

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHU ROHE**

[2026] NZERA 569
3452444

BETWEEN	PAUL BRENDON BROWN Applicant
AND	ALLIANCE GROUP LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Mary-Jane Thomas and Sam Welsh, counsel for the Applicant Shaun Brookes and Amiria Bates, counsel for the Respondent
Investigation Meeting:	29 and 30 June 2026 in Invercargill
Submissions Received:	13 July 2026 and 3 August 2026 from the Applicant 27 July 2026 from the Respondent
Date of Determination:	20 August 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Paul Brendon Brown was employed by Alliance Group Limited (Alliance) at their Mataura meat works from 1987 latterly as a Butcher until being summarily dismissed on 30 January 2026. Mr Brown was a member of The New Zealand Meat Workers and Related Trades Union (the Union), and bound by a applicable collective agreement.

[2] Mr Brown claims he was unjustifiably dismissed after failing a workplace drug test despite disclosing the use of prescription medicinal cannabis and he seeks reinstatement and compensatory remedies.

[3] Alliance contends Mr Brown's dismissal was a fair and reasonable decision after he failed a second drug test and they oppose reinstatement by questioning whether Mr Brown could continue to work in a safety sensitive area.

[4] In contrast, Mr Brown contends even if serious misconduct could be established the sanction of dismissal was not an action that a fair and reasonable employer could have taken in all the circumstances. Mr Brown alleges Alliance failed to consider his individual circumstances or they were not properly and fairly considered, at the time of the dismissal.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence or deal with all matters raised in submissions.

[6] Mr Brown, his union organiser, Juan Tohiariki, co-workers: Richard Green and the shift health and safety representative Kelvin Andrew and Alliance's Matura Plant Operations Manager, Bruce Caughey, the Plant Health and Safety Manager, David Glover, the Plant First Aider/Injury Manager, Vicki Kelly and the Plant's HR Manager, Diane Wilson. CannaPlus Clinic's Dr Afraz Adam attended the investigation meeting (by AVL) to give general evidence on the use of medicinal cannabis that provided useful background but was tempered by the fact he had never been in a patient-doctor relationship with Mr Brown.

[7] All witnesses provided written statements and responded to oral questions. I record all assisted my investigation. At the end of the investigation meetings counsel provided timetabled written submissions and some additional background documentation.

Issues

[8] The issues the Authority must determine are whether:

- (a) the conduct Mr Brown was dismissed for, constituted serious misconduct; and if so:
- (b) was the decision to summarily dismiss Mr Brown, one that a fair and reasonable employer could have reached in all the prevailing circumstances as measured against the standard set by s 103A of the Act and consideration of s 4 of the Act's good faith requirements and relevant

policies and obligations flowing from the applicable collective agreement;

(c) if Mr Brown's personal grievance is established what if any, remedies should be awarded considering his claims for:

i. Reinstatement.

ii. Lost wages.

iii. Compensation under s 123(1)(c)(i) of the Act;

(d) if Mr Brown is successful in all or any element of his personal grievance claim should the Authority reduce any remedies granted because of any contributory conduct? and;

(e) how costs should be dealt with.

What caused the employment relationship problem?

[9] Mr Brown commenced working for Alliance in 1987 and through the years worked in various departments, progressing to being a butcher. Mr Brown was designated an A grade slaughtering in 1999, and this seniority required he tutors other workers and deals with reporting health safety and hygiene compliance issues. During the investigation meeting Mr Caghey and other Alliance witnesses spoke in glowing terms of Mr Brown's skills and abilities and willingness to share them.

[10] As context, in or around 2016, Mr Brown incurred a very serious workplace injury during an incident when he was crushed between two cattle. The accident that resulted in Mr Brown being hospitalised and absent for a lengthy period, left him with ongoing chronic pain issues and sleep issues. Mr Brown says he managed his pain through regular prescribed analgesic use. In 2022, after consulting his GP on a wish to avoid the negative side effects of previous analgesic use, Mr Brown says he was prescribed medicinal cannabis oil as an alternative pain management tool. Mr Brown says he was advised to take the oil at nighttime and that provided he took it 8 hours in advance of commencing work, it would not show up in a drug test. Mr Brown says the medicinal cannabis assisted him greatly with improving sleeping patterns and it caused him less side effects than analgesic use.

[11] Mr Brown, in evidence that was not contested, says he provided the then Alliance occupational health nurse a copy of a 21 December 2022 medical certificate from his general practitioner in February 2023, confirming “he is being treated with medicinal thc/cbd drops for his chronic medical conditions”. Mr Brown recalled the nurse saying she would inform the then production manager of his prescription and he may have to be put on a trial. It was agreed that the GP’s certificate was placed on Mr Brown’s personal file, however, there did not appear to be any questioning of the late disclosure or any agreement on the regular monitoring of Mr Brown’s situation. I was shown no follow up correspondence from Alliance flowing from Mr Brown’s initial disclosure that would indicate any health and safety issues around potential impairment. Mr Brown recalls he was the subject of a random saliva sample drug test in February 2023 that returned a negative THC reading.

[12] Thereafter, up to 18 July 2025, when he had his next random drug test, Mr Brown says no concerns were raised about his continuing use of medicinal cannabis. Unfortunately, despite recalling he once again raised the issue of his use of medicinal cannabis, he failed the drug test with it returning a non-negative result. This led to Mr Brown, as per Alliance’s policy (discussed below), being suspended until he completed a negative test and agreed to undertake a six weeks’ drug counselling course. Mr Brown fulfilled these requirements and recalled signing an OCP Drug and Alcohol Rehabilitation Contract on 18 July 2025 - selected provisions of which stated:

I agree to advise my supervisor of any medication that I am taking.

