

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 172
5516679

BETWEEN NICO WIREMU
Applicant

A N D LEVIN BOBCATS LIMITED
t/a CORE INFRASTRUCTURE
Respondent

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, Advocate for the Applicant
John Shingleton, Counsel for the Respondent

Investigation Meeting: 29 June 2015 at Christchurch

Submissions Received: 25 September and 5 November 2015 from the Applicant
9 October 2015 from the Respondent

Date of Determination: 12 November 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Wiremu was unjustifiably dismissed by the respondent, and is awarded remedies which are subject to a 75% reduction for contribution.**
- B. I decline to impose a penalty upon the respondent.**
- C. I decline to impose a penalty against Mr Wiremu.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Wiremu claims he was unjustifiably dismissed on 18 March 2014 from his position as a labourer. He also claims that he was unjustifiably disadvantaged in his

employment. He also seeks that a penalty be imposed on the respondent for failing to keep proper time and wage records and for a breach of good faith.

[2] The respondent denies that Mr Wiremu was unjustifiably dismissed but, acknowledges that it relied on a defective 90 day trial period clause in dismissing him. The respondent seeks a reduction of 100% in any remedies awarded to Mr Wiremu if his application for unjustified dismissal succeeds.

[3] The respondent also seeks a penalty against Mr Wiremu for a breach of his employment agreement by failing to take responsibility to ensure his own safety and the safety of others and for acting in bad faith by not being adequately communicative or responsive when questioned about his conduct.

Brief account of the events leading to the dismissal

[4] The respondent operates a drain laying company. Mr Wiremu commenced employment with the respondent on 3 March 2014. The parties entered into an individual employment agreement, although there is a dispute as to when this was first given to Mr Wiremu. Mr Wiremu claims that he was not given it until a week after he had started work, whereas the respondent states that it was given to him on his first day at work.

[5] There is a suggestion by the respondent that Mr Wiremu deliberately altered the date on which he and the owner of the respondent, Mr Jason Goertzen, signed the employment agreement, changing it from 3 March to 13 March 2014. However, I decline to make a finding on this allegation as it is not relevant to the key issues that the Authority needs to determine.

[6] The date that Mr Wiremu was first given his employment agreement to sign may have been relevant had he been dismissed pursuant to a valid 90 day trial period. Indeed, at the time of his dismissal, the respondent believed that a valid 90 day trial period was in place, and relied upon it to dismiss Mr Wiremu. However, the respondent has since acknowledged that the wording in the employment agreement it relied upon (which was actually a probationary period) does not satisfy the requirements of s.67A of the Employment Relations Act 2000 (the Act) and no longer relies upon it.

[7] Under these circumstances, it is of less relevance exactly when the employment agreement was given to Mr Wiremu, and I decline to make a finding on that matter also.

[8] It is common ground that Mr Wiremu was inducted into the company's processes on 3 March 2014, and that he was told about the company's health and safety requirements. It is also agreed that Mr Wiremu read and initialled (on a date that is not agreed) a copy of the respondent's drug and alcohol impairment free workplace policy.

[9] On 12 March 2014 the company asked Mr Wiremu to undergo a random drug test, which returned a negative result.

[10] The Authority heard evidence from one of the company's drain layers, Chris Pampoukidis, who said that, on Monday 17 March 2014, he was at the first smoko break of the day, sitting in the portacom, when Mr Wiremu walked into it at around 10.30am, as the smoko finished, and filled the portacom out with a smell of marijuana. Mr Pampoukidis says that, when he asked Mr Wiremu about the smell, Mr Wiremu giggled with a smirk on his face.

[11] Mr Pampoukidis said that, on the same day during the lunchbreak, Mr Wiremu was missing for longer than normal so he went looking for him because he needed Mr Wiremu to help him on site. In his written brief of evidence Mr Pampoukidis said that he came across Mr Wiremu smoking a joint in the toilet behind the portacom and he found a packet of K on the ground. K is short for K2, and is a drug that mimics the effect of cannabis, and is often known as *synthetic cannabis*. Mr Pampoukidis' evidence at the investigation meeting was slightly different in that he said that he witnessed Mr Wiremu with a joint which he flicked to the ground as he was walking out of the toilet.

