

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 352
3034412

BETWEEN SHANE WILLIAM FOSTER
Applicant

AND MODEC MANAGEMENT
SERVICES PTE LTD
Respondent

Member of Authority: Michele Ryan

Representatives: Jamie Waugh, counsel for the Applicant
Caroline Silk and Philip McCarthy, counsel for the
Respondent

Investigation Meeting: 6 and 7 August 2019 at New Plymouth

Submissions [and further 13 August 2019 from the Applicant
Information] Received: 20 August 2019 from the Respondent
28 August 2019 “in reply” from the Applicant

Date of Determination: 31 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shane Foster was employed by MODEC Management Services Pte Ltd (MODEC). He was dismissed on one month’s notice for breaching MODEC’s policies following a series of breath alcohol tests taken on 27 February 2017 indicating the presence of alcohol. He claims his dismissal was substantively and procedurally unjustified and seeks reinstatement, compensation, lost wages and costs.

[2] MODEC rejects Mr Foster’s claims and says it reasonable of it to dismiss Mr Foster particularly in circumstances where he worked in a safety sensitive area.

Summary of relevant information

[3] Mr Foster began his employment with MODEC in 2014. In May 2016 he accepted a Deck Operator (level 2) position. He performed the role on facilities located off-shore in the Maari oil field off the coast of Taranaki. The Maari facilities are owned by OMV New Zealand Ltd (OMV) but largely operated by MODEC under contract with OMV.

[4] Incorporated into Mr Foster's terms and conditions of employment were various policies, including MODEC's "*Group Life Saving Rules*" which states "*No alcohol or drugs while working or driving*", and its "*Workplace Drug and Alcohol Procedure*" ("the D&A Procedure").

[5] Alongside other off-shore oil and gas operators, OMV engaged HNZ GLOBAL Ltd (HNZ) to transport workers from New Plymouth airport by helicopter. HNZ required all passengers to undergo a breath alcohol test before boarding a flight. MODEC's D&A Procedure defined the New Plymouth Heliport as a "worksite" and a "safety sensitive area".

[6] On Monday 27 February 2017 Mr Foster travelled by car from his home in Whanganui to the heliport, in readiness to transfer to the Maari facilities.

[7] Over the two hours Mr Foster undertook 7 breath alcohol tests at the heliport. Each of the test results recorded in this determination measured, in micrograms, the amount of alcohol detected per litre of breath. The result is expressed as a quantum of micrograms per litre, for example 100 micrograms per litre of breath is expressed as "100 mcg/L". Mr Foster's unchallenged written evidence reports 100 mcg/L is a very low threshold compared to the legal limit of 250 mcg/L associated with a motor vehicle on a public road.

Breath alcohol testing by HNZ

[8] An initial test at 9:33 am detected breath alcohol.

[9] At 9:35 am Mr Foster underwent a first screening test (the second test) which recorded 80 mcg/L. Under HNZ's procedure that result would not prohibit a passenger from boarding a flight. However the person who tested Mr Foster is said to have reported to OMV that he smelt strongly of alcohol and HNZ was asked to take another test.

[10] Mr Foster gave written consent for HNZ to perform a confirmation test (the third test) albeit there is a dispute as to when this occurred. A confirmation test was taken at 9:55 am.

The breathalyser messaged there was an “*error*”. The device was turned off, then back on, at which point it recorded 110 mcg/L.

[11] Another testing machine was produced. It too reflected a level of 110 mcg/L (test four).

[12] A ‘Near Miss’ Report drafted on behalf of MODEC records The Drug Detection Agency (“TDDA”) was contacted at 9:59 am and mobilized to the heliport.

[13] At 10:15 am, a fifth test was undertaken by HNZ (also taken at OMV’s request) and recorded Mr Foster’s breath alcohol content as 70 mcg/L.

[14] Mr Foster says he was advised by HNZ to “*suit up*” in preparation for travel. His evidence is that at the heliport he had been led to believe the threshold level for a positive alcohol test was 100 mcg/L. He later reported this understanding to MODEC.

The Drug Detection Agency (TDDA) tests

[15] Shortly thereafter however Mr Foster was informed he was not permitted to board. He was contacted by MODEC’s then Country Operations Manager, Mr David Gleave, who told him TDDA’s mobile unit would soon be arriving to undertake tests. At 11:07 it performed an initial test resulting in a reading of 20 mcg/L. A confirmation test taken at 11:32 am recorded zero or “negative” result.

[16] Mr Foster was advised to drive to a hotel provided by MODEC and await instructions. He did not fly out to the Maari facilities.

MODEC’s investigation

[17] Mr Foster met with representatives from MODEC on no less than five occasions between 28 February 2017 and 6 March 2017 whilst MODEC investigated the incident and commenced a disciplinary process. Each meeting was recorded and transcribed. I have summarised the key aspects of their discussions.