I understand that, if on any future occasion during my rehabilitation programme I am found to be taking a non-prescription drug on company property or other workplace or return a non-negative/positive drugs or alcohol test, it will be dealt with as serious misconduct and may result in termination of my employment.

I understand that a non-negative/positive drug test under the terms of this contract means that there need only be the presence of any amount of drug or metabolite (i.e. not cut-off levels) detected.

[13] Mr Brown says he signed the rehabilitation contract without challenging its appropriateness as he thought if he refused - he would be dismissed and he had disclosed his ongoing prescription cannabis use. In addition on 28 July 2025 Alliance, in line with their ‘Drugs and Alcohol Group Policy’, issued Mr Brown with a final written warning that he did not contest. I was not provided with any evidence of the disciplinary meeting preceding the issuing of the final warning. The warning was confirmed by a 28 July 2025 note placed on Mr

Brown's personal file headed "Confirmation of Disciplinary Action" that was signed by him, his union representative and, an unnamed Alliance manager.

[14] The counselling course Mr Brown subsequently completed was tailored to deal with people who had recreational drug issues and Mr Brown says the counsellor intimated that she saw no remedial benefit in seeing him. Mr Glover recalled Mr Brown expressing that he thought the course was a waste of time. Mr Brown nevertheless completed the course. In questioning during the investigation meeting, Alliance witnesses all conceded 'rehabilitation' counselling served no useful purpose in Mr Brown's situation but at the time this was not acknowledged nor was the programme modified or any alternatives examined to address concern about medicinal cannabis usage. Alliance witnesses also acknowledged that the company policy settings around prescription medicine use needed revision.

[15] Mr Glover, the Alliance health and safety manager, says he was generally responsible for the ongoing management of employees who failed drug tests and latterly, their Alliance plant had no specialist occupational health nursing support. He said while having no specific training on identifying impaired workers, from his vast experience and time on the plant floor he kept an eye out for any issues but had no concerns relating to Mr Brown. Mr Glover says he was aware of Mr Brown's prescription for medicinal cannabis and ongoing use, but no health monitoring was in place, and he just assumed prescribed usage was safe.

[16] Mr Brown says he had in early February 2025, been referred to the CannaPlus, a specialist medical cannabis Clinic, by his own GP's medical practice and he inquired about less potent alternative pain treatment because of his fear of failing a drug test and was eventually recommended the use of a cannabis flower product. Mr Brown says this alternative prescribed product came with advice it would not show up in a salvia test provided he administered it the evening prior to his shift commencing and that it was safe to drive a vehicle, provided there was a six-hour interval. Mr Brown says he took the less potent prescription and would administer it between 7:30 pm – 9 pm before leaving for work at 5 am the following day and he was comfortable it dealt with his ongoing pain without feeling any side effects.

[17] An analysis of Mr Brown's medical records disclosed after the investigation meeting, showed Mr Brown was wrong in recalling the timing of his changes in medication by suggesting his initial analgesic pain medication had commenced a decade after his workplace accident and also establishing, he engaged with the CannaPlus clinic five months prior to his

last failed drug test and his medication regime did not change after the failed test. Alliance in submissions highlighted this inconsistency and highlighted concern over when Mr Brown took medication to both support the dismissal decision and question Mr Brown's credibility.

[18] While I acknowledge these concerns, I do not find they are of significance given the evidence showed Alliance did not engage over this issue at the time of the dismissal nor crucially at the time he disclosed his first use of medicinal cannabis. It is also not clear whether Mr Brown had access to his own records before the investigation meeting or sought and disclosed them thereafter. Alliance did not ask Mr Brown to disclose his medical history as part of their investigation leading up to the dismissal or seem interested in Mr Brown's willingness to consider alternative medication to retain his employment. I note Alliance's concern in submissions that Mr Brown, despite saying he had stopped using medicinal cannabis after his dismissal, is a claim seemingly inconsistent with his latterly disclosed prescription records. However, during the investigation meeting the timing of when Mr Brown stopped taking his medication was not put to him. At the time of the investigation meeting Mr Brown did say he was no longer on any medication and was managing his pain through diet and exercise. Mr Brown also said he was willing to attend an occupational health assessment should he be reinstated.

[19] In August 2025 Mr Brown was the subject of a 'for cause' drug test after he missed a carcass while working on the legging stand. This test returned a negative result, and contrary to Alliance's submissions suggesting this was evidence of ongoing monitoring for potential impairment, I was provided with no evidence of any follow up that would indicate Alliance conflating the test to concern about Mr Brown's use of medicinal cannabis.

Events leading up to dismissal

[20] It emerged from evidence that on 26 August 2026, Ms Wilson reasoned that despite him being on a final written warning and subject of additional testing scrutiny, Mr Brown had not been drug tested for a significant period, so she instructed Mr Caughey to undertake a drug test of Mr Brown on the morning of 27 August. Despite portraying the test to Mr Brown as random, Alliance conceded it was targeted and not prompted by any concerns around Mr Brown's demeanour or presentation at work. Ms Wilson says she maintained a list of all those on final warnings who may be tested at any time in the period of 12 months from the issuing of the warning and although Mr Brown had been tested 6 months prior, she felt another test was necessary but conceded he had "fallen through the cracks" regarding follow up testing.

