IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2025] NZEmpC 207
EMPC 428/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	MARITIME UNION OF NEW ZEALAND Defendant

Hearing:	26 May 2025 (Heard at Christchurch)
Appearances:	A Shaw and S R Smith, counsel for plaintiff S Mitchell KC, counsel for defendant
Judgment:	15 September 2025

JUDGMENT OF JUDGE K G SMITH

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[1] In July 2024, Lyttelton Port Company Ltd (LPC) introduced a health monitoring policy and procedure intended to apply to all new and existing employees who work in safety-sensitive jobs at the port.

[2] A dispute arose between the company and the Maritime Union of New Zealand (MUNZ) over whether the union's members who are employed by the company can be compelled to submit to the policy.

[3] MUNZ sought a finding from the Employment Relations Authority that:[1]

[1] *Maritime Union of New Zealand v Lyttelton Port Company Ltd* [2024] NZERA 573 at [7].

(a) LPC's ability to undertake health monitoring for its members was determined by the relevant collective agreement and not the company's policy; and

(b) any direction by LPC to its members to undertake health monitoring under the policy was not lawful or reasonable.

[4] LPC also sought findings from the Authority that:[2]

(a) it had the ability to undertake health monitoring pursuant to its policy; and

(b) any direction for MUNZ members to undertake health monitoring under the policy was lawful and reasonable.

[5] The Authority summarised the competing positions adopted by the union and company as being encapsulated in the employment relationship problem: is the health monitoring policy and procedure lawful in respect of MUNZ members?[3]

[6] The Authority determined that the policy was inconsistent with the collective agreement. That conclusion meant allowing LPC to implement it would be to permit a variation to the existing terms and conditions of employment for the union's members that could only be achieved by agreement.[4]

[7] Having reached those conclusions the Authority investigated whether, nevertheless, the policy could be imposed on the union's members. It did so by considering whether the Health and Safety at Work Act 2015 (HSWA), and recommendations by the Transport Accident Investigation Commission (TAIC) following a tragedy at the port in 2022, provided a basis to impose the policy without agreement. It was satisfied that LPC's statutory duties were not akin to situations such as those that arose during the COVID-19 pandemic where mandatory vaccination was required for certain workplaces. Having completed this evaluation the Authority

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2 At [8].
3 At [9].
4 At [57].

commented that LPC is in a difficult position and that if it wanted to implement its policy that could only be achieved through agreement with the union.[5]

The challenge

[8] LPC challenged the determination. It elected to do so in a limited way by pleading that material errors of law were made by the Authority.[6] It sought to establish the determination was materially in error by concluding that the policy was not lawful in respect of MUNZ members and was inconsistent with the collective agreement.

[9] LPC supported its pleading with six further grounds. They can be summarised as claims that the Authority fell into error by:

(a) making a finding that the policy applied to all employees when it applies to new employees and those who work in safety-sensitive roles;

(b) the way it applied the principles of contractual interpretation to the collective agreement;

(c) finding that cl 10.1 of the collective agreement did not permit LPC, following consultation, to unilaterally implement new policies and procedures for health and safety;

(d) failing to properly consider the impact of the HSWA, the TAIC report, and an occupational physiotherapist's report obtained by LPC on health and safety duties;

(e) failing to consider LPC's obligations and the right to introduce mandatory health monitoring following consultation; and

(f) failing to consider whether LPC's actions amounted to a lawful and reasonable instruction.

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5 At [62]-[63].
6 Employment Relations Act 2000, s 179(5).

[10] MUNZ responded to the challenge by supporting the Authority's conclusions. It maintained that there is no basis on which LPC could introduce the policy unless that outcome is achieved through bargaining.

Why the policy was introduced

[11] At the outset it is important to record that LPC and MUNZ agree that safety is important in this industry. The union does not oppose measures to improve safety for its members, or object to voluntary participation by them in the health monitoring measures covered by the policy.

[12] There was no material disagreement about why the policy was created. LPC's only witness was Ms Baird, its Head of People and Industrial Relations, who described the company's workforce and why it developed the policy.