[12] Mr Pampoukidis said in his brief of evidence that he knew that Mr Wiremu had been smoking marijuana because of the smell. He said he recognised it because his flatmate at the time used to smoke it. When questioned by the Authority, Mr Pampoukidis said that there is a different smell between natural cannabis and synthetic cannabis, but he was able to recognise both smells. He said during the investigation meeting that he smelled synthetic cannabis both when Mr Wiremu walked into the portacom during the morning smoko, and when Mr Wiremu came out

of the toilet later that day. Mr Wiremu says that he had been smoking tobacco when he was coming out of the toilet, but Mr Pampoukidis does not accept that, as he said that the smell of tobacco was quite distinct from the smell of natural and synthetic cannabis.

[13] Mr Pampoukidis said that the packet of K2 on the ground was empty and so he took it into the portacom. He then went to tell the site foreman, Mr Alan Hohaia, that he had caught Mr Wiremu smoking weed behind the portacom. Mr Pampoukidis says that Mr Hohaia stopped all site works, confronted Mr Wiremu about the matter but that Mr Wiremu denied that he had been smoking weed.

[14] According to Mr Pampoukidis, Mr Hohaia then asked Mr Wiremu to set up some road cones on Kilmore Street, but Mr Pampoukidis saw Mr Wiremu wander down to the Manchester Street/Kilmore Street corner and sit down in the middle of the road. Mr Pampoukidis said that, while Mr Wiremu was walking down the road, he saw him *swaying from left to right, walking real slow and did not look healthy to be on site.*

[15] Mr Pampoukidis said that he then saw Mr Wiremu *hop back up* and walk back towards them. Mr Pampoukidis said that he heard Mr Wiremu say that he was *being a cone*, and that he was mumbling and being very vague. Mr Pampoukidis said that he had seen the same effect on his friends who had been smoking K2.

[16] Evidence was also heard from the assistant site project manager, Ms Sasha Phillips. She says that she had been telephoned in the afternoon of Monday 17 March by Mr Hohaia and informed of the events involving Mr Wiremu. Ms Phillips did not attend the site immediately and, when she got there, Mr Hohaia had already stood Mr Wiremu down for the day. Ms Phillips and Mr Goertzen then discussed what to do about the situation and it was agreed that Mr Wiremu should be dismissed under what they believed was the 90 day trial period clause in his individual employment agreement.

[17] Ms Phillips then met with Mr Wiremu the following day and says that she asked him about what had happened. She says that she told him that she had to let him go under the 90 day trial period. She asked whether he had anything to say and he did not. Ms Phillips said that he seemed very *humble* whilst she had been speaking to him.

[18] Ms Phillips said that, had Mr Wiremu not been under a 90 day trial period, the company would have investigated the matter further, including getting a drug test carried out.

[19] Ms Phillips says that Mr Wiremu's father, Pablo Wiremu, had called her after the dismissal, but had not mentioned that Mr Wiremu had obtained a second drug test since being dismissed in which he was again given a negative result.

[20] Ms Phillips says that she recalled being with Mr Wiremu when he had taken the first drug test, while still employed, and said that he had been nervous prior to the test, but seemed very relieved that it had given a negative result.

[21] Ms Phillips said that, as far as she was concerned, the fact that Mr Wiremu had been smoking a drug was not as bad as having sat in the middle of the road without wearing personal protective equipment. She said that, even if Mr Wiremu had taken a drug test and had shown a negative result, his actions in sitting in the road were serious enough to have justified dismissing him. She also said that, when she spoke to Mr Pablo Wiremu, he had not known about his son sitting in the road.

[22] The Authority saw evidence of the second NZDDA drug test result that Mr Wiremu had paid for himself, which had taken place on 21 March 2014. However, the NZDDA result shows that no analysis had been made for detecting synthetic cannabinoids.

[23] Mr Wiremu denied that he had smoked either natural or synthetic marijuana on 17 March 2014 or, indeed, that he had smoked any drugs before that time. He also said that he was not aware of what K was, and that none of his friends had anything to do with synthetic cannabis.