[21] The saliva drug test was administered on Mr Brown by Ms Kelly with Mr Caughey observing at around 6 am on 27 August 2026. Mr Brown returned a non-negative test result and then declined to give consent to a further urine test (saying in evidence he was not fully apprised of the scope of the urine test's purpose, and he just thought it was pointless as he had failed the earlier test). After the test result became known Mr Brown was placed on an unpaid suspension until he could return a negative drug test.

[22] On 28 January 2026 a letter headed "Suspension and Notice of Investigation Meeting", was provided to Mr Brown indicating he had failed the drug test; was now suspended until he returned a "clear test" and once he had, "we will meet in an investigation meeting as soon as it is possible". The letter also suggested that during the administration of the drug test Mr Brown had "behaved in a manner which made the testing process difficult and prevented requesting a urine test" – a statement from Ms Kelly was attached (this was not a contemporaneous statement having been prepared later after a discussion with Ms Wilson).

[23] The failing of the drug test was described as "a potential serious misconduct breach of the Employee Handbook". It then described the potential allegations as:

- Returning a non-negative result, following a drug alcohol test
- Reporting to work under the influence of illegal drugs, which in the employer's opinion makes the employee unable to carry out their duties in a safe and proper manner.

[24] The letter went on to say:

The potential outcome of investigation is disciplinary process. Potential outcome of serious misconduct disciplinary process may be termination of employment, without notice if you are already on a final warning for drug or alcohol related offences.

If termination of employment doesn't occur the outcome may be a final written warning, during which you will be required to complete monthly random rehabilitation testing as directed in addition to the normal 3% random testing.

[25] Mr Caughey then identified himself as the decision maker, that the upcoming meeting would be recorded; that an Alliance HR support person may be present and, that Mr Brown was entitled to bring a Union or other representative to the meeting. The letter warned Mr Brown: "While the investigation into this allegation is on-going" he should maintain confidentiality and not discuss the matter with others except for his representative or support person or risk further disciplinary action. Counselling support was also offered.

[26] I find the letter was muddled and given the resources available to the employer, inexplicably unclear on process. It, for example, gave the impression that an ongoing investigation would take place before a disciplinary process. A key error was an allegation that Mr Brown had taken and been found under the influence of illegal drugs. Ms Wilson conceded the letter was, in places, inaccurate and says this resulted from it being based on a 'template'.

[27] On 29 January, at 10:50 am, Mr Brown undertook a further Alliance administered drug saliva test, which returned a negative result.

30 January disciplinary meeting

[28] At 10:25 am Friday 30 January, Mr Caughey and Ms Wilson attended a meeting with Mr Brown and his union organiser Mr Tohiariki. The meeting was recorded and subject of an agreed transcript. The meeting lasted approximately 22 minutes inclusive of a 7–10-minute break. Ms Wilson's evidence during the investigation meeting was prior to the meeting she had sought from Alliance's in house counsel, delegated authority to dismiss Mr Brown during a six-minute telephone conversation. Ms Wilson in a further brief of evidence filed after the investigation meeting concluded, says although she usually sought approval for a termination it was not a policy requirement and Mr Caughey had the necessary delegation.

[29] The transcript shows Mr Caughey opened by defining the issue as Mr Brown's second non-negative 'random' drug test. Mr Caughey noted Mr Brown had been suspended but had returned a clear test the previous day so he would "be back on the payroll pending this investigation". Mr Caughey then said they needed to find out the reason (impliedly for the failed test), and he then indicated to Mr Brown "I understand you are on medication". Mr Brown then extensively recited the history of why he was taking pain medication and the background of his transition from analgesics to prescription cannabis. Mr Brown outlined the timing of when he took medication and said he did not feel impaired at work nor had he been approached with any concerns. He concluded by indicating he was prepared to cease medication and had a GP visit planned for 12 February to explore alternatives.

[30] Mr Caughey instead of engaging Mr Brown on his GP visit, then asked Mr Brown to recite the history of his injury and its causation. I find this question was unfair and unnecessary and indicative of the fact that Mr Caughey and Ms Wilson had admittedly not reviewed Mr Brown's personal file prior to the meeting. Mr Brown then recited in some detail the history

of his accident and recovery and the aftermath of his pain management issues. This took up a significant period of the meeting. In response, after briefly acknowledging that Mr Brown had been lucky to survive the accident, Mr Brown referred back to the failed drug test saying “you mentioned that you weren’t impaired, but I don’t know that” – he then acknowledged limitations of the test being unable (using alcohol as an example) to ascertain what quantum had been consumed.

[31] Ms Wilson then set out Alliance’s view in part, as:

I think we need to be clear that, you know whilst you’re saying that that you’ve got a prescription for it and we understand that, there is, our policy states that anything above, you know, well, anything that triggers a non-negative in the machine is a matter of serious misconduct.

[32] Further, Ms Wilson suggested Mr Brown would be aware of the consequences of failing a second drug test as potential dismissal as per Alliance policy and then stated: “I understand your points that you’ve raised but looking at our policy, it does make it pretty difficult”. Ms Wilson said the decision was “ultimately” Mr Caughey’s and suggested “this is an investigation meeting” and they had “now heard from you, your explanation”. Ms Wilson then invited Mr Tohiariki to make a submission.

[33] Mr Tohiariki noted this was not the place to argue about any deficiencies in the drug policy and he concentrated his submission on the test not being able to establish any level of impairment and the fact that this was subjective and no supervisor had reported Mr Brown acting untoward. In response, Mr Caughey and Ms Wilson confirmed this essentially was not a ‘for just cause’ test - it was random with no trigger for the test. Mr Tohiariki then highlighted the union’s belief that the group drug policy needed revising as it was predominately aimed at discouraging illegal drug use and did not sufficiently accommodate Mr Brown’s situation of disclosed prescription drug use.