[13] The company has three primary workplaces – the Port of Lyttelton, CityDepot and the Midland Port. Its total workforce is 634 permanent employees and 25 casual employees. Of the total of 659 employees, 242 are members of MUNZ.

[14] Ms Baird explained that LPC has 474 employees in positions considered to be safety sensitive. Those employees not in safety-sensitive areas generally work in an office. Over the last 10 years the average age of LPC's employees working in safety-sensitive positions has been around 50 and they are mostly males.

[15] LPC identified 40 safety-sensitive jobs its employees perform, with varying degrees of physical demands and risks. One example illustrates the nature of this assessment. The company identified a physically demanding job, operating power tools weighing greater than 10 kilograms, placing a heavy load on the employee and requiring grip strength and lifting.

[16] Health and safety was brought sharply into focus in the port following a fatality on 25 April 2022. One of LPC's stevedores, who was a MUNZ member, was discovered deceased on the deck of a ship underneath coal being loaded on to the vessel. LPC was charged with an offence under ss 36(1), 38(1) and 48 of the HSWA. It pleaded guilty and was fined $480,000 with costs of $35,000.

[17] Subsequently, TAIC conducted an inquiry into the fatality along with another fatality at the port of Auckland. Ms Baird referred to TAIC's recommendations arising from the Lyttelton death, identifying that the deceased stevedore had a pre-existing health condition. The nature of the condition is unknown because it was not disclosed in TAIC's report or to LPC.

[18] TAIC found that a more comprehensive medical fitness assessment was likely to have discovered the stevedore's pre-existing health condition, enabling and informing an assessment of his suitability for the task being performed at the time of his death. The TAIC report, and LPC's heightened awareness of its health and safety duties, are strong motivations for the company's push to implement the policy.

[19] In October 2023, LPC advised its employees that it would implement TAIC's recommendations. By 20 June 2024, it was in a position to confirm the decision to introduce the policy with effect from 1 July 2024.

The policy

[20] The policy is comprehensive. Its purpose is stated to be to ensure employees are healthy and fit for work, particularly those undertaking tasks where the risks are high, or where they are exposed to an adverse effect on their health.

[21] The policy provides that, from 1 July 2024, LPC will introduce:

(a) annual health monitoring assessments;

(b) health monitoring assessments after a health or injury event (as required); and

(c) final employment health monitoring assessments (prior to leaving).

[22] The policy stated that assessments would be undertaken based on the tasks the employee does in each role. The lists of roles and tasks are provided in the policy and LPC reserved the right to change them.

[23] The policy has five objectives which, in summary, are to:

(a) benchmark the levels of health issues, injury and disease within the workplace to understand and manage any associated risks;

(b) provide a risk-based assessment of tasks across all roles as a benchmark for the physical demands on employees to perform the tasks safely;

(c) monitor employee's health to mitigate harm from the work and that employees have a base level of health and fitness to enable them to safely work;

(d) provide health management plans for employees for health and injury issues; and

(e) continue to provide pathways to support employees to "exit their roles where they are unable to sustain the tasks of the role safely and suitable alternatives have been explored".

[24] The risk-based assessment referred to above in [23](b) is contained in the policy. All employees who undertake heath monitoring will be informed of the outcome which determines the employee's work status as:

A. Medically fit to carry out the required tasks for the role

B. Medically fit to carry out the required tasks for the role, with conditions

C. Temporarily medically unfit to carry out the required tasks for the role

D. Permanently medically unfit to carry out the required tasks for the role

[25] The policy contains a section called "Treatment Provider/Specialist Assessments". This section refers to some employees experiencing health issues possibly requiring advice from a treatment provider, or a specialist medical assessment. The assessments are to guide "risk management" described in the following list of factors:

- Functional capacity of the employee.
- What tasks and working conditions the employee can safely sustain.
- How the person is supported to safely sustain the tasks in their role.
- Is there further support, treatment, or reasonable modifications LPC can make to support the employee to safely sustain the tasks in their role.
- Timeframes for recovery.