[24] Mr Wiremu also said that, when Mr Pampoukidis had seen him outside of the toilet on 17 March, he had a cigarette, not a joint. He said he was not aware of any empty packet of K on the ground.

[25] Mr Wiremu said that he had been told to make sure the road next to the trench was clear so he went down to the end of the road to check it had been cleared properly. He says that Mr Pampoukidis then asked him *what the f**k are you doing* and he said he was checking that it was all good down the road. He then said that he was then told that they were just going to fill in the hole so he could go home.

[26] Mr Wiremu says that he did not sit in the middle of the road and he doubted that he had been walking slowly and swaying.

[27] With respect to the following day, Mr Wiremu says in his brief of evidence that Ms Phillips came up to him in the smoko room and said that someone had told her that he had smelt like marijuana the night before. In his evidence to the Authority, however, he said that Ms Phillips had said that it had been the portacom that had smelt of marijuana, and that if Fletchers engineers smelt it, it would look bad. Mr Wiremu says that Ms Phillips never mentioned him sitting in the road pretending to be a road cone.

[28] With respect to the second voluntary drug test he took, Mr Wiremu said he had simply asked NZDDA to carry out the same test that had been carried out previously by the company. In that test the company had also not asked that the presence of synthetic cannabinoids be tested for.

The issues

[29] The Authority must determine whether the dismissal was either procedurally or substantively unjustified and, if either, what remedies Mr Wiremu is due, if any.

Procedural fairness

[30] Although the respondent denies that Mr Wiremu was unjustifiably dismissed, even on its own evidence the respondent did not comply with the requirements of s.103A of the Act. In particular, it did not carry out a sufficient investigation of the allegations against Mr Wiremu, as it did not, for example, ask Mr Wiremu to undergo a drug test which tested for synthetic cannabinoids. This failing was in breach of the express terms of the company's drug and alcohol impairment free workplace policy which stated:

Testing will occur when an on the job incident occurs and when the company believes an employee is impaired and that belief is genuine and provable.

[31] Although Ms Phillips said that the key issue for her was the behaviour of Mr Wiremu by sitting in the road, the smoking of drugs was clearly one of the principal reasons for dismissal, as this is stated in a letter from Mr Goertzen to Ms Oberndorfer dated 26 May 2014 in reply to Ms Oberndorfer's letter raising a personal grievance on

behalf of Mr Wiremu. In addition, the company did not appear to take written statements from Mr Hohaia or Mr Pampoukidis relating to Mr Wiremu sitting in the middle of the road.

[32] Finally, Ms Phillips said in her evidence that, had she not been relying on the 90 day trial period that she believed was in force, a drug test would have been undertaken.

[33] Having established on these facts alone that the dismissal of Mr Wiremu did not follow the requirements set out in s.103A of the Act, I must find that the dismissal was procedurally unjustified because of significant flaws, which were not minor. Whilst I accept that the company made a genuine mistake believing that it could rely upon the terms of a trial period which turned out to be defective by reference to the statutory requirements, it would not be just to allow the consequences of that error to be borne by Mr Wiremu.

Substantive fairness

[34] Having established that the dismissal was unjustified procedurally, I must also consider whether it was justified substantively. On the balance of probabilities, I find that Mr Wiremu:

- (a) Had been smoking a synthetic cannabinoid substance on Monday 17 March 2014; and
- (b) Did sit in the road in the afternoon of 17 March 2014, while under the influence of that drug, without due care to his personal safety. Whether he also said he was *being a cone* is immaterial.

[35] I make this finding for the following reasons:

- (a) Mr Wiremu's evidence was not credible when he told the Authority under cross examination that he did not know what K was. Indeed, his evidence was flippant, saying that K was short for *OK*, which was a *response to someone*. This was clearly an evasive response which severely cast doubt on his general credibility.