[34] While saying she had not seen it, Ms Wilson disclosed she was aware a ‘draft’ revised group drug policy was being discussed with the Union. Mr Brown acknowledged signing a previous warning but suggested with the knowledge that he was taking prescription medication and had reduced the efficacy of his dose “to as low as possible”, he expected Alliance to be more supportive and work through their concern if he failed a drug test. He then reiterated he was prepared to give it up completely and was willing thereafter to be frequently drug tested. Mr Tohiariki then urged Alliance to consider this offer and distinguish it from other habitual users of drugs who resisted the company right to question their usage.

[35] Ms Wilson in responding then explained the current policy and suggested that Mr Brown was the subject of testing that meant a test below the cut off level would have been at issue (i.e. the “presence of any amount of drug or metabolite”). Ms Wilson stated that she did not want to go into “the debate about the timing of taking the medication and the impacts of that on the tests” and the Union should “just need to be clear that where our policy sits” and Mr Caughey would decide the matter. Ms Wilson then, on a prompt from Mr Caughey, adjourned the meeting asking Mr Brown and Mr Tohiariki to sit out in the reception area.

[36] I listened to the recording of the meeting, and it did not disclose any aggressive or disparaging approach by Mr Caughey or Ms Wilson and during the investigation meeting Mr Brown conceded his earlier suggestion that Mr Caughey had an ulterior motive to dismiss him was unsustainable. I record Mr Caughey appeared genuine in his regard for Mr Brown and noted the only time they had any tension, was over Mr Brown raising health and safety issues with him, that Mr Caughey says were often legitimate concerns.

The decision

[37] The adjournment was accepted as brief of around 7–10 minutes, Mr Caughey opened the resumed meeting by stating it had been “a hard decision to come to” and explained his rationale as:

First of all, I must stipulate that there is a cut-off point. You mentioned that you’re taking prescription medication and that. But it came back as non-negative which doesn’t, we can’t hand on heart say whether you self-medicated or it was just the prescription drugs. We don’t know. We could have been here you know, in the first non-negative you gave. We could have been down that track there of giving up all the prescription drugs and forgot about it all then, but we still carried on. I’m talking about you Paul. I think if we’re going to have to part ways, terminate your employment, Paul It’s not a decision I’ve made lightly but I’m just going from, we have to be consistent with what has happened in the past here at Matura for second failed non-negatives, we have to be consistent with what’s happened in the past.

[38] Although the conversation did continue after the above unequivocal statement he had reached a decision to dismiss Mr Brown, Mr Caughey did not follow Alliance’s own disclosed guidelines (“Manager Checklist for ER Matters”) that suggest a manager should seek feedback on a “proposed outcome” before making a final decision.¹ I find this inexplicable given the presence of Ms Wilson and impliedly, indicative of a rushed decision.

¹ *Manager Check List for ER Matters -What do I need to do to safeguard from a Personal Grievance?* undated.

[39] After Mr Tohiariki sought clarification if any distinction was being made between medicinal cannabis and illegal use of cannabis, Mr Caughey responded the decision was solely based on Mr Brown failing the drug test. Ms Wilson then reiterated concerns about Alliance not being able to ascertain if Mr Brown was “self-medicating or misusing the prescription”. There then followed an inconclusive discussion around the communicated decision to dismiss Mr Brown with Ms Wilson indicating a letter confirming the decision would be provided later that day. Any objective analysis of the transcript (and recording).

The dismissal letter

[40] By email to Mr Brown (copied to Mr Tohiariki) of 3:55 pm on 30 January 2026, Ms Wilson attached a letter signed by Mr Caughey confirming the outcome of “the meeting held this morning, which resulted in the termination of your employment”. Ms Wilson’s email apologised for being unable to correct the letter (as Mr Caughey had left for the weekend) that the dismissal letter wrongly referred to an unrelated warning issued on 20 August 2025 as “final” when it was just a “first written warning”.

[41] The attached letter headed “Outcome of Disciplinary Process” recorded Mr Brown’s contextual explanation for why he had failed the drug test while taking medicinal cannabis; that he had advised the company of this; he was of the belief he had taken his medication within sufficient time to pass a drug test and believed he had not attended work impaired. Further it recorded that Mr Brown had made an appointment with his GP to discuss alternative pain management and that “you are willing to cease taking medicinal cannabis entirely”.

[42] Without acknowledging the dismissal decision had been communicated during the earlier meeting, Mr Caughey stated:

I have considered what you have said. Serious misconduct breach of the Employee information handbook is proven:

- *Returning a non-negative (positive) result following a drug test*

[43] Mr Caughey then confusingly tried in the letter to portray his earlier decision as a proposal to terminate Mr Brown’s employment without notice and he recounted Mr Brown’s response, before conceding: “I considered this and decided to terminate your employment without notice”. Mr Brown was then advised his leave entitlements would be paid out, he had to return any Alliance property and was told: “You are not to return to the plant”.

The aftermath

[44] The Union by way of a letter of 10 February 2026 lodged a personal grievance for Mr Brown which Alliance's in-house counsel responded to on 16 February, denying the personal grievance but suggesting the parties attend mediation.