- (a) Mr Foster was candid with his explanations.
 - (i) He acknowledged he’d had a “*pretty boozy Saturday night*” which he thought might have contributed to the test results.
 - (ii) He said he’d had 3 beers on Sunday afternoon. He had also shared a bottle of wine with his wife that evening, finishing about 9 pm.

- (iii) Mr Foster said he'd eaten little over the course of Sunday, but that he'd felt fine when he travelled from Whanganui to New Plymouth on the Monday morning.
- (b) The testing process including the difficulties with the device used to obtain a confirmation test result was canvassed.
 - (i) Mr Foster queried why his breath alcohol results would rise during the testing process.
 - (ii) Ms Gray's evidence is that she followed up on that matter and made inquiries with the TDDA regarding the fluctuation in Mr Foster's test results. She says she was told this was not unusual, and would be reflective of Mr Foster's body metabolising the alcohol.
 - (iii) Mr Foster asked why TDDD were not considered definitive.
 - (iv) MODEC regarded the confirmation test(s) of 110 mcg/L taken by HNZ was the critical result.
- (c) Mr Foster raised the possibility of rehabilitation.
 - (i) Mr Gleave acknowledged Mr Foster's contribution to the MODEC but advised due to the nature of the breach regarding a safety sensitive area, and that because MODEC and OMV held zero tolerance policies towards alcohol, he had no other choice but to dismiss. Mr Gleave noted "even if we accept it, [OMV] would not".

[18] On 9 March 2017 Mr Foster received formal notification from MODEC of his dismissal on one month's notice. The letter advised he was dismissed for breach of its "zero tolerance" policy at 7.1 of the D&A Procedure when attempting to mobilize off-shore, and its 'Group Life Saving Rules' policy.

[19] The Group Life Saving Rules prohibit an employee from being "under the influence of alcohol" when driving. This matter concerns Mr Foster's travel from his to the heliport.

The parties' positions

[20] It is useful to set out a brief overview of each party's position to provide context to the issues that require determination.

[21] At the crux of Mr Foster's personal grievance is his claim that the "confirmation test", on which MODEC relies as cause for his dismissal, should not have been taken where there was no grounds to do so. He further alleges MODEC breached its own alcohol testing procedures, and that there are reasonable doubts about the reliability of several test results which were not sufficiently investigated by MODEC. Finally, he says dismissal was not a response reasonably available to a fair and reasonable employer applying its policies and practices.

[22] MODEC says it had no control over the procedure undertaken by HNZ but that Mr Foster consented to a confirmation test in any event. MODEC acknowledges the D&A Procedure contains "some ambiguity" regarding alcohol threshold levels, but says Mr Foster was not disadvantaged where its policies allowed it to investigate the concerns and Mr Foster was aware of its zero tolerance policy to alcohol. It says the breach occurred in a safety sensitive area and amounts to serious misconduct for which it could reasonably dismiss.

The Authority's investigation

[23] Mr Foster's statement of problem was lodged with the Authority 16 months after his dismissal.

[24] Mr Foster and Mr Gleave, provided written statements to the Authority. Written statements were also received from MODEC employees Hazel Gray, and Roger Pickering, who investigated the incident. Mr Foster and Ms Gray were questioned in person at the Authority's investigation. Mr Gleave was interviewed via video conference on the same date.

[25] As is permitted by s 174E of the Employment Relations Act 2000 ("the Act") I have not referred to all the evidence produced, nor every issue of dispute between the parties. This determination has made findings of fact and law necessary to dispose of Mr Foster's claims.

The law

[26] MODEC accepts the obligation lies with it to justify the dismissal under the legal test set out in the Employment Relations Act 2000 (the Act).

[27] Section 103A of the Act requires the Authority to assess and determine whether a dismissal is justifiable by applying the test in subsection (2), which states:

The test is whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[28] In practical terms, the inquiry involves an examination not only as to whether the reasons on which MODEC relies for the dismissal are such that a fair and reasonable employer could reasonably conclude dismissal was warranted in the circumstances, but also whether the process taken to reach that conclusion was fair.

Preliminary issue

[29] MODEC has raised a preliminary matter regarding the scope of Mr Foster's personal grievance. It says Mr Foster accepted, during its disciplinary process, that he had produced alcohol breath test scores of 110 mcg/L. I understand MODEC to say Mr Foster cannot now dispute the accuracy of those recordings where the scores were not raised as an issue of dispute within his personal grievance.

[30] Mr Foster's claim that his dismissal was unjustified largely concerns the way in which the alcohol tests were obtained. To separate the test results out from an inquiry into whether the test results were obtained fairly is unduly narrow. The basis for the tests, and the subsequent results are factual matters intrinsic to "*all the circumstances at the time the dismissal occurred*" against which the employer's actions must be examined.