- (b) Mr Wiremu's evidence also contained inconsistencies as between his brief of evidence and his oral evidence in respect to what he was told by Ms Phillips.
- (c) Whilst Ms Phillips did not witness the alleged events of 17 March, she did have those events relayed to her on that day by Mr Hohaia. Whilst her evidence is hearsay in that respect, it is admissible in the Authority pursuant to s.160(2) of the Act, although it will carry less probative weight than non hearsay evidence. Nevertheless, this hearsay evidence is consistent with the evidence of Mr Pampoukidis.
- (d) Furthermore, there is no obvious reason for Ms Phillips to lie on behalf of the respondent given that she was herself bringing a claim in the Employment Relations Authority against it at the time she gave her evidence.
- (e) Similarly, Mr Pampoukidis was about to leave the employment of the respondent company in the week that he gave his evidence to the Authority. Whilst it does not appear that he has fallen out with the respondent, again, as a person who was soon to be no longer employed by the respondent, he had less reason to be untruthful. In addition, Mr Wiremu conceded in evidence that he and Mr Pampoukidis had got on prior to his dismissal.
- (f) Whilst the second drug test undertaken by Mr Wiremu was negative, it is inconclusive, given that the presence of synthetic cannabinoids was not tested for.
- (g) Mr Hohaia's evidence (given to the Authority by telephone after the investigation meeting, at a later date) largely supported the evidence of Mr Pampoukidis. He also had no reason to support the respondent, given that Mr Goertzen had said that Mr Hohaia was a subcontractor who has fallen out on a personal level with him.

[36] Normally, all other things being equal, I would have been persuaded that the factual findings referred to at paragraph 34 above would have led to a finding that the dismissal was substantively justified. This is because a flagrant disregard of the respondent's drug policy, of which Mr Wiremu was aware, and the consequential risk

to his personal safety that that disregard led to, were serious enough to have justified summary dismissal.

[37] However, there is another factor that I cannot ignore. The respondent's *drug and alcohol impairment free workplace policy* required that testing for the presence of drugs would take place when an on-the-job incident occurred. I am satisfied that the incidents that occurred on 17 March 2014 were sufficient to have triggered this requirement to test, in that there were:

Observed behaviours which a supervisor or fellow employee believes places team mates at risk of accident and/or injury.

[38] The policy then sets out what would occur if a positive drug test was returned. Assuming that Mr Wiremu had been tested positively for synthetic cannabinoids, the policy states that the following should have occurred:

POSITIVE DRUG OR ALCOHOL TEST

A positive drug or alcohol test will result in the following:

First Occasion

Formal disciplinary procedures will be as follows:

- *An interview with the employee will be held where an explanation for the positive test will be sought.*
- *Suspension from duty. The employee will not be permitted to return to work until such time as they have undertaken and passed a subsequent screening test at their expense.*
- *The employee being advised of the unacceptability of their behaviour and the risk such behaviour creates for the safety of the individual and other employees.*
- *The employee being advised that any serious breach of the Policy will result in termination of employment for serious misconduct.*
- *The employee being advised of their responsibility to demonstrate that the problem has been effectively addressed.*
- *The employee being formally offered the opportunity to participate in counselling or an appropriate rehabilitation programme through EAP Services.*
- *The employee receiving a formal written warning.*
- *The employee being notified that they will be monitored for a twelve (12) month period and that during this time periodic testing may occur.*

[39] The policy also set out the details of the health rehabilitation programme that Mr Wiremu should have been offered. In brief, this states that there would be initially an assessment of the employee, the cost of which would be paid by the respondent company. A judgement would then be made as to the specific requirements of the

rehabilitation programme which could range from a number of counselling sessions to referral to external rehabilitation services.

[40] The employee would be required to sign a Health Rehabilitation Contract which would include acknowledgement of a positive drug or alcohol test, commitment to a health rehabilitation programme, consent to follow-up tests over a specific period and permission for the respondent representative to discuss recommendations and compliance. The respondent would meet the cost of counselling and/or rehabilitation within the EAP Service usage guidelines.

[41] What these factors mean is that, had the respondent not made an error regarding its right to dismiss Mr Wiremu under the 90 day trial period, it would have been obliged to have followed its drug policy, which would have meant that it would not have been likely that Mr Wiremu would have been dismissed for a first offence.

[42] This in turn means that the dismissal cannot have been substantively justified, as it was in breach of the respondent's own policy.