[26] An appendix to the policy describes the assessments for each role falling into categories A, B or C. The sort of tasks in category A include cargo handling, boilermakers, electricians, fitters and mechanics, along with others. The tasks in category B include security shift supervisors, lines supervisors and coal yard forepersons. Category C is listed as office workers.

[27] For each category the appendix lists what is to be assessed. For example, category A lists the required assessments as:

- Audiometry
- Spirometry (except*)[7]
- Visual acuity
- CVD- cardiovascular disease (Instant Chol, bp and BSL)[8]
- Diabetes- blood glucose
- Cardio, strength, balance and mobility
- Range of Movement – includes flexion, abduction [and] extension, grip strength, empty can, and scratch test.
- Function: squat, sit and reach, lunge, reach
- Balance: static and star excursion
- Lifting and Chester Step Test
- Health Questionnaires – Biometrics, Alcohol, Sleep (Obstructive Sleep Disorder), Physical Activity Readiness

[28] The list of assessments for category B is shorter and C is shorter again.

[29] The policy recognises that an occupational physician or specialist may be required to provide expert assessment about an employee's ability to undertake tasks safely and how that needs to be managed. It requires all health records about

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7 Exceptions were for cargo handlers, foreperson stevedores, pilots, launch deckhands and wash operators; (footnote added).

8 These tests are understood to be for cholesterol, blood pressure and blood sugars; (footnote added).

individuals to be kept securely to comply with the Privacy Act 2020 and the Health Information and Privacy Code 2020.

[30] LPC has required 111 mandatory health monitoring assessments over a six-month period, from 24 September 2024 until the end of March 2025. Over 40 per cent of those assessments indicated potential pre-existing health risks requiring further assessment. LPC's occupational health nurse has referred employees to audiologists, general practitioners, opticians and physiotherapists for assessment. Ms Baird said none of those employees lost their jobs.

[31] Mr Loader is the National Vice President of MUNZ and is employed by LPC as a foreman stevedore. He explained MUNZ's concern about this policy is that it was unilaterally developed and is intended to be compulsory. The union considers the company is attempting to use the policy to monitor employees beyond what is already provided for in the collective agreement.

[32] The union also sees LPC's policy as overly intrusive and not necessarily having any bearing on an employee's ability to work. Mr Loader accepted the collective agreement provides for some health monitoring. He said the union is not, therefore, opposed to all health monitoring but it wants an opportunity to have a say on the scope and extent of what is monitored. The union considers such an outcome can only be achieved through bargaining. He mentioned that, at one point, the union attempted to bargain for what he described as medical redundancy, recognising an employee may face dismissal if he/she is unable to work for medical reasons. The proposal was rejected by LPC.

[33] The parties agreed on a chronology of events which showed extensive steps by LPC in advising MUNZ and the Rail and Maritime Transport Union about its intention to introduce the policy. The company considered that this communication was consultation, but Mr Loader disagreed.

[34] Finally in this overview, the policy provides that failure to comply with testing may be treated as a disciplinary matter and LPC has not resiled from the ability to dismiss any employee for medical incapacity.

The Authority's determination

[35] To provide context to LPC's challenge it is necessary to say a little more about the Authority's determination. As already mentioned, the Authority considered that the employment relationship problem was whether the policy was lawful as the company sought to apply it to employees who are members of MUNZ. To answer that question it identified four issues:[9]

(a) Is the health monitoring policy consistent with the collective agreement or is it a variation of the terms of employment set out in the agreement?

(b) If the policy is inconsistent with the collective agreement, can it nonetheless be imposed on MUNZ members?

(c) If the policy can be implemented, was the process for doing so compliant with LPC's obligations of good faith?

(d) If the policy was correctly implemented, are the resulting obligations imposed on MUNZ members lawful and reasonable in all the circumstances?