[31] I am unwilling to limit the Authority's inquiry to whether the decision to dismiss Mr Foster was a justifiable action in response to test results alone and its application regarding this aspect of Mr Foster's claim is rejected.

The issues

[32] In the circumstances of this case the Authority must first consider the material policies concerning alcohol screening of MODEC employees and determine:

- (a) whether MODEC or HNZ's policies applied to the breath alcohol screening applied at the heliport; and
 - (i) if MODEC policies applied, which of the testing provisions governed the particular circumstances; and
 - (ii) whether the procedure undertaken by HNZ complied with the governing provisions

- (b) if the procedure taken to obtain the confirmation test was flawed, whether MODEC was able to investigate and sanction Mr Foster on the basis of:
 - (i) his consent to the confirmation test, and/or
 - (ii) clause 13 of the D&A Procedure regarding the reporting of non-negative drug and alcohol tests; and or
 - (iii) all or any of the particular circumstances material at the time including – MODEC’s zero tolerance policy; the substantive test results; and MODEC’s health and safety obligations.

Overview of policies concerning alcohol screening of MODEC employees.

[33] In *McLeod v Environwaste Services Ltd*,¹ - a case concerning dismissal for failure to pass a drug test, the Authority observed the inquiry [as to justification of the dismissal] must begin with a consideration of the policy or contractual provisions that afford an employer the right to require the drug test.² I accept also that there is no reason to treat policies concerning testing for alcohol differently to those for drugs. Drawing these threads together it is appropriate to record and consider the relevant portions of the D&A Procedure concerning alcohol threshold and testing procedures both in general and at the heliport in particular.

[34] The D&A Procedure applies to MODEC’s New Zealand Operations and is a relatively comprehensive document spanning 39 pages.

[35] There is a dispute as to the acceptable threshold for breath alcohol. Clause 7.1 provides that a breath alcohol level that exceeds zero in a safety sensitive area is prohibited. In contrast cl 19 defines a positive breath alcohol test in a safety sensitive area as over 100 mcg/L.

[36] There is also a disagreement to which testing procedure should be applied. By way of a flowchart at cl 7 of MODEC’s the D&A Procedure, a range of instances where drug and alcohol testing of MODEC employees may occur are recorded, including pre-employment testing, testing following an incident or accident, ‘with cause’ testing and random testing. Post-accident/incident and ‘with cause’ provisions each require the testing procedure must be in accordance with cl 19 as follows:

19.2 Procedure

¹ *McLeod v Environwaste Services Ltd* [2016] NZERA Christchurch 103
² Above at [37]

All aspects of the testing procedure will be carried out in a confidential and private manner:

- (a) [this sub-clause sets out the testing device to be used]
- (b) The employee or contract will be closely observed for ten minutes prior to testing to ensure they haven't taken on fluid, food or other substances orally.
- (c) An alcohol testing informed consent form must be signed.*
- (d) The first test will require the employee to blow into the device with a disposable mouthpiece. The time will be recorded.
- (e) If the result is negative no further test follows.
- (f) If the result is positive the confirmatory test on the same device (using a new mouthpiece) will be conducted after a 15-20 minute period, the second result will be the result that is reported as a confirmed positive or negative.

...

*A MODEC consent form is attached to the D&A Procedure at Appendix C

[37] The provisions for "Random testing" in safety sensitive areas or roles at cl 11 are silent as to the structure of the testing procedure although a flowchart at Appendix H groups random testing with post-accident/incident" and 'with cause' events for testing purposes.

[38] The last page of the D&A Procedure is Appendix K. Amongst other things it states:

Drug and alcohol testing will be carried out by an independent testing agency in accordance with the relevant testing standards at the time.

Post incident drug and alcohol testing may be conducted by an authorised MODEC employee.

Drug and alcohol testing will be mandatory for designated Safety Sensitive Areas and Roles.

[39] Important to this determination are points 4 and 5 at cl 7.2 provide the following;

[POINT 4] All workers boarding a flight to a [MODEC] facility may be tested for the presence of Prohibited Drugs/Alcohol before boarding any flight to a [MODEC] facility. Should any person refuse to be tested they will be removed from the flight list. The Operations Manager will be notified of the situation and action taken as per the Employee Standards and Disciplinary Procedure.

[POINT 5] Any person whose breath alcohol level exceeds the threshold limits will be escorted to a nominated clinic for a confirmation test. If the confirmation test is negative the person will be returned to work with no loss of pay. If the confirmation test is positive they will be dealt with according to disciplinary procedures.