[45] The Union then engaged present counsel for Mr Brown and an application for interim reinstatement with accompanying affidavit evidence was received by the Authority on 20 March 2026. On 23 March, I directed the parties to mediation and set up a teleconference call for counsel on 11 May, should the mediation prove unsuccessful. On the morning of 11 May counsel for the applicant confirmed the matter was still unresolved. The Teleconference proceeded on 11 May 2026 at which counsel agreed that the matter should proceed to an investigation meeting on 29 and 30 June 2026, to deal with the claim for permanent reinstatement. Exchanges of written evidential statements and the production of a common bundle of documents was also timetabled.

[46] In the interim, Alliance made an unsuccessful application to the Authority to have the matter removed to the Employment Court.² A further urgent application to the court seeking special leave to have the matter removed was declined in a 24 June 2026 judgement.³

The decision to dismiss – was it justified?

[47] Although the Authority may not have unlimited discretion to substitute its decision for that of an employer⁴ it can reach a different conclusion, provided the conclusion is reached objectively assessing all the relevant circumstances at the time the dismissal occurred.⁵ The Authority is essentially deciding “whether the decision and conduct of the employer fell within the range of what a fair and reasonable employer could have done in all the circumstances”.⁶

[48] Section 103A (3) (a-d) of the Act, contains elements that the Authority must objectively measure an employer's actions against, these are in summary:

² *Alliance Group Limited v Brown* [2026] NZERA 380.

³ *Alliance Group Limited v Paul Brenden Brown* [2026] NZEmpC 128, EMPC 246/2026.

⁴ *X v Auckland District Health Board* [2007] 1 ERNZ 66.

⁵ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

⁶ *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

- (a) whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss?
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

[49] Applying the above elements broadly requires the Authority to look at whether Alliance's actions and/or omissions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must also have regard to the Act's good faith provisions and any relevant employment agreement and/or linked employer policies. This requires that I consider various contextual factors, including broadly whether concerns were sufficiently raised by the employer with the employee, whether a full, fair, and thorough investigation was completed and whether a reasonable opportunity to respond to those concerns was given and, whether the employer genuinely considered the employee's explanations before the decision to dismiss was made including consideration of alternatives to dismissal.

[50] This is a dismissal that can neatly be divided into process and substantive elements to be assessed as follows.

Process

[51] I find that Alliance given its available group resources and recourse to an experienced in-house counsel, should be held to a reasonably high standard.

[52] I observe, despite a reference to an 'investigation' taking place and a letter to Mr Brown inviting him to an "investigation meeting", it was evident the decision to dismiss was not informed by any careful exploration of contextual factors raised by Mr Brown. A more thorough investigation could have included: interviewing co-workers to ascertain if Mr Brown was manifesting any signs of impairment or unusual behaviours at work that would have

informed a wider risk assessment; a review of Mr Brown's employment file and a wider look at how his disclosure of prescription medication had been handled including if any monitoring or support mechanisms had been utilised (particularly focussing on the latter period after he failed the first drug test); and seeking further medical information from Mr Brown to inform any alternative options or seeking independent medical advice on the impact of the medication he was taken, its properties and, whether Mr Brown was correctly administering his prescribed drug dosage (especially given Dr Adam's cautious evidence around the timing of dosages). Ms Wilson conceded in evidence that the investigation was very limited and concentrated only on the testing documentation. In submissions Alliance contended the investigation was sufficiently 'abbreviated' because key facts were not contested (an undisputed drug test result) and Mr Brown, when represented, had a full opportunity to respond to concerns raised. I disagree with the latter submission as this does not fall into a category where serious misconduct was conceded – Mr Brown in my view raised issues that warranted further reflection from Alliance including the central deficiency of its own limited drugs policy regarding medicinal drug use.

[53] Having made these findings above, I also am fully aware that this was a difficult situation for all involved and I accept Mr Caughey was genuine in his approach as he otherwise had a high regard for the attributes Mr Brown brought to his role. I also accept that although a blunt instrument, the use of drug testing serves a legitimate purpose as an overall mitigation of risks.

[54] However, objectively reviewing the evidence both documentary and orally presented, no careful investigation (other than hearing from Mr Brown and his Union organiser at a brief meeting) took place. I find this was not the approach a reasonable employer could have taken. In the circumstances, I consider the investigation meeting was convened too quickly and it quickly morphed into a disciplinary meeting without time for genuine reflection or inquiry into, the legitimate issues and mitigating factors Mr Brown identified. Ms Wilson who is an experienced practitioner was ill-prepared for the investigation meeting, having failed to apprise herself of Mr Brown's personal file and the history of his extensive employment. I would not go as far as to say in obtaining the delegation to dismiss that the decision was pre-determined, but it did lead to a decision to dismiss without further reflection. I find too much emphasis was placed by both Ms Wilson and Mr Caughey (and in submissions), on a somewhat simplistic and rigid application of the company drug and alcohol policy that was primarily aimed at resolving problems with those abusing illicit drugs or alcohol.

[55] A further procedural concern was the handling of the allegation identified in the 28 January 2026 notice of investigation meeting that Mr Brown behaved in a “manner which made the testing process difficult”. This, it emerged in evidence, was a suggestion that Mr Brown had attempted to influence the test by consuming liquid from a bottle he had concealed upon himself during the test process that Ms Kelly administered. In giving evidence Ms Kelly recalled observing this remarking it was suspicious and making a note of it that she provided to Mr Caughey, but she did not at the time ask what Mr Brown had consumed or request the bottle he used but she recalled discussing this later with Ms Wilson (a conversation not documented). Also, despite the allegation being levelled that Mr Brown had made the testing process difficult, Ms Kelly’s evidence was he was OK despite appearing irritated during the test. This matter was not put to Mr Brown during the investigation meeting. However, after hearing from Mr Caughey, I was not convinced this was a factor influencing his decision nor he conceded, was the first written warning he had earlier issued (despite Alliance’s submission that this was ‘post-facto’ akin to cumulative misconduct justifying the dismissal).