[36] Before dealing with those issues the Authority noted two points for clarity. The first point was that alcohol and drug testing had in some situations been referred to as a form of health monitoring, while recording that the policy did not involve that testing. The second point was that the determination had no bearing on LPC's other employees.[10]

[37] The Authority's investigation turned almost entirely on interpreting the collective agreement and, in particular, cl 10. It is appropriate at this stage to set out the clause:

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9 *Maritime Union of New Zealand*, above n 1, at [10].
10 Meaning those who are not MUNZ members, at [11].

10.0 HEALTH AND SAFETY

General Provisions

10.1 The parties recognise that the Health and Safety at Work Act 2015 and any subsequent amendments imposes significant obligations on the parties. Procedures have been implemented to reflect these obligations and to deal with the risks at the Port.

10.2 Committees shall continue to develop and implement a programme to ensure a safe and healthy work environment using the Ministry of Business Innovation and Employment Code of Practice for Health and Safety Representatives and Committees as a guide.

10.3 The parties to this Agreement support regular testing and monitoring of hearing, sight and respiratory conditions. The employer may in specific areas of employment require testing and where this occurs the employer shall pay for the same.

10.4 All employees are to be trained in basic health and safety and complete the NZQA module unit 497.

Eyesight and Vision Protection

10.5 The LPC Eyesight and Vision Protection Policy shall apply to employees covered by this collective agreement. The company will partially subsidise the cost of the prescription eyewear lenses or contact lenses up to $220 every two years.

Intoxicating Liquor and Drugs

10.6 Employees shall not, unless otherwise approved by the employer, consume intoxicating liquor or drugs on board any ship or on any wharf or any sheds or other premises which for the time being are under the control of the employer.

Smoking

10.8 Employees shall not smoke in the holds of vessels or in the vicinity of open hatchways or on the wharf in the vicinity of any cargo or any part of a ship under repair or overhaul or any other place where so directed by the employer and in accordance with the Smoke Free Environments Act 1990 and any subsequent amendments.

Protective and Safety Clothing

10.8 Where protective and safety clothing or footwear or helmets are supplied by the employer these must be worn as per the safety requirements of the employer.

[38] The Authority introduced its analysis of the collective agreement by stating the general principles to apply to contractual interpretation and as applied to collective

agreements, discussed in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* and *New Zealand Air Line Pilots' Assn Inc v Air New Zealand Ltd*.[11]

[39] Four considerations were identified:[12]

(a) the ordinary and natural meaning of the text to be interpreted;

(b) the collective agreement "in its entirety";

(c) any relevant background information, particularly the safety-sensitive nature of the workplace; and

(d) the broader context, meaning HSWA, the objects of the Act and good faith.

[40] A separate textual analysis of cl 10.3 was not undertaken before the Authority looked at the collective agreement as a whole. In that review it identified the absence of general provisions in the agreement relating to LPC's policies and procedures informing the company's ability to implement and/or vary them. The absence of any provisions dealing with the status of any LPC policies and procedures, other than cl 10.1, was noted.[13]

[41] The Authority determined that the collective agreement only provided for specified health monitoring in cl 10.3 and in two other specific instances, in the marine services schedule and the maintenance services schedule.[14] Both schedules provide for medical checks and inoculations where they are required because of the specific nature of the work.

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11 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432; and *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948.

12 *Maritime Union of New Zealand*, above n 1, at [49].

13 At [50].

14 At [53].

[42] The Authority concluded that cl 10.1 did not permit LPC to unilaterally implement new procedures for health and safety, but worked to acknowledge and bind the parties to existing practices.[15]

[43] The Authority accepted that the HSWA informed an "expansive approach" to interpreting health monitoring provisions in the collective agreement, as did the safety-sensitive nature of the work. However, it was not prepared to conclude that the agreement could be read in the "permissive language" argued for by LPC where further health and safety measures were concerned.[16]

[44] The objects of the Act and good faith obligations informed the Authority's view that it should not "readily apply the terms and conditions in the Collective Agreement in an expansive way", which could add to any imbalance of power and "negate the principles of collective bargaining". The Authority determined that the collective agreement did not permit the introduction of wider ranging and ongoing testing and monitoring of employee health.[17]

[45] Having reached that conclusion, the investigation considered whether the policy could still be imposed. That assessment was in response to submissions that LPC must comply with the HSWA, meet the TAIC's recommendations and a report it had received from an occupational therapist. The Authority did not accept that those obligations provided a basis to impose the policy regardless of the collective agreement.[18]

Preliminary observation

[46] LPC pleaded that the Authority made material errors of law but introduced its challenge by referring to where the determination mentioned the policy applying to all employees as being a mistake of fact. The point is technically correct because the policy is intended to apply to new employees and those in safety-sensitive roles. However, the subject did not feature in the substantive part of the Authority's determination and was not debated by MUNZ. In any event, implemented over time

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15 At [52].
16 At [54].
17 At [55]–[56].
18 At [62].

the policy will apply to all employees. Apart from recording the submission, the error was not relied on and nothing further needs to be said about it.

The issues

[47] The issues are as follows:

(a) What does the collective agreement provide for when properly construed?

(b) Does the collective agreement prevent LPC from implementing the policy for its employees who are MUNZ members?

(c) Is LPC's duty to comply with HSWA, or the TIAC recommendations, sufficient to allow the policy to be implemented regardless of the collective agreement?

The collective agreement construed

[48] Mr Shaw introduced LPC's interpretation of the collective agreement by stating that the company's position is that, by using a permissive reading of cl 10.3 and a contextual reading of the whole agreement, there is no inconsistency. Further, there was no express restriction on LPC's ability to introduce the policy, a position which was "substantially enhanced" by its duties under HSWA and an obligation to be a good employer.

[49] With that introduction, Mr Shaw first looked at cl 5.5 under the heading "WORK PERFORMANCE":

> Work shall at all times be carried out as required by the employer in a responsible, safe and efficient manner in accordance with any statutory, regulatory or other recognised requirements that have application to the waterfront industry.

[50] Mr Shaw placed reliance on the broad language of cl 5.5 as supporting a similarly broad reading of cl 10.3.

[51] Reliance was placed on cl 10.1 reinforcing obligations under HSWA, reflecting LPC's obligations as a person in control of a business or undertaking, to address safety risks to employees.[19]

[52] Returning to the underlying theme of a permissive approach, those submissions were rounded out by emphasising that cl 5.5 recognises the shared emphasis on safety and the requirements of HSWA in the waterfront industry, while cl 10.1 confirmed the significant health and safety obligations placed on both parties to the agreement.

[53] In this analysis, Mr Shaw next turned to *Vector Gas Ltd v Bay of Plenty Energy Ltd* which he submitted required an objective approach to contractual interpretation, which does not limit the background material available to interpreting the contract.[20] He said that *Vector Gas Ltd* established that there was no need for any ambiguity in the meaning of a contract to exist before intrinsic evidence to assist in determining its meaning might be used.[21]

[54] After referring to *Vector Gas Ltd*, Mr Shaw amplified the submission by relying on *Firm PI 1 Ltd* and the subsequent Supreme Court decision in *New Zealand Air Line Pilots' Assoc Inc* applying the same approach to interpreting collective agreements.[22]

[55] Mr Shaw then concentrated on what LPC considers to be the ordinary and natural meaning of cl 10.3. To do that, he returned to the analysis of cls 5.5 and 10.1, describing the language used in them as "permissive", which was contrasted with a clause written in exclusive or narrow terms.[23] The submission was that the language does not restrict health assessments to those areas specified in cl 10.3. LPC's case was that interpreting the collective agreement should be undertaken by using a "broad and liberal construction of the relevant provisions, allowing for a wider range of actions or situations to be covered under the scope of cls 5.5 and 10".

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19 Health and Safety at Work Act 2015, s 17.
20 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
21 At [5]–[6] per Blanchard J, [22] per Tipping J and [56]–[57] per McGrath J.
22 *Firm PI 1 Ltd*, above n 11; *New Zealand Air Line Pilots' Assoc Inc*, above n 11.
23 Relying on *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2023] NZHC 466.

[56] To establish that the clauses should be interpreted permissively, Mr Shaw referred to *New Zealand Carbon Farming Ltd v Mighty River Power Ltd*.[24] In that case, an agreement containing examples, when read in context, did not confine the Court to only those examples to the exclusion of others.

[57] All of that argument was wrapped up in a comment that cl 10.3 is silent about health assessments beyond hearing, eyesight and respiratory conditions and in particular:

(a) there are no further restrictions in the collective agreement, such as for example the "employees' right to refuse consent, or limitations on the types of health assessment";[25]

(b) cl 10.3 provides that both parties support regular health assessment and monitoring of the specific conditions;

(c) the plain words of the clause suggest a shared emphasis on health and safety rather than a limitation on the ability to monitor health; and

(d) including the sentence "the employer may in specific areas require testing" demonstrated that the parties accepted mandatory health monitoring.

[58] Turning attention to what was meant by inconsistency in the Authority's determination, Mr Shaw referred to *Maritime Union of New Zealand Inc v TLNZ Ltd*.[26] In that case, the Court said that if an employer reserved the right to make rules beyond the terms of a collective agreement, they must be reasonable and not inconsistent with it.

[59] While accepting that there are obvious difficulties if there are inconsistencies between a policy, or intended policy, and a collective agreement, Mr Shaw referred to a dictionary definition of inconsistency as: not agreeing in substance, spirit or form,

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24 *New Zealand Carbon Farming Ltd v Mighty River Power Ltd* [2015] NZHC 1274.
25 LPC did not further develop the submission about an employee's right to refuse consent.
26 *Maritime Union of New Zealand Inc v TLNZ Ltd* (2007) 5 NZELR 87 (EmpC) at [118].

not in keeping, not constant or in accordance with or at variance, discordant, incompatible or incongruous.[27] On this definition, he submitted, the policy was not inconsistent with the collective agreement and is capable of co-existing with it.

[60] A subsidiary submission was that, if there is any potential inconsistency, then the context supports an interpretation that reads down cl 10.3 in favour of the more general provisions in cls 5.5 and 10.1. That conclusion was invited because, it was said, there is a contractual purpose evident in the collective agreement about mutual obligations to provide for health and safety.

[61] The last point to support these propositions was the existence of the maintenance services and marine services schedules. It was said that they recognised LPC may require employees to undergo medical testing and were outside the scope of cl 10.3, showing that the clause was not exhaustive.

[62] LPC's point was that the extensive health monitoring in the policy did not amount to an inconsistency with the collective agreement and, therefore, did not infringe the approach in the *Maritime Union of New Zealand Inc v TLNZ Ltd* case. Further, the policy was described as reasonable. The work to which it relates is safety sensitive, LPC has obligations under HSWA, and it already operates outside of cl 10.3 with an alcohol and drug testing policy as well as a long-term illness and injury assessment standard.[28]

[63] Mr Mitchell KC's response was that there is no material error in the Authority's determination, the pleadings did not mention a permissive reading of cl 10 and what LPC wanted to achieve goes further than a proper interpretation allows. His starting point was that the parties agreed on some health monitoring, but that did not provide a licence for LPC to go further and to impose other testing beyond the scope of what was agreed.

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27 Oxford University Press "Inconsistency" (September 2024) Oxford English Dictionary <www.oed.com>.

28 Relying on *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, [2013] ERNZ 531 at [24].

[64] MUNZ's interpretation of cl 10.3 is that it lists what may be tested and cannot be read as anything other than exhaustive. On this approach, if the clause was intended to provide unconstrained authority for LPC to introduce any health-related monitoring at all, different drafting would have been used. Mr Mitchell's point was that the only proper way to read cl 10.3 was that it conveyed consent to test employees in discrete health areas and could not reasonably be read as going any further.

[65] The union explained the second sentence of cl 10.3 as doing no more than cross-referencing to the agreed testing for the subjects in the first sentence of the clause and the two could not be read in isolation as if they did different things. Mr Mitchell submitted that was obvious and could be readily understood from a drafting perspective; it was unnecessary and cumbersome to repeat the phrase "hearing, sight and respiratory conditions" in the second sentence.

[66] Supplementing that submission, Mr Mitchell said that cl 10.1 is descriptive of duties under HSWA but goes no further than a statement that the parties must adhere to the law. Similarly, cl 5.5 was said to add nothing material to understanding cl 10.3.

[67] MUNZ's case is that if its interpretation of cl 10 is accepted, it follows that LPC does not enjoy any other legal right to impose the policy on its employees who are members of the union.

Analysis

[68] The principles for interpreting contracts, including the extent to which pre-contractual negotiations and evidence of post-contractual conduct can be admitted, was restated by the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[29] In *Bathurst*, the Court reaffirmed the general approach to contractual interpretation in *Firm PI 1 Ltd*:[30]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties

[29] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
[30] At [43], citing *Firm PI 1 Ltd*, above n 11, (footnotes omitted).

> intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependant on there being an ambiguity in the contractual language.
> …
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[69] The health and safety provisions of the collective agreement are grouped in cl 10, except for two specific areas that are fleetingly dealt with in two schedules. In a one-sentence clause, the marine services schedule provides for:

> **3.0 MEDICAL CHECKS AND INOCULATIONS**
>
> Where any of the above are required as a result of the specific nature of the work to be undertaken the costs of such will be met by the employer.

[70] In the maintenance services schedule the same statement is made with one minor addition. After mentioning the specific nature of the work to be undertaken the clause adds "(e.g. Diving)" before concluding that the costs are to be met by the employer. These schedules contain no other references to the medical checks or inoculations required or anticipated and say nothing about who may initiate them.

[71] The plain language of clause 10.3 contemplates two things. The first sentence is an agreement for testing in three discrete subjects: hearing, sight and respiratory conditions. The language is unequivocal. As Mr Mitchell submitted, there are no words in the first sentence that either directly or indirectly authorise anything more than the listed testing.

[72] The second sentence in cl 10.3 is clearly subordinate to the first one and cannot be read in isolation from it. This sentence is designed to authorise testing for the subjects listed in the first sentence, which is apparent from using "may" and "require". That language indicates LPC has a discretion about whether or not to test for hearing, sight and respiratory conditions. Once it exercises that discretion the employee must comply; he or she is required to participate. The work areas or tasks that could attract compulsory testing are not defined, but that does not alter the fact that consent is provided to test three discrete subjects. Implicit in that language is that the parties accept that consent is required to test employees and the consent provided is limited.

[73] No other part of cl 10 suggests a different interpretation of cl 10.3 should apply. Clause 10.1 is a statement by the parties that they are bound by HSWA, and goes no further. Clause 10.2 provides for certain committees to continue and has no bearing on the other health and safety-related clauses. Clause 10.4 is confined to training and has no wider connotations.

[74] That leaves cls 10.5 to 10.8 inclusive. Clause 10.5 is an agreement that the LPC Eyesight and Vision Protection Policy applies. That is consistent with cl 10.3 and, if anything, supports the union's interpretation.

[75] Clause 10.6 prohibits an employee from consuming alcohol or drugs on board a ship, on any wharf or any shed or other premises controlled by LPC unless prior approval is obtained. The drafting may be a little unfortunate, but the intention is clear. Consumption is prohibited unless expressly allowed by LPC. The clause offers no assistance in interpreting cl 10.3 or suggesting that the health-related testing consented to is a broader class or group that is stated in that clause.

[76] Clause 10.7 prohibits smoking and requires compliance with the SmokeFree Environments Act 1990 so it does not advance the discussion any further.

[77] Finally, cl 10.8 requires protective clothing and equipment to be used. It is consistent with the general provisions in cl 10.1 but offers no help in interpreting cl 10.3.