Remedies

[43] Having found that the dismissal was unjustified, the key issue for the Authority is to determine what, if any, remedies are due to Mr Wiremu.

[44] Section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen;

[45] Section 128 of the Act provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[46] Section 124 provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[47] In this case, where the respondent argues that there should be a reduction of 100% to any remedies awarded, I shall examine the question of contribution first.

Contribution

[48] First, given my finding of significant blameworthy conduct by Mr Wiremu, I find that it is appropriate to reduce the remedies that would otherwise have been awarded.

[49] In the Employment Court's judgement in *Waterford Holdings Limited v Nathan Morunga*¹, His Honour Judge Corkill reduced any remedies that may otherwise have been awarded for compensation under s.123(1)(c)(i) of the Act by 100%. His Honour said²:

...I am satisfied that Mr Morunga's misconduct when considered in context is so egregious as to lead to a conclusion that this is one of those very rare cases where a 100 per cent contributory finding in respect of such consequences should be made.

¹ [2015] NZEmpC 132

² At [41]

[50] Mr Morunga had been found by the Authority to have indulged in acts of animal cruelty towards cows in his charge³.

[51] Is this also one of those *very rare cases* where a 100% contribution is appropriate? Whilst Mr Wiremu was clearly responsible by a significant extent for the situation giving rise to his personal grievance, I cannot ignore the terms of the respondent's *drug and alcohol impairment free workplace policy* which the respondent should have followed, had it not erroneously believed that it could rely on its 90 day trial period.

[52] Whilst I accept that the respondent made a genuine error in believing that it could rely upon a statutory trial period, the implications of that error should not be borne by Mr Wiremu. Mr Wiremu was entitled to the full protection of the Act and, in particular, the requirements of s.103A and, in accordance with the contract that he entered into with the respondent company, he was also entitled to have been offered the opportunity to undergo a drug test and, if appropriate, the health rehabilitation programme. The fact that he was not was certainly not his fault. It is likely on a balance of probabilities that, had he be given these opportunities, Mr Wiremu's employment would have continued.

[53] For these reasons, I reject the respondent's submission that Mr Wiremu's remedies should be reduced by 100%. Indeed, the respondent's employment agreement effectively foresees that its staff will occasionally be under the influence of drugs or alcohol and it is to be commended for having a process in place to assist employees in ceasing such damaging behaviour. It cannot, therefore, be appropriate or just for Mr Wiremu's remedies to be reduced to nil when he was not given the opportunities afforded by the respondent's employment agreement.

[54] I acknowledge that Mr Wiremu's actions contributed towards the situation that gave rise to his personal grievance and that those actions were significantly blameworthy. However, I believe that it is not appropriate to reduce his remedies by more than 75%.

³ These findings were not challenged by the parties in the Employment Court, which was considering a non de novo challenge.

Reimbursement of lost wages

[55] Mr Shingleton refers in his submissions to Mr Wiremu being arrested for armed robbery and possession of a Class C controlled drug since the Authority's investigation meeting, asking it to draw inferences from that. However, as at the date of finalising this determination, no further evidence has been put before the Authority with regard to whether Mr Wiremu has been found guilty at trial and no evidence has been given by the respondent about what its policy is with regard to employees in custody awaiting trial. I therefore cannot safely draw any conclusions about what the effect on his continued employment of his arrest and remand in custody would have been. In any event, Mr Wiremu's arrest happened more than a year after his dismissal, so has no bearing upon the calculation of lost wages.

[56] In addition, as I have found that Mr Wiremu's dismissal was not substantively justified, I am obliged to consider what award should be made under s.123(1)(b) for lost wages.

[57] Ms Oberndorfer has provided a statement of loss of earnings which equates to the gross sum of \$4,436. Mr Wiremu was paid at \$18 an hour, and was required to work for 40 hours a week. It appears that, in the 13 weeks from his dismissal, he obtained work for six weeks plastering and sandblasting, and further casual work at The Warehouse. I understand that he earned a gross of \$4420 in this employment. This results in a loss of earnings in the gross sum of \$4,924.