[40] HNZ's 'BREATH ALCHOL SCREENING PROCEDURE' is also at issue in this case, and states the following:

- The **initial** screening test is a simple passive test (speak into the device)

- If the **initial** screening test reads “ALCOHOL”, proceed to the **first** screening test (using a mouthpiece) which **does not require a consent form** to be filled out.
...
- If the initial **first** screening test indicates a positive result **above the 100 [mcg/L]** then a **confirmatory second test** on the same device (using a new mouthpiece) will be conducted **after a 15-20 minute** wait period.
- **For this second test** the breach alcohol **testing consent form** shall be completed and signed by all parties accordingly with a witness present.
 - If the result of the **second breath test remains over the 100 [mcg/L]** threshold, the employee/contractor will **immediately be stood down and prevented from flying**.

Whose policy/procedure applied at the heliport?

[41] At the outset I note there is no suggestion that a contractual arrangement is created or exists between MODEC’s employees and HNZ separate to the employment relationship MODEC has with its employees which provided for alcohol screening.

[42] In its statement in reply, and evidence MODEC reports Mr Foster was tested by HNZ in accordance with its breath alcohol screening procedures. Mr Gleave says HNZ controlled the heliport workplace and that it (HNZ) required everyone including MODEC employees to undertake a breath screening test.

[43] No evidence concerning the arrangements between MODEC and HNZ for the testing of [MODEC’s] workers travelling off-shore was provided, but in the absence of an arrangement between individual employees and HNZ, the foundation on which HNZ was able to breath test MODEC’s employees for alcohol can only have been provided by MODEC itself. That authority is demonstrated, albeit indirectly, by the wording at bullet point 4, cl 7 of MODEC’s D&A Procedure whereby workers are informed of the requirement to undergo testing for prohibited substances before transferring to off-shore facilities.

[44] I am satisfied also that screening for alcohol at the heliport was a necessary incidence of employment between MODEC and those of its employees who transferred to off-shore facilities to work and a term and condition of employment. Pre-flight screening of MODEC employees therefore needed to conform to the policies MODEC had with its employees as to how testing would be conducted whether undertaken by it or HNZ.

[45] MODEC’s assertion that alcohol screening at the heliport was outside its control together with an inference that it therefore had no obligations as to how the testing on MODEC

employees was conducted is not accepted. If that was truly the case that HNZ's actions were conducted at arms-length and outside MODEC's involvement, it is unclear on what grounds MODEC could obtain and rely on HNZ's testing results and regime to impose a sanction on Mr Foster as if he were in breach of its own procedures.

[46] MODEC is not able to ignore its own policies concerning alcohol screening simply because testing at the heliport was undertaken by a third party.

Which of MODEC's procedures applied?

[47] Turning then to MODEC's policies for screening alcohol, with the exception of points 4 and 5 of cl 7.2 of the D&A Procedure no other policies or procedures refer to alcohol screening that relate specifically to MODEC employees in advance of travel. Whilst point 5 does not expressly link itself to any of the provisions above it (including point 4) and each may be read alone, the reference to a breath alcohol measurement is a logical consequence of the testing mandated at bullet point 4.

[48] I must find points 4 and 5 of cl.7.2 of the D&A Procedure were the operative provisions that governed the testing process at the time Mr Foster was screened at the heliport and the content of those provisions bound both Mr Foster and MODEC.

Did HNZ testing process comply with MODEC's procedure?

[49] In determining whether HNZ's alcohol screening procedure satisfied the requirements of points 4 and 5 of cl.7.2 it is necessary to examine the content of point 5.

[50] The provision presupposes that at least one prior initial test will have been conducted before a confirmation breath alcohol test can be embarked upon and only in circumstances where the initial test establishes "the threshold limit" has been "exceeded".

[51] Critical to this case, point 5 is silent as to what level the "the threshold limit" is set, and it is unclear which of the two possible thresholds levels recorded in MODEC's D&A Procedures; 0 mcg/L or 100 mcg/L, prevails. That point 5 sits within a collection of policies including that breath alcohol threshold levels must comply with 7.1 leans towards a finding that the threshold limit is zero. However, the initial test(s) used to assess whether the threshold has been exceeded was taken, at MODEC's direction, under HNZ's procedures which allow for a threshold limit of 100 mcg/L.

[52] It is difficult to conclude a fair and reasonable employer could impose a testing regime with a corresponding sanction if a breach of its standard occurs without first ensuring the standard is clear and certain. In the absence of any certainty as to what the threshold limit is for breath alcohol screening in a pre – flight setting I cannot find that grounds for a confirmation test pursuant to point 5, cl. 7 was met in Mr Foster’s circumstances.

[53] In *Parker v Silver Fern Farms Ltd (No 1)*³ the Court observed that drug and alcohol policies promulgated by the employer should be interpreted and applied strictly where these impinge on individual freedoms.

[54] There can be no real dispute that HNZ went beyond its stated procedures by having Mr Foster undertake a confirmation test where there is no certainty as to threshold limit applicable to the procedure at point 5 and where HNZ’s own threshold limit had not been exceeded. Even if those difficulties could be set aside, point 5 requires the confirmation test to occur at a “nominated clinic”. There is nothing contained in MODEC’s procedure which permitted HNZ to perform a confirmation test, in any event, where it is not a “nominated clinic”.

[55] It is clear HNZ’s testing procedure, and in particular the testing it conducted to obtain a confirmation test result, did not comply with MODEC’s procedure at point 5 of cl 7.2. It follows MODEC could not reasonably rely exclusively on those results to find Mr Foster had breached its *Group Life Saving Rules*” or cl 7.1 of the D&A Procedure.

[56] MODEC required Mr Foster to undertake further testing by TDDA on a ‘with cause’ basis but I understand it does not seek to rely on the results obtained by that agency where the “confirmation” test produced a negative result.

[57] It is debatable as to whether the screening procedure at cl 19 initiated on a ‘with-cause’ basis was available as a testing option for MODEC where I have found the testing process at points 4 and 5 of the D&A Procedure prevail.

[58] However even if ‘with-cause’ grounds were met it is unlikely I would have found a confirmation test was permissible where TDDA’s initial test result of 20 mcg/L fell below the threshold limit required at cl 19 for a confirmation test.

³ [2009] ERNZ 301 at [26]

Was Mr Foster's consent to a confirmation test grounds for MODEC to rely on HNZ's confirmation test result?

[59] Next, MODEC contends its policy was not breached where Mr Foster signed HNZ's consent agreement which authorised it to; conduct a confirmatory test; release the results to MODEC, and; notifies the signatory that a positive test result is likely to lead to disciplinary action which may include dismissal. MODEC says the test was not therefore taken in breach of any policy. I am not persuaded by this submission.

[60] I do not accept Mr Foster's consent to HNZ can be fairly construed as giving permission to it or MODEC to alter or exceed pre-existing drug and alcohol testing procedures particularly where these may result in disciplinary action. The consent form stated the breath test was for the "*purpose of determining whether [Mr Foster had] a level of alcohol higher than 100 mcg/L per litre of breath*" and Mr Foster's consent must be viewed in the context of the stated purpose where Mr Foster was seeking to mobilize to the facility.

[61] Nor is there evidence to suggest Mr Foster was informed he was not obliged to agree to additional testing and I find it unlikely HNZ apprised him of that matter given OMV had asked it to undertake a further test. I also note, by signing the consent form, Mr Foster agreed he understood a "*refusal to consent and/or share the results may be taken into account in any employment investigation or inquiry*". An inference that disciplinary action could result if he did not submit to a further test were consequences that misrepresented the parties' rights and obligations.

[62] Overall I am not persuaded Mr Foster's consent to undertake further testing was given in circumstances when he was insufficiently informed, and I am therefore unwilling to consider his consent was properly and genuinely given. My finding that the procedure by which HNZ obtained Mr Foster's confirmation test results did not comply with MODEC's procedure at points 4 and 5 of cl 7.2 is not altered by the consent form he signed. As with my previous finding MODEC could not rely on HNZ's confirmation test results.

Does cl 13 of the D&A Procedure provide MODEC with grounds to take disciplinary action?

[63] Despite the difficulties MODEC faces concerning HNZ's confirmation test score(s) result, it submits it was entitled, in any event, to commence a disciplinary process pursuant to cl 13 of the D&A procedure, as follows;

13. **Notification of a Non-Negative Drug or Alcohol Test.**

13.2 **Formal notification**

In all instances of a non-negative drug or alcohol test result:

1. In the case of an employee of MODEC – the employee’s manager/supervisor will be informed, and a disciplinary process may commence.

[64] The “Definitions” section at cl 4 of the D&A Procedure defines a ‘non-negative’ test, in the following way:

The drug test screening equipment result will show a non-negative result if any of the target drugs are detected. This non-negative result is not confirmed until a sample has been analysed by an authorised laboratory (ESR) and confirmed as a positive test.

[65] MODEC accepts the D&A Procedure does not provide a definition for a non-negative alcohol screen test result.

[66] Mr Gleave’s evidence is that by applying the same definition to the detection of alcohol (as that to drug detection above) any level of alcohol in a test reading is also treated as a non-negative result. MODEC says it treated Mr Foster test results as non-negative results. In reaching this position MODEC took into account the first screening test result (the second test) of 80 mcg/L.

[67] The stumbling block for MODEC is that there is no equivalent definition provision for a non-negative alcohol test in the D&A Procedure: the operative testing procedures record breath alcohol test results as either negative or positive. As noted, cl 19 expressly defines a positive test as higher than 100 mcg/L. The governing policy/process in this case is recorded at bullet point 5, cl 7.2 which states “*If the confirmation test is positive, the employee will be dealt with according to disciplinary procedure*”. The consent form that MODEC’s employees are required to sign undergoing an alcohol breath test provides a similar statement.