[56] I find the discussion on whether Mr Brown should be dismissed was unusually brief and Ms Wilson says she took no notes of the factors they discussed; claiming she never took notes in such situations. A response that is inconsistent with Alliance’s manager checklist for ER matters that stipulate “take notes of everything – if it’s not written down, it didn’t happen”. Ms Wilson suggested they had very little discretion to exercise as the drug policy was, from her perspective, clear and managers had very limited discretion. She went further to suggest ‘we always terminated after someone fails a second drug test (and is on a final warning)’.

[57] Mr Caughey took no notes of the deliberations on Mr Brown’s fate and recalled being briefed on the scope of the drug policy application. Mr Caughey confirmed he did not access Mr Brown’s personal or medical files and did not take account of his service or past disciplinary record apart from the final warning for failing the first drug test. He recalled not taking the first warning into account as this was a matter involving a group of workers disputing an instruction he had issued. He could not recall discussing the attempt to influence the drug test or it being a concern to him during the test administration. Mr Caughey, although signing the initial suspension letter of 28 January setting out the allegations, says he did not draft it or read it. When asked if he fairly considered Mr Brown’s offer to stop using medicinal cannabis, Mr Caughey first said he did not know how to answer this, first reasoning it may not have been genuine but then when pressed he stated he did not consider it as a mitigating factor he took into account in his decision to dismiss.

[58] I find that except for fulfilling a requirement of identifying their concerns prior to dismissal and hearing from Mr Brown, Alliance rushed the dismissal process and has not satisfied the requirements of fairness and reasonableness as set out in s 103A(3)(a) – (d) of the Act.

The substantive decision

[59] A key issue, as this was a dismissal based on a finding of serious misconduct, is whether after conducting a rudimentary drug test and having a brief investigation/disciplinary meeting with Mr Brown, could Alliance conclude that Mr Brown's actions constituted serious misconduct sufficient to destroy the ongoing relationship of trust and confidence they were entitled to place in him. Was this a fair and reasonable conclusion that Alliance could have reached in all the circumstances.

[60] The first part of this assessment is to determine what can reasonably be categorised as serious misconduct. In *Emmanual v Waikato District Health Board*, the Employment Court in applying leading authorities (references omitted) summed up an approach to determining what may constitute behaviour that deeply impairs or is destructive of confidence or trust as follows.

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

[60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee

knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.⁷

[61] Objectively considered, given Mr Brown disclosed he was taking prescribed medication, and he was not tested for any manifestation of behaviour causing concern, it cannot be said that Mr Brown engaged in an act of serious misconduct. I accept that Mr Brown failing the second drug test breached Alliance's drug and alcohol policy and he had been placed on a final non-contested warning in the same circumstances, but that cannot logically convert, as suggested in submissions, into an automatic finding of serious misconduct warranting summary dismissal without all the contextual factors being considered.

[62] Alliance's submissions suggested:

The deliberate act was not taking the medication per se; it was Mr Brown's decision to take his medication in a manner and at a time that he knew or ought to have known, would result in THC being present in his system above the ASNZ cut off while at work.

[63] I am not convinced Alliance established the above proposition during its investigation or that they put this to Mr Brown as a central concern.

[64] Alliance's submissions also suggested Mr Brown could not seek to use his prescription medication status as an automatic shield to the consequences of a non-negative drug test. I was not convinced Mr Brown was seeking to establish this contention and took his submissions to be that the current drug and alcohol policy did not cater for those on disclosed prescription medication, and he expected a more coherent approach from his employer in a

⁷ *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

practical policy setting. That, I find, was not an unreasonable expectation, given Alliance placed emphasis on their obligation to manage health and safety risks yet allowed significant periods when Mr Brown was not drug tested.

Other factors

[65] Despite finding above it leaves s 103A (4) of the Act for consideration that allows the Authority in considering overall whether the employer acted fair and reasonably to consider any other factors it thinks appropriate. In this regard, it was submitted that Alliance had an obligation to ensure Mr Brown was working in a safe manner given it was accepted he worked with heavy machinery in a safety sensitive area.

[66] While I could find little direct authority from past New Zealand precedents, I was somewhat assisted by an Australian Fair Work Commission decision, *Gauci v DP World Brisbane Pty Ltd*.

[67] In *Gauci* the Commission concluded that the employer drugs and alcohol policy was lawful and reasonable and referred to the conclusion of a full Commission bench decision, *Sharp v BCS Infrastructure Support Pty Ltd* where it was stated:

[f]or that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable.⁸

[68] The Commission heard expert evidence on the question of impairment but found that it was peripheral as the worker was not dismissed for being impaired but was dismissed for breaching the alcohol and drug policy by failing to notify the employer of their prescription and attending work with a proscribed drug in their system. The Commission found that the decision to dismiss was consistent with the policy and not disproportionate in the circumstances.

[69] However, *Gauci* can be distinguished from Mr Brown's situation, where disclosure of the medicinal cannabis was made and known for a lengthy period. My focus is on how Alliance handled the second failed drug test with the knowledge they had and what alternatives were reasonably explored. In this context, I am somewhat assisted by a more recent Australian Fair Work Commission decision, *Mills v Glamorgan Spring Bay Council* that involved prescribed

⁸ *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 at [79].

cannabis use in a safety sensitive contextual setting. The Fair Work Commission concluded Mr Mills had not acted with malevolence in failing to make a prior disclosure of his medicinal cannabis use and the employer had failed to give sufficient time for him to explore other pain treatment options or give sufficient consideration of other available options. The Commission also found the employer had not established Mr Mills was so incapacitated in all the circumstances to fulfil his role and Mr Mills was reinstated.⁹

[70] While the contrasting cases described above, give some weight to the reasonableness of a drug policy governing safety sensitive areas they show more consistent with New Zealand's legislative framework, that a 'zero tolerance' approach has its limitations and a worker's individual circumstances (not just at the time they fail a drug test) need to be fairly assessed consistent with good faith obligations owed. I find these circumstances should prudently include a more careful analysis of an individual's physical health situation and the reasons given for them using medicinal cannabis.

Finding

[71] As well as determining the process adopted did not satisfy fairness requirements including rushing the decision to dismiss and discounting objectively reasonable alternatives, I find carefully weighing all contextual factors, including how Alliance handled matters after the initial disclosure of medicinal cannabis, that Alliance has not objectively established that Mr Brown's overall conduct met the threshold of serious misconduct. The evidence disclosed Alliance did not turn their mind to this basic threshold question.

[72] I find in all the circumstances, Mr Brown was unjustifiably dismissed as Alliance acting as a fair and reasonable employer, could not have concluded he engaged in acts of serious misconduct.

Should Mr Brown be reinstated?

[73] Mr Brown first identified his claim for reinstatement in his interim application to the Authority of 20 March 2026. I understand that the position Mr Brown formerly occupied remains unfilled.

⁹ *Mills v Glamorgan Spring Bay Council* [2025] FWC 116.

[74] The reinstatement claim is made pursuant to s 123(1)(a) of the Act. Section 125 of the Act details reinstatement is the primary remedy and subs (2) indicates.

If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[75] The Employment Court in *Christiesson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as:

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.¹⁰

[76] The onus of proving that it is not reasonable and practicable to reinstate rests with the employer.¹¹

[77] Alliance suggested generally that they could not safely reintegrate Mr Brown into a safety-sensitive role while the risk that give rise to his dismissal remains unresolved. This assertion was based on a suggestion from his prescription records that Mr Brown had not established he had ceased taking medicinal cannabis or changing his dosage regime sufficient to allow him to pass a drug test or that he had previously well managed the timing between taking medication and commencing work. Alliance also cited the difficulty, contrary to Mr Brown's assertion, of monitoring functional impairment and there being no available and scientifically validated testing. Alliance also pointed to the evidence of Dr Adam who had given the opinion that it was a "huge undertaking to let someone taking THC undertake safety sensitive work". Alliance suggested Mr Brown would have to undergo daily drug testing to manage his health and safety risk, and this would be impractical.

¹⁰ *Christiesson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [39].

¹¹ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

Subsequently discovered misconduct

[78] In addition, Alliance raised an issue of an incident that occurred eight days prior to Mr Brown's dismissal that they say amounted to potentially serious misconduct. While describing it in submissions under a heading "Subsequently discovered misconduct" and suggesting that reinstatement should be declined if a person returns to an immediately precarious position, the evidence did not show why Alliance failed to progress the matter either prior to dismissal or as part of the disciplinary proceedings.

[79] The incident on 22 January 2026 involved a confrontation Mr Brown is said to have had with a co-worker in the smoko room that, according to video footage (without sound), shows Mr Brown pulling a chair from underneath a worker and the worker falling to the ground. While no formal complaint was made by the co-worker, he did sustain a minor injury that required physiotherapy and an ACC claim (Alliance handling such as an accredited employer). Mr Glover's evidence is he became aware of the incident from Ms Kelly who shared a report of the injury with him. Mr Glover says he viewed the video footage and interviewed the co-worker involved who would not identify Mr Brown as the person pulling the chair away. None of this was documented. Mr Glover says he then advised Ms Wilson and Mr Caughey but could not recall when this occurred (again no documentation provided). Ms Wilson was not clear on the timing of when she became aware of the 'chair incident' first claiming she had not viewed the video until after Mr Brown's dismissal and then suggested she was not aware of the incident prior to Mr Brown's final disciplinary meeting. Mr Glover did not approach Mr Brown to seek his explanation of the incident.

[80] Mr Caughey was unsure in his recall of when the incident came to his attention and when he viewed the video. However, in both his affidavit opposing interim reinstatement and written statement provided for the substantive investigation meeting, Mr Brown says Alliance was "in the process of commencing an investigation at the time Mr Brown was suspended, therefore this investigation was put on hold".

[81] I reasonably conclude it is more likely than not, given the time span between the chair incident and the dismissal and the evidence given, that Alliance chose to concentrate on the failed drug test, that they concluded they had insufficient evidence of the chair incident to put this to Mr Brown as a concern. I find no issue of subsequently discovered misconduct arises.

[82] Alliance submitted that should I reinstate Mr Brown, the Authority should make an order permitting Alliance to carry out a disciplinary investigation of the chair incident with “the ability to impose a disciplinary outcome up to and including summary dismissal if the allegations are substantiated”. I decline to make this order as I consider it inappropriate in the circumstances given it would licence an investigation of a matter that was not dealt with or put to Mr Brown at the time.