[58] Mr Wiremu was not paid for his last day of employment, which amounts to \$144. Calculation of loss should therefore include this day.

[59] Mr Wiremu also claims that there was a deduction of \$72 from his pay in respect to the day he was sent home. I agree with Ms Oberndorfer that this deduction was unlawful, as there was no right in the employment agreement to suspend without pay.

[60] Therefore, Mr Wiremu sustained a total gross loss of \$5,140.

Compensation for humiliation, loss of dignity and injury to feelings

[61] It was the evidence of Mr Wiremu that his confidence was knocked really badly and that he tried *to put on a neutral mind so that he could move on*, but he was

angry and upset about it. He said that the respondent never gave him a fair chance. He also said that the anger affected his relationship between him and his parents and it was better when he moved out.

[62] Mr Wiremu's evidence was that he had originally been training to be a chef, but that he had decided to move into drain laying to try something different. Mr Wiremu was not with the respondent for more than six weeks. I do not believe there was strong evidence of a significant effect on him of his dismissal. I also consider that some of his distress would have been as a result of him having made a foolish mistake which led to his dismissal.

[63] However, I do accept that he suffered humiliation, loss of dignity and injury to his feelings in being dismissed and assess that effect at a moderate level. Therefore, I believe that it would be appropriate to award Mr Wiremu the sum of \$2,500 under s.123(1)(c)(i) of the Act, subject to reduction for contribution.

Reduction for contribution

[64] Applying the 75% reduction, this results in an award of lost wages in the gross sum of \$1,285 and an award under s.123(1)(c)(i) of the Act of \$625.

Claim for unjustified disadvantage

[65] It is not clear what actions, apart from those which constituted the dismissal, support the claim for unjustified disadvantage. Whilst it is clear that the actions of the respondent in dismissing Mr Wiremu resulted in an unjustified disadvantage in his employment, it is not appropriate to award any separate remedies in respect of that disadvantage.

Penalties sought by Mr Wiremu

[66] In his statement of problem, Mr Wiremu sought a penalty for *failing to keep proper time and wage records*. However, in her submissions Ms Oberndorfer seeks a penalty for the failure to comply with the duty of good faith in regard to the dismissal.

[67] Mr Goertzen said, during the Authority's investigation meeting, that the wage and time records had been already produced, but that he would check. The Authority has heard nothing more about this matter, and it appears that Ms Oberndorfer may

have dropped the matter, given the absence of a reference to it in her submissions. I therefore decline to impose a penalty against the respondent in this respect.

[68] As far as a breach of good faith is concerned, I believe that the respondent did not act in bad faith when it dismissed Mr Wiremu. It believed that it was acting in accordance with its contractual rights. It was not, but that error was not borne out of bad faith. Again, I decline to impose a penalty upon the respondent.

Penalty sought by the respondent

[69] The respondent seeks a penalty against Mr Wiremu for a breach of his employment agreement by failing to take responsibility to ensure his own safety and the safety of others and for acting in bad faith by not being adequately communicative or responsive when questioned about his conduct. This latter allegation relates to the respondent's evidence that, when questioned by Ms Phillips on 18 March 2014, he merely shrugged his shoulders.

[70] It is certainly the case that Mr Wiremu acted in breach of his employment agreement by smoking a K2, and then sitting in the road on 17 March 2014. However, he was dismissed for this, and his remedies have been reduced under s.124 of the Act, so it would not be just to impose a penalty upon him.

[71] In respect of the non communication by Mr Wiremu at the time of his dismissal, whilst he did not deny this, I believe that he suffered for the approach he took more than the respondent did in not answering Ms Phillips' questions. Therefore, again, it would not be just to impose a penalty.

Orders

[72] I order the respondent to make the following payments to Mr Wiremu:

- a. lost wages in the gross sum of \$1,285; and
- b. an award under s.123(1)(c)(i) of the Act of \$625.

Costs

[73] Costs are reserved. The parties are to seek to agree how costs should be dealt with between them. However, in the absence of such agreement within 14 days of the date of the determination, any party seeking a contribution towards their legal costs

should serve and lodge a memorandum within a further 14 days and any opposition to that application should be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority