the parties cannot resolve that issue themselves.

Employment Relationship Problem

[1] Over a span of more than 15 years Adrian Rottier worked for several different periods at a factory Concrete Structures (NZ) Limited (CSL) operates in Rotorua. During some of those periods he was a direct employee of CSL, on others he worked for a sub-contractor engaged to work on the site.

[2] At 10.30am on 6 May 2019 Mr Rottier began work there again after an absence of more than a year. By 2pm that afternoon he had been told to leave the site by CSL's Precast Manager Paul Henderson. Events during that period of less than four hours, followed by what was said later that day in a telephone conversation with Mr Henderson, formed the basis of personal grievances for unjustified suspension and unjustified dismissal Mr Rottier raised subsequently. This determination resolves those grievances.

[3] Mr Rottier's departure from the site around 2pm followed what became a heated conversation with Mr Henderson. Mr Henderson had criticised the quality of some of the work Mr Rottier had carried out that morning, commented about Mr Rottier spending time talking to two sub-contractors who visited the site that morning without completing a health and safety check in and then said Mr Rottier have to undergo a drug test before being allowed to continue work at the factory.

[4] Mr Henderson's account of the conversation was that Mr Rottier had become agitated and started sweating after Mr Henderson said he would not tolerate low standards of work or Mr Rottier inviting people on to the site. Mr Henderson believed the two sub-contractors who came to the factory that morning had done so at the invitation of Mr Rottier.

[5] Mr Henderson said Mr Rottier's visible agitation at his comments made him suspicious Mr Rottier was "high" and he told Mr Rottier he would have to take a drug test. Mr Rottier replied that he would not pass a drug test, so there was "no point". Mr Henderson then said if Mr Rottier could not pass a test, he could not stay at work. Mr Rottier then became more agitated and said he "didn't need this fucking job anyway". Mr Henderson responded by saying: "If you feel that way, you can fuck off if you want". Mr Rottier replied that he would "fuck off then" and soon after left the site.

[6] Mr Rottier contacted Mr Henderson by telephone later that day and complained about the way he had been treated. Mr Henderson repeated his earlier advice to Mr Rottier that he needed to take a drug test and told him he could return to work when he had a "clean" test.

[7] Later the same day Mr Rottier also sent Mr Henderson a letter by email raising a personal grievance for unjustified disadvantage. His letter said Mr Henderson had unjustly used a clause in the employment agreement to initiate a drug test and denied he was under the influence of drugs.

[8] By 13 May the situation remained unresolved and Mr Rottier sent Mr Henderson a further letter raising a personal grievance for unjustified dismissal.

[9] On the same day CSL's site foreman Brett Nicholas sent Mr Rottier a message asking him to contact CSL's general manager Paul Romanes. Mr Rottier replied that his mobile phone was broken and asked Mr Romanes to contact him by email. Mr Romanes then sent a message asking if Mr Rottier could visit the office or Mr Romanes could come to see him to "see if we can sort things". In an exchange of messages that followed Mr Rottier said he thought there was no future for him at CSL but Mr Romanes said he was "keen to catch up anyway" and hear Mr Rottier's side of the story. Mr Romanes wrote that he needed to know if his managers were "out of line … so I can stop it happening in the future". Although Mr Rottier replied that he would "shortly" provide Mr Romanes with a full written account of what happened on 6 May, he did not send any further written information to Mr Romanes about events that day.

[10] Although the parties later met in mediation Mr Rottier's grievances were not resolved there and he applied for an investigation by the Authority.

[11] In its reply to that application CSL denied that Mr Henderson's actions in telling Mr Rottier to leave the site and saying he could only return to work once he had a "clean" drug test amounted to unjustified suspension or dismissal. It said Mr Rottier had reacted irrationally to a simple direction about work rules which had resulted in Mr Henderson telling him to take a drug test. CSL said Mr Henderson was permitted to require the test under the company's health and safety policy and the terms of its employment agreement with Mr Rottier.

The Authority's investigation

[12] For the Authority's investigation written witness statements were lodged from Mr Rottier, Mr Nicholas, Mr Henderson, Mr Romanes, CSL's health and safety manager Chris Mackie and Stuart Bourke, a former employee who had been working at CSL's premises on 6 May 2019. Mr Rottier's doctor Thomas Brons also provided a letter about Mr Rottier's health and, under summons, attended the investigation meeting to answer questions. All witnesses answered questions under oath or affirmation from me and the parties' representatives. Under an agreed timetable the representatives later lodged written closing submissions.

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

The issues

[14] From the evidence given by the witnesses, in writing and orally, and from the submissions made by the representatives, the issues requiring resolution were these:

(i) Were the actions of CSL, through what Mr Henderson did by requiring Mr Rottier to leave the workplace on 6 May and not return until he had a "clean" drug test, what a fair and reasonable employer could have done in all the circumstances at the time?

(ii) If CSL did act unjustifiably, were its actions solely a suspension of Mr Rottier or did they amount to a dismissal, either actual or constructive?

(iii) If Mr Rottier was unjustifiably disadvantaged and/or dismissed, what remedies should be awarded, considering:

  (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

  (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)

(iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Rottier that contributed to the situation giving rise to his grievance?

(v) Should either party contribute to the costs of representation of the other party.

Reasonableness of CSL actions

[15] Under the Employment Relations Act 2000 (the Act) the Authority must determine an employee's grievance on the basis of whether the employer's actions in dealing with that employee met the statutory test of justification. This test considers whether what the employer did, and how it did so, were what a fair and reasonable employer could have done in all the circumstances at the time.[1]

[16] In this case the assessment of the reasonableness of CSL's actions, against that statutory standard of the fair and reasonable employer, could be made by considering whether what CSL did met the requirements of the terms in its employment agreement with Mr Rottier and any policies CSL had in place for safe operation of the workplace.

[17] CSL's employment agreement with Mr Rottier had a term headed Health and Safety that required both parties to comply with safety obligations and the following specific clause about drug testing (underlined emphasis added):

> 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.

[18] The company also had a written Drug and Alcohol Policy. The policy was not specifically referred to on CSL's induction checklist that Mr Nicholas said he spent around half an hour going over with Mr Rottier in the factory 'smoko' room on the morning of 6 May. Mr Nicholas accepted while answering questions during the Authority investigation that he had not referred to the policy during his induction of Mr Rottier that day. Mr Nicholas said he had pointed out some health and safety information on a notice board in the room. A photograph produced in evidence showed the policy was, amongst others, pinned up on that notice board, behind an electric jug and toaster on a countertop.

[19] While doubtful that such a non-specific reference to the policy was really adequate to bind Mr Rottier, reference to the contents of that policy was nevertheless useful for the purposes of this determination as a means of assessing whether CSL's

[1] Employment Relations Act 2000 s 103A(2).

actions met the requirements of the standards it had set itself, both in that policy and in its employment agreement with him.

[20] The relevant parts of the policy prohibited employees arriving at work "under the influence" of drugs or with their ability to work "impaired" by the consumption of drugs or alcohol.

[21] It included clauses advising CSL could conduct pre-employment testing and could random drug testing, with the selection of employees for random testing to be made by external consultants. Those clauses matched two questions asked in CSL's employment application form, to which Mr Rottier had answered yes. One asked him to agree to undergo drug and alcohol testing "prior to employment". The other asked if he agreed to undergo "periodical random drug and alcohol testing". Neither circumstance applied to Mr Rottier in the situation on 6 May. No pre-employment test was arranged for him before he started work that day and Mr Henderson's direction that Mr Rottier required a 'clean' drug test to be able to return to work was not an instance, as the policy said it would be, of selection by an external consultant for a random test.

[22] In the circumstances on 6 May the one potentially relevant provision of the policy was a clause that said CSL could conduct what it described as "just cause" testing. It explained such testing in this way:

> 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.

[23] For the following three broad reasons, what Mr Henderson did as CSL's representative on 6 May, and how he did so, fell below the standards and criteria set by CSL's own terms of employment and drug policy.

Reasonable ground for suspicion not fairly established

[24] Firstly, Mr Henderson's evidence underplayed the effect of what he had said to Mr Rottier as a possible cause for Mr Rottier's heated reaction in their very brief conversation that day. Mr Henderson's witness statement said his conversation with Mr Rottier on the factory floor "lasted at most around two minutes". Mr Henderson did

not fairly take account of the possibility that Mr Rottier simply got upset because he felt he was being unfairly criticised. According to Mr Henderson's written witness statement, it was not until he criticised Mr Rottier about his involvement in the two contractors visiting the site that morning that Mr Rottier "started to become agitated and started sweating".