[68] In the absence of a clear definition as to when a breath alcohol test may be regarded as non-negative I am not prepared to conclude MODEC may, by analogy, extend the definition of a non-negative test. This is particularly so where cl 13 permits the implementation of a disciplinary process at a much lower bar than that expressed at point 5 of cl 7.2 which requires a “positive test” before a disciplinary process may be initiated.

Are there are other factors which provided good cause for MODEC to rely on HNZ test scores

[69] MODEC submits that even if HNZ's confirmation test results were not obtained in strict accordance with the material policies, there may be some circumstances in which an employer may be able to rely of information, even if improperly obtained, to justify a dismissal.⁴ It points to a range of factors on which it says justifies its reliance on the test results to dismiss Mr Foster.

Zero tolerance policy

[70] MODEC suggests the internal inconsistency in the D&A Procedure regarding the alcohol threshold limit had not real impact on Mr Foster where MODEC's zero tolerance approach to alcohol in the workplace had been clearly communicated to Mr Foster via training, its 'Group Life Saving Rules' and his employment agreement. I am satisfied Mr Foster was generally aware that being under the influence of alcohol at work was prohibited.

[71] But the key question on this issue is what was communicated and understood between the parties concerning the alcohol threshold limit relevant to pre-flight screening tests at the heliport.

[72] In a disciplinary meeting on 3 March 2017 Mr Gleave conceded an "ambiguity" existed between HNZ and MODEC policies [regarding alcohol threshold levels] and was a matter that would be "sorted out" after Mr Foster's investigation.⁵

[73] On balance, I find it likely that MODEC was simply unaware that HNZ allowed for an alcohol threshold limit of 100 mcg/L at the time of the incident.

[74] No evidence was produced to counter Mr Foster's explanation to MODEC that he had been led to believe a breath alcohol level up to 100 mcg/L was acceptable at the heliport. His belief was a reasonable one to hold in the circumstances I find.

[75] I am unwilling to accept MODEC's assertion that Mr Foster knew (or should have known) that a zero threshold limit was required at the heliport.

⁴ MODEC referred to *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31 at [64]; *Vice Chancellor of the university of Otago v ASG* [2014] NZEmpC 208; *ASG v Hayne* [2017] NZSC 59 at [87]

⁵ Meeting Notes dated 3 March 2017, page 1

Test results

[76] Next, there is an inference that as the result(s) of the confirmation tests were higher than either of the potential threshold limits, Mr Foster was in breach of MODEC's minimum standards no matter which policy applied. Both parties' referred to *Hooper v Coca Cola Amatil (NZ) Limited*⁶ – a case that concerned an employer's reliance on a positive drug test to justify a dismissal. In that case the test had been obtained on a "reasonable cause" basis but the Court found the employer had not established a reasonable cause to test, and held:

... The test results cannot be relied on by the employer to retrospectively validate the testing process if that process was fundamentally flawed through the absence of a prior reasonable cause to test.⁷

[77] I do not accept the facts in this matter distinguish it from *Hooper*. While it may be that all passengers were required to undertake breath testing to travel off-shore, it remains, as was the case with Mr Hooper, that the test result on which the employer relied upon to dismiss was obtained without a lawful basis.

[78] In any event, it is clear during MODEC's investigation that Mr Foster questioned why, under HNZ's testing regime his breath alcohol level had increased from 80 mcg/L to 110 mcg/L over the course of testing. I note there is no suggestion that Mr Foster was able to or did consume alcohol at the heliport and MODEC appears to have accepted Mr Foster's explanation that he stopped drinking 12 hours (or thereabouts) before undergoing tests. Unfortunately there is no record of the information she received but Ms Gray properly made inquiries with TDDA as to why testing scores would rise. I have no reason to doubt Ms Gray's evidence but her response to the Authority's questions concerning the detail of her discussion leads me to consider it more likely her inquiry did not specify Mr Foster's test results and the discussion with TDDA more likely to be brief. A 27% increase in breath alcohol over a 20 minute period, particularly 12 hours after the event is considerable.

[79] On balance I am not satisfied MODEC obtained sufficient information as to whether the increase in Mr Foster's test results reflected an increasing impact of the effects of alcohol or some other physical response. The omission brings into question whether the confirmation test results in the circumstances they were taken were a reliable indicator of impairment.

⁶ *Hooper v Coca-Cola Amatil (NZ) Limited* [2012] NZEmpC 11
⁷ Above at [35]

Health and Safety obligations

[80] The principle submission advanced by MODEC as justification for Mr Foster's dismissal centres on its duties under the Health and Safety at Work Act 2016 (HSWA) where the off-shore environment is designated a "Major Hazard facility" under HSW Regulations 2016.

[81] A considerable portion of evidence described the risk Mr Foster presented, had he been mobilized off-shore with alcohol in his system, including, for example, the possibility of a ditching event at sea. MODEC submits if it had failed to act on the test results and an accident causing harm occurred, it would have been in serious breach of its obligations as an employer, and liable for hefty penalties. It says it had a positive duty to act upon the test results.

[82] I accept MODEC has significant health and safety obligation but the submission seeks to conflate two entirely separate obligations and corresponding actions. The first concerns the activities required to secure the health and safety of its employees in the workplace; the second relates to actions taken to dismiss Mr Foster.

[83] To the extent the test results demonstrated a potential health and safety hazard for travel the facility in the morning of 27 February 2017, MODEC was entitled to eliminate or minimize the risk and, in effect, it did so by preventing Mr Foster's travel and its initiation of additional tests which ultimately produced a negative result. But MODEC's decision to dismiss Mr Foster in early March 2017 in reliance of the test results was not an action necessary to prevent a workplace accident on 27 February 2017, and there is no evidence of some additional over-riding health and safety imperative that would justify MODEC's use of the test scores in a later disciplinary setting. The following statement as it concerns an employer's health and safety obligations, its policies, and its obligations to act as a fair and reasonable employer, remains good law, as follows:

[35] ...While employers face an array of health and safety obligations and are to be commended for taking any initiatives through employment agreements or policy statements to meet such obligations, their managerial prerogatives in any given case may well be constrained by relevant statutory obligations or the provision of relevant employment agreements. In such circumstances, the employer is required to observe the legal restraints. ...

[84] There is also no evidence that that MODEC undertook any type of assessment to ascertain whether Mr Foster was negatively impaired or influenced by alcohol such that he

presented an actual risk for which MODEC could reasonably dismiss. Nor am I satisfied MODEC established Mr Foster's conduct resulted in a breached a health and safety standard for which dismissal was warranted.

[85] It has not been necessary to review the procedure MODEC took to dismiss Mr Foster where I am unable to conclude MODEC followed its policies to a degree where I consider it could justify Mr Foster's dismissal.

[86] Principally, as I have found, MODEC was not able to rely on the confirmation test result(s) of 110 mcg/L where these results were invalidly obtained in breach of its procedure standards. There are some additional doubts about the significance of HNZ's confirmation tests results but in any event the confirmation test, on which MODEC is entitled under its own policy to rely, must be conducted at a nominated clinic. However MODEC did not treat TDDA results as conclusive, and preferred HNZ's test results. An employer is expected to act in accordance with its policies and a failure to do so is not the action of a fair and reasonable employer in all the circumstances. I must find MODEC dismissal was substantively unjustified and he has a personal grievance.

Remedies

Reinstatement

[87] Mr Foster seeks reinstatement. At the time Mr Foster was dismissed on 3 April 2017 reinstatement was not a primary remedy but the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[88] MODEC says reinstatement is not reasonable and practical for several reasons.

[89] It is not necessary to decide whether the length of time, (almost 18 months) taken by Mr Foster to pursue his claim is unreasonable. This is because I find it is impracticable to reinstate Mr Foster to his position where it is doubtful the action may be carried out. OMV own the facilities on which Mr Foster performed his role. In evidence MODEC furnished a letter written to it by OMV seven months after the dismissal. OMV emphasised its strict policy regarding alcohol, the obligation on both MODEC and its employees to comply with its policies and Mr Foster's test results. The letter noted "*Given the seriousness of the breach ... OMV has decided that Mr Foster is not permitted on OMV property or worksites in any capacity until further notice.*" No additional evidence was furnished to indicate OMV had altered its position

on this matter. I understand also that there are no other platforms in New Zealand on which MODEC could place Mr Foster which are not owned by MODEC.

[90] The application for reinstatement is declined.

Lost wages

[91] Mr Foster obtained alternative full time work during his notice period. However his rate of pay was much lower than what had earned with MODEC. In early July 2017 he accepted another role with improved remuneration although, again, not at the rate he received at MODEC. He seeks the difference between what he was paid and what he would have received had he remained employed by MODEC over 13 weeks beginning 3 April 2017 until 3 July 2017. MODEC says there was no loss of wages for Mr Foster where he was paid Mr Foster \$21,101 (gross) comprising 4 weeks wages and holiday pay, plus wages from his new position.

[92] MODEC's approach to Mr Foster's claim for lost wages is mistaken. Mr Foster's employment finished on 3 April 2017. That he was not required to work for 4 weeks before that date but paid over this period was a matter of contract between the parties and does alter his claim for lost remuneration as a result of the dismissal. Nor could payment of his statutory holiday entitlement modify his lost remuneration.

[93] Having established Mr Foster was unjustifiably dismissed, s 128(2) of the Act requires the Authority to award the lesser of either a sum equal to his actual loss or a sum equal to 3 months' ordinary pay.

[94] Mr Foster earned \$13,558.06 (gross) over the 3 months' following his dismissal. Had he remained in employment with MODEC over the same period he should have been paid \$35,067.16 (gross).⁸ Subject to an assessment regarding contribution, I am satisfied Mr Foster is owed \$21,505.13 (gross) in lost wages.

Compensation

[95] Mr Foster claims \$20,000 as compensation for humiliation, loss of dignity and injury to feelings corresponding to his personal grievance.

⁸ Based on Mr Foster's annual total remuneration of \$140,654 divided by 52.142857 = \$2697.47 per week x 13 weeks.

[96] A sizeable portion of Mr Foster's evidence centred on the stress he says he experienced by the procedure used and the time taken between the incident and receipt of his notice of dismissal: 7 days in total. I accept Mr Foster felt humiliated by the attention given to events at the heliport but the investigative and disciplinary procedure implemented by MODEC was in accordance with its policies which, alongside the D&A Procedure and Group Life Saving Skills, formed terms and condition of employment. Nor do I consider the length of the process unreasonable, and this aspect of Mr Foster's claim is not a matter for which he should be compensated.

[97] Mr Foster further advised he was required to subdivide a property after his dismissal to meet his expenses. However this event occurred 6 months or more after his dismissal, no evidence of hardship was provided and the proceeds of the sale was used to pay down a mortgage. I agree the link between this action as reason to compensate non-economic loss is tenuous and, on balance, does not form part of my assessment.

[98] Mr Foster did however describe the embarrassment he felt at having to advise his daughter of his dismissal and where he needed to convey to her that felt he was no longer in a position to contribute to her living expenses whilst she attended university. I am satisfied he was humiliated by the discussion and moreover generally distressed by the loss of his job and the affect it had on ability to provide for his family. Mr Foster also said his wife was distressed by the events leading to his dismissal where she felt some responsibility for the alcohol they shared on 26 February 2017. However compensation under s 123(1)(c)(i) is not a remedy that may be awarded to an employee's partner, and Mr Foster's wife did not attend the investigation meeting to give evidence as to the effect of the dismissal on Mr Foster. No further evidence was given as to the impact the dismissal had upon Mr Foster. Subject to an assessment as to contributory behaviour, I assess an award of compensation of \$14,000 is appropriate.

Contribution

[99] The Authority must also consider the extent, if any, to which the employee's action contributed towards the situation that gave rise to the grievance, and if so to reduce remedies accordingly.⁹

⁹ Employment Relations Act, s 124

[100] It is apparent from notes taken during MODEC's investigation, it had concerns as to why Mr Foster had, on Sunday morning, cancelled pre-arranged accommodation in New Plymouth for that evening, in preparation for an early mobilisation on 27 February 2017. No finding was made by MODEC on the matter and I am unwilling to accept an adverse inference that Mr Foster was aware he would continue to have alcohol in his system on or made purposeful plans with that effect.

[101] By his own admission however Mr Foster accepts he had drunk heavily on Saturday 25 February 2017 and moderately so the following Sunday afternoon and early evening. He also accepts he needed to be present in a safety sensitive area on Monday morning.

[102] In *Harris v The Warehouse Ltd* Chief Judge Colgan considered s 124.¹⁰ He observed:

... "the situation that gave rise to" that personal grievance is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably. Longstanding case law establishes that there must be more than simple cause and effect shown. The employee's actions must be culpable or blameworthy or wrongful actions which must have contributed, for example, to a complaint of serious misconduct which, following investigation, brought about the dismissal of the employee.¹¹

[103] MODEC submitted that had Mr Foster not consumed the amount of alcohol he did over the weekend prior he would not have returned the test results he did, which ultimately led to his dismissal. There is no real dispute Mr Foster's weekend alcohol consumption led to the initial detection of Mr Foster's breath alcohol and the 2nd test result of 80 mcg/L. I accept those actions form part of the factual matrix leading to the dismissal and may be viewed as a causative factor to that end. But Mr Foster's dismissal was a consequence of HNZ's request to have him undergo a confirmation test, and MODEC's use of that information. I have found the test was invalidly obtained where the ground to obtain it did not exist. But for that testing Mr Foster would not have been dismissed. I must therefore find there are insufficient grounds to warrant a reduction to Mr Foster's remedies under s 124 of the Act.

Summary of orders:

[104] MODEC Management Services PTE Ltd is ordered to pay Shane Foster the following:

¹⁰ *Harris v The Warehouse Ltd* [2014] NZEmpC 188

¹¹ Above at [178]

- (a) \$21,505.13 (gross) in lost wages pursuant to s 123(1)(b) of the Employment Relations Act 2000.
- (b) \$14,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act.

[105] The application for reinstatement is declined.

[106] This determination has been issued outside the timeframe set out at s 174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.¹²

Costs

[107] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

¹² Pursuant to s 174C(4)