Mr Brown’s submission seeking reinstatement

[83] Counsel for Mr Brown concentrated on no evidence being led to show he could not be reintegrated back to work given his skill range and abilities. They contested a suggestion that Mr Brown could not work constructively alongside Mr Caughey. Generally, the point was made that, where the employer could not legitimately as I have found here, claim trust and confidence had been destroyed then the employer had no practical or reasonable ground in this context to oppose reinstatement.

[84] In addressing Alliance’s concerns about managing health and safety risks should Mr Brown be reinstated his counsel’s submission noted he was willing to undertake a medical assessment of his fitness to return to work.

[85] Mr Brown was also portrayed as being fully committed to his work that he had undertaken all his working life and that he was suitably proud of his contribution to the organisation and had long standing and trusted relationships with co-workers. Mr Brown noted that during the disciplinary meeting after communicating his dismissal, Mr Caughey invited him to re-apply to be re-employed next season.

Finding

[86] I conclude there are no evident insurmountable practical difficulties in reinstating Mr Brown.

[87] I order immediate reinstatement of Mr Brown to the payroll and that he be the subject of a medical assessment by a suitably qualified occupational health specialist that is to focus upon Mr Brown’s pain management regime, how he can practically assuage Alliance’s concerns about his safe functionality and what supportive measures Alliance can put in place to reintegrate Mr Brown into the workplace in the position he formerly occupied with no loss of seniority.

[88] I make the following finding on other remedies sought.

Lost earnings

[89] Mr Brown seeks lost wages for the period from his last working day at Alliance being 30 January 2026 until the date of the Authority investigation meeting of 29 June 2026 pursuant to s 123(1)(b) of the Act. While Mr Brown sought reinstatement, he also detailed his inability to find alternative paid employment in an area at his age with few opportunities to utilise his skill base and the obvious difficulty of seeking an employer willing to put aside the circumstances of his dismissal at Alliance where he had worked for 38 years. Mr Brown says he got by on voluntary work and supplemented his lack of income by hunting for food.

Finding

[90] Given the finding above that Mr Brown was unjustifiably and summarily dismissed and is to be reinstated, I find the claim for reimbursement of lost wages sought for the above period, is reasonable in the circumstance and is granted.

Compensation for hurt and humiliation

[91] Mr Brown gave compelling evidence on the ongoing impact on him of how he was summarily dismissed and the dislocation and isolation this cause in his life and ongoing mental well-being. While Mr Brown sought no medical intervention to assist him, his evidence of getting support from family and friends and his own efforts to cope did not displace my conclusion that he was the subject of a period of anxiety, depression at his prospects and, despair and unusual lack of motivation.

[92] Mr Brown spoke of his unusually strong and significantly lengthy connection to his workplace, providing him with a sense of purpose, that was now absent and his incomprehension at the way his dismissal occurred. While I was satisfied that Alliance management treated Mr Brown with dignity during the disciplinary meeting, his dismissal was nevertheless unnecessarily abrupt and his exclusion from the workplace immediate. I conclude this caused Mr Brown to suffer humiliation and a loss of dignity in all the prevailing circumstances.

Finding

[93] Considering the evidence proffered and the overall circumstances, I find that Mr Brown's evidence warrants reasonably significant compensation. I fix that at \$25,000 under s 123(1)(c)(i) of the Act.

Contribution

[94] Section 124 of the Act states that I must assess the extent to what, if any of Mr Brown's actions contributed to the situation that gave rise to the personal grievances and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation* and assessed the unusual factual circumstances of Mr Brown's employment relationship problem.¹²

[95] In the unusual circumstances where, despite Mr Brown failing a second drug test, I have found no serious misconduct was established and conceptually conclude it would be difficult to categorise Mr Brown's use of a prescription medication for a legitimate purpose as being a contribution to his personal grievance arising. I was also not attracted in evidence, to the submission that Mr Brown had been inappropriately administering his medication or that he had any history of reckless disregard for others safety at work.

[96] In all the unusual circumstances I do not reduce any of Mr Brown's awards for contribution.

Orders

[97] Alliance Group Limited unjustifiably dismissed Paul Brenden Brown and must provide the following remedies:

- (i) Alliance Group Limited is to permanently reinstate Mr Brown to the position and seniority he formerly occupied pursuant to s 123(1)(a) of the Employment Relations Act 2000 and the relevant collective agreement.
- (ii) To effect this reinstatement order, Mr Brown is to be placed back on the payroll from 23 August 2026 and provided with a wage reflecting what he would currently earn had he not been dismissed. Mr Brown

¹² *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

is then to be the subject of a specialist occupational health assessment focussing solely upon the grounds described above in this determination finding at para [91], to be completed before Mr Brown returns to work on active duties in the role and seniority he formerly occupied. Mr Brown is to co-operate fully in the timing and operation of the health assessment that must be completed as soon as practicable.

- (iii) Should the occupational health practitioner's assessment not be completed by 2 October 2026 and Mr Brown is not put back to work by this date, then leave is granted for the parties to return to the Authority to seek resolution of any outstanding matters.
- (iv) \$25,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 for the unjustified action; and
- (v) the sum of lost wages pursuant to s 123(1)(b) Employment Relations Act for the period between 30 January 2026 and 29 July 2026 in an amount to be based on an average of the preceding 12 months total earnings prior to the dismissal occurring.

Costs

[98] Costs are reserved.

[99] The parties are encouraged to resolve any issue of costs between themselves.

[100] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Paul Brenden Brown may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Alliance Group Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[101] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

David G Beck
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1