[25] In his evidence to the Authority investigation Mr Rottier was adamant that he was not responsible for the two contractors visiting the site that morning. Both visitors were part of the sub-contracting team that he had previously worked for on the site but who no longer worked there. In his oral evidence Mr Henderson accepted he had made an assumption Mr Rottier had rung the two contractors to arrange for them to visit him at the factory that morning as they had, on arrival, driven to the part of the site where he was working. Mr Henderson said that when Mr Rottier had denied doing so, he "possibly" then called him a liar. Mr Henderson said that up to that point in the conversation Mr Rottier "seemed ok but when I put that to him he got all anti and aggressive and upset very quickly". Mr Henderson said it was at that point that he "suspected there was something else going on here".

[26] Apart from a brief exchange of greetings when Mr Rottier called by Mr Henderson's office to pick up some safety glasses as he started work that day, Mr Henderson had not spoken to Mr Rottier before their two-minute conversation on the factory floor. Both Mr Nicholas and Mr Bourke had spoken to Mr Rottier at greater length earlier in the day. While conducting Mr Rottier's induction that morning over a 30 minute period Mr Nicholas said he observed "nothing out of the ordinary" about Mr Rottier's demeanour. Mr Bourke said he and Mr Rottier spoke twice while he was on site that day and, contrary to Mr Henderson's description, Mr Bourke observed Mr Rottier to be "apprehensive" rather than "wound up".

No reasonable opportunity to explain

[27] Secondly, even if Mr Rottier's demeanour during their brief conversation on the factory floor could reasonably have given Mr Henderson grounds to suspect Mr Rottier was under the influence of drugs, Mr Henderson then failed to observe what the employment agreement and CSL's policy said about how an employee could be required to take a drug test and making suitable arrangements for Mr Rottier to do so.

[28] The policy contemplates the manager interviewing an employee after observed behaviour that "could be" due to effects or after effects of drugs and be a potential or actual hazard. Mr Henderson and Mr Rottier agreed in their respective evidence that, after Mr Henderson said Mr Rottier had to take a drug test, Mr Rottier had replied that there was "no point". They differed in whether Mr Rottier had then said that was because he "would not" or "may not" pass such a test. The difference between 'would' and 'may' was however not material because, on either account, Mr Henderson made no further query on what those words might mean.

[29] Instead Mr Henderson took Mr Rottier's response as admitting he was under the influence of illegal drugs at the time. CSL's closing submissions properly acknowledged there was a difference between being under the immediate influence of illegal drugs and returning a positive drug test based on residual compounds being detected in a person's system due to having consumed or used such drugs at an earlier time. However it became apparent in Mr Henderson's evidence that he did not understand or make any such distinction between what could be identified about prior use and whether a person's present performance or perception was directly affected.

[30] Mr Rottier's evidence, when asked in the Authority investigation, was that he had smoked marijuana in the previous week. He said he had not smoked any marijuana after signing his employment agreement on 2 May as he knew he was starting work on the following Monday. However he said he understood residue from that earlier use could still be detected by any drug test he was required to take. This was why he said he would not 'pass' a test. It was not an explanation that Mr Henderson got to hear at the time because he did not ask Mr Rottier to explain his response or for any other information about what he said. This failure by Mr Henderson was not what could reasonably have been expected of a fair and reasonable employer applying its own policy that referred to the employer interviewing the employee to determine whether testing was required and also operating under an employment term that required an employer to establish reasonable grounds for a suspicion that testing may be required. It was, therefore, a failure to meet the standard set in s 103A(3) of the Act requiring an employer to sufficiently investigate any concerns about an employee's conduct and prohibiting the employer from taking any action without first giving the employee a reasonable opportunity to respond those concerns. Acting on an unexplained comment made during a brief and heated conversation on the factory floor did not amount to giving a reasonable opportunity to respond.

No reasonable arrangement made for suspension and testing

[31] Thirdly, there was no contractual basis for suspending Mr Rottier without pay until he arranged his own drug test and returned a 'clean' result. As established in the evidence of Mr Mackie and Mr Romanes, on previous occasions when CSL employees had been suspected of being under the influence of illegal drugs at work, those employees were not required to make their own arrangements to undergo a drug test or, necessarily, to remain off work without pay until they could provide a 'clean' drug test.

[32] Mr Henderson said he had, during the course of the brief conversation on the factory floor on 6 May, suggested he could take Mr Rottier to get tested immediately that day. He did not pursue this idea once Mr Rottier said there was "no point" because Mr Henderson had assumed this was an admission by Mr Rottier that he was under the influence of illegal drugs at the time they were speaking rather than, as Mr Rottier explained in his evidence, that he knew any testing that day would show residue from previous use. However the conversation ended with Mr Henderson directing Mr Rottier to leave the premises and making no specific arrangements for him to attend a drug testing facility.

[33] Mr Mackie's evidence was that on previous occasions of suspected drug use by employees, CSL made the arrangements for drug testing to be carried out, on the day, either on the premises or by taking the employee to the local agency that CSL used to carry out such tests. Those arrangements included providing an order number for the billing of the work done by the agency in carrying out the test. Mr Rottier, by contrast, was sent away with no such arrangement. Neither did CSL take any steps in the following days to facilitate that testing by, for example, making an appointment for Mr Rottier to attend, telling him of the time to do so and arranging with him or the agency for the cost to be met by the company.

[34] In their conversation on the factory floor, and by telephone later that day, Mr Henderson also told Mr Rottier that a 'clean' result was required before he could return to work. On Mr Henderson's understanding, as apparent from his oral evidence during the Authority investigation, such a result would require no detection of any residue of drug use. As Dr Brons noted in his evidence, from his knowledge as a general practitioner, residue from use of marijuana could be detected in tests taken up to 30 days after the drug had been used. Consequently Mr Henderson was setting a higher

standard for ending Mr Rottier's suspension than was set by the use of the phrase "under the influence" in the employment agreement.

[35] His requirement that Mr Rottier could only return to work once he had a 'clean' result also went beyond how the employment agreement contemplated CSL dealing with results of drug testing of employees. Both Mr Henderson and Mr Romanes, in their oral evidence, explained they intended the word 'clean' to mean a test result showing no residue of any drug use whatsoever. However the term on drug testing in the employment agreement said CSL "shall" discuss the result of a positive test with the employee and consider any explanation given "before any outcome is decided". The use of the word "shall" made this process of listening and considering mandatory, not discretionary. The order that only a 'clean' result could result in a return to work indicated CSL was not prepared to abide by its own agreement and consider any explanation before deciding on such an outcome. It was also contrary to Mr Romanes' evidence that, if Mr Rottier had contacted him as requested on 13 May, alternative work could have been found for Mr Rottier to return to work soon after.

[36] Mr Henderson's actions in sending Mr Rottier away from the workplace on 6 May, in the way he did and on the conditions he set, also went unreasonably beyond CSL's contractual right to suspend Mr Rottier in those circumstances. The employment agreement contained no term allowing for suspension. And, if there were nevertheless reasonable grounds to suspend Mr Rottier from work on safety grounds pending a drug test, a fair and reasonable employer could not have done so without paying him for the relatively short time that arranging and having the test conducted would have required.[2]

A suspension only or also a dismissal?

[37] There was no doubt that Mr Rottier was suspended from his employment, without pay, on the condition that he could only return to work on providing a drug test result that indicated no residue of any previous drug use. This was clear from an email from Mr Henderson on 13 May which told Mr Rottier that CSL "had no option but to stand you down, under our H&S policy, until you can pass a drug test".

[38] For the reasons already given CSL's actions in suspending Mr Rottier on that basis were not what a fair and reasonable employer could have done in all the

[2] *Singh v Sheridee Holdings Limited* EC AC 53/05, 22 September 2005 at 94.

circumstances at time. His suspension, in the way that it happened and how it was done, was unjustified. He had a personal grievance on that ground.

[39] However Mr Rottier said CSL's actions also amounted to a dismissal. At the end of the investigation meeting I indicated that if, on the evidence heard, there was a finding of no actual dismissal, the circumstances could nevertheless amount to a constructive dismissal caused by CSL breaching terms of the employment.[3] The parties were invited to address that issue in their closing arguments, to be submitted in writing, and did so.

[40] Dismissal is a 'sending away' of an employee at the employer's initiative, whether by words or actions. The evidence was not, on the standard of the balance of probabilities, sufficient to establish any such actual dismissal of Mr Rottier occurred. However CSL's actions, as already discussed, included breaches of its terms of employment with Mr Rottier that caused him to view the employment relationship at an end. Mr Henderson had indicated a standard for the test result Mr Rottier knew he was unlikely to reach for some time. For reasons already given, that standard was higher than provided in the terms of CSL's employment agreement and its policy.

[41] Those breaches were sufficient to seriously damage the employment relationship with Mr Rottier, even if CSL did not intend to do so. Looking at CSL's conduct as a whole, Mr Rottier could reasonably not be expected to put up with the effect of those breaches.[4] The result, in which he came to view the employment relationship as at an end was not, as CSL submitted, him abandoning the employment. Rather, Mr Rottier's employment ended by constructive dismissal caused by the employer acting outside the bounds of its own terms of employment and policy. Accordingly Mr Rottier had also established a personal grievance for unjustified dismissal.

Remedies

Lost wages

[42] Mr Rottier sought an award of lost wages for the period of 62 weeks from when he left CSL's premises on 6 May 2019 to the date of the Authority investigation

[3] Employment Relations Act 2000, s 122.
[4] *Auckland Power Board v Auckland Local Authorities IUOW* [1994] 1 ERNZ 168. 172 (CA) applying *Woods v W M Car Services (Peterborough) Limited* [1981] ICR 666, 672.

meeting, less the amount of $800 he was paid for some work he had briefly gained during that extended period.

[43] Having established a personal grievance for unjustified dismissal, and having lost remuneration as a result, Mr Rottier was entitled to an order reimbursing him for the lesser of a sum equal to that loss or to three months' ordinary time remuneration.[5] The Authority also has a discretion to order payment of more than that lesser sum.[6]

[44] In Mr Rottier's case the assessment of his loss had to take account of the effect of health issues he experienced on the length of time he was not reasonably able to actively seek work and then his endeavours to mitigate his loss once his health was good enough that he could reasonably be expected to try to do so.

[45] Prior to returning to work at CSL in May 2019 Mr Rottier had faced some physical and mental health challenges arising from family and personal circumstances that made him more fragile in dealing with effects of how that job came to end. During that earlier period Dr Brons, who had been Mr Rottier's general practitioner since childhood, diagnosed him as suffering depression and anxiety which was treated by medication. Mr Rottier was also on medication for treatment of a longer term thyroid condition.

[46] Soon after 6 May Dr Brons diagnosed Mr Rottier as having "an acute anxiety episode" related to the events of that day and concerns in the subsequent days about the future of his employment. He prescribed further courses of medication for the treatment of depression.

[47] Dr Brons described Mr Rottier's poor state of mental health as not being caused by what happened at CSL but as having been made worse by it. As result I accept that Mr Rottier was not reasonably able, for health reasons, to seek work for many weeks after May 2019. However by October 2019 Dr Brons assessed Mr Rottier as "doing well" and, with the assistance of his ongoing medication, his depression was well controlled. From September 2019 Mr Rottier began making reasonable efforts to find further employment, with multiple job applications.

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[5] Employment Relations Act 2000 s 123(1)(b) and s 128(2).
[6] Employment Relations Act 2000, s 128(3).

[48] Accordingly the period of loss arising from his personal grievance is assessed as lasting four months, thereby including an additional one month over the minimum period of three months to account for the limits on his ability to endeavour to mitigate his loss during that time.

[49] A longer period was not appropriate because there was a further earlier mitigation step that Mr Rottier could have taken but did not properly explore. He did not take up Mr Romanes offer to meet in mid-May. Mr Romanes gave credible evidence that, if Mr Rottier had met with him as requested, he would have considered arranging for Mr Rottier to work at a different site. The correspondence between both parties about the prospect of meeting had been warm in tone. Mr Rottier had worked on the factory floor many years earlier with Mr Romanes when he had started work in CSL so was familiar with him. There was some, if not necessarily certain, prospect Mr Rottier could have mitigated his subsequent loss of wages if he had pursued that option.

[50] Calculated on the $20 hourly rate Mr Rottier was to be paid for 40 hours a week, the award for lost remuneration for four months is $13,864.[7] This is the sum CSL must pay Mr Rottier under s 123(1)(b) of the Act within 28 days of the date of this determination.

[51] The award is not reduced by the $800 Mr Rottier said he had earned for work gained later in the 62 week period for which he had sought lost wages. This is because, as I understood his evidence, that sum was earned for work outside the four month period for which an award has been made. Neither, contrary to CSL's submissions, should the level of award made be adjusted to allow for the value of any benefit paid to him by Work and Income during that time. It is a matter between Mr Rottier and Work and Income whether he will need to repay any benefits he received during the period for which he is now to be paid an award of lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[52] Mr Rottier said he was humiliated and shocked by the way Mr Henderson treated him on 6 May and having to leave the workplace that he had returned to only that day and knew a number of the other workers. It resulted in what his doctor called a "situational crisis" that made the depression Mr Rottier already experienced worse.

[7] $20 x 40 = $800 x 52 weeks = $41,600 divided by 12 months = $3,466 x 4 months.

[53] As already noted this continued to affect Mr Rottier's ability to seek alternative work for several months, during which time he was also referred for specialist mental health assistance. However, as confirmed in the oral evidence of Dr Brons and Mr Rottier, he was back on an even keel by October 2019 and the impact on him of having lost his job at CSL in that way had waned considerably. By the time of the Authority investigation meeting Mr Rottier was looking forward to resuming study for an accounting qualification he had half-completed before he had gone back to work for CSL in May 2019.

[54] The order for compensation may address only the distress caused by CSL's actions. This includes the extent to which conditions such as depression and anxiety, which Mr Rottier was already experiencing, were worsened by those actions. While existing sensitivities may have increased the injury to his feelings and sense of humiliation Mr Rottier experienced, the compensation is assessed on the basis of what distress was caused by the events giving rise to his employment relationship problem, and not by other challenges in earlier or other parts of his life. Making that assessment, and considering compensation awarded in similar cases, an appropriate award of compensation was $12,000. This is the sum CSL must pay to Mr Rottier as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Reduction for contribution

[55] In considering remedies for a personal grievance the Authority must consider the extent to which any culpable conduct by the employee contributed towards the situation that gave rise to the grievance and whether that conduct, assessed in a proportionate and common sense way, required a reduction of remedies that would otherwise be awarded.[8]

[56] In this case the conduct in question were the topics touched on by Mr Henderson in his brief conversation with Mr Rottier on 6 May. His comments about the quality of work expected from Mr Rottier did not reach the level of culpable conduct. Mr Henderson, in his oral evidence, said he told Mr Rottier clients were now "more fussy" than when Mr Rottier previously worked for CSL and greater attention needed to be paid to finishing work when casting the concrete slabs.

[8] Employment Relations Act 2000, s 124.

[57] While Mr Henderson had legitimate concerns about two sub-contractors arriving on the site without completing whatever health and safety sign-in procedure was in place, he had not reasonably established Mr Rottier was to blame for them being there that day. Rather, Mr Rottier disputed any responsibility for it at the time and it was Mr Henderson's apparent comment that Mr Rottier was a liar that had escalated events that day.

[58] The third element, Mr Rottier's observation that he would not or may not pass a drugs test if administered that day, did not amount to culpable conduct in the circumstances. His frank comment was taken by Mr Henderson as an admission that Mr Rottier was 'high' at the time they were speaking in the workplace. If Mr Rottier were in that state he would have been in breach of his responsibility to come to work able to work safely and unimpaired by the consumption of illegal drugs. However there was no reliable evidence that Mr Rottier's performance was, in fact, impaired in any way that day due to being under the influence of drugs. His comment about what a drug test might reveal did contribute to the situation that gave rise to his grievance but it was not, given the general good faith obligation to be open and honest, culpable conduct. Accordingly, no reduction of the remedies awarded as lost remuneration and compensation was required.

Costs

[59] Mr Rottier pursued his claim in the Authority with the assistance of a legal aid grant. In closing submissions he sought to be heard on costs. Costs are therefore reserved. The parties are encouraged to resolve any issue of costs between themselves.

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

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[9]

Robin Arthur
Member of the Employment Relations Authority

[9] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].