[78] The two schedules mentioned earlier say nothing about who may seek or impose the medical checks or what they might be for, but they do require LPC to pay for them and any inoculations. While Mr Shaw tended to see those schedules as supporting LPC's position, they are more consistent with the restrictive approach contemplated by cl 10.3. That is, rather than provide approval for LPC to select what other types of tests it might seek to administer to its employees, the schedules require that, because of the specific nature of the work in the marine and maintenance services areas, medical checks and inoculations may be required. The drafting does not say what those checks might be or anything about the inoculations. The nearest they come to doing so is in the maintenance schedule which gives diving work as an example. That language suggests the type of testing referred to is that which arises specifically because of issues associated with either the marine or maintenance work. In other words, these are specific areas of approval and nothing more.

[79] I do not accept Mr Shaw's submission that cl 5.5 opens the door to the permissive interpretation favoured by LPC. The task is to objectively assess the meaning which the document would convey to a reasonable person having all of the background knowledge. Mr Shaw's submission went very close to inviting something other than such an assessment, one which was designed to ensure that LPC's preferred outcome is achieved.

[80] Clause 5.5 is a statement of contractual intention, but it does not go so far as LPC considered the language took it. The plain language of the clause contemplates two things. First, that the work will be carried out as required by the company and, second, that when the work is carried out it will be done responsibly, safely and efficiently, in accordance with any statutory, regulatory or otherwise recognised requirements in the waterfront industry. The clause is capable of being read as both parties accepting they must act safely. That is, however, a long way short of creating contractual authority for compulsory testing of the type contemplated by the policy or, alternatively, directing some wider reading of the specific language in cl 10.3. The converse is far more likely, that cl 10.3 takes priority over the very general language in cl 5.5.

[81] That leaves whether there might be something in the background circumstances that should lead to a different conclusion about the collective agreement. The parties did not refer to bargaining materials exchanged during negotiations, although Mr Loader mentioned the union unsuccessfully attempting to include medical redundancy.

[82] LPC pointed to the alcohol and drug policy, and to the illness and injury management standard, both of which either pre-dated or co-exist with the collective agreement. That material was said to show that the parties understood the collective agreement was not exclusive or exhaustive.

[83] MUNZ accepted that the alcohol and drug policy applies to its members and that it allows LPC to administer random testing. Mr Mitchell considered the existence of that policy did not make any difference. That was because the testing contemplated by it is not the same as generic health monitoring and the factors taken into account are often different.[31]

[84] It is difficult to see how the acceptance of alcohol and drug testing, and the illness and injury management standard, could lead to the consequences contemplated by LPC. The alcohol and drug policy is consistent with cl 10.6, which recognises the dangers of employees being at work under the influence of alcohol and drugs. That does not assist LPC, because it supports the conclusion that the consent provided by the collective agreement is limited. Likewise, the standard is about returning to work following illness, injury and rehabilitation, which is different from what is planned by the policy and therefore offers no support to this aspect of LPC's case.

[85] In reaching the conclusion that the collective agreement did not permit LPC to unilaterally implement new policies or procedures for health and safety, the Authority referred to *Electrical Union 2001 Inc v Mighty River Power Ltd*, in two respects.[32] First, as part of framing the questions to answer about whether the policy is consistent

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31 See *NZ Amalgamated Engineering Printing and Manufacturing Union v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC) *[Air New Zealand Ltd]*.

32 *Electrical Union 2001 Inc*, above n 28.

or inconsistent with the collective agreement.[33] Second, in concluding that cl 10.1 did not permit LPC to unilaterally implement new policies and procedures.[34]

[86] Mr Shaw submitted that this reliance on *Mighty River Power Ltd* was misplaced because the case is distinguishable from the present one. In that case, the employer sought to introduce an alcohol and drug policy for random, or suspicionless, testing for alcohol and drugs.[35] At the time, the collective agreement provided for situations where fitness for work could be established. That allowed for alcohol and drug testing where there was a reason to suspect impairment. The collective agreement also incorporated the right to refuse to medical treatment under the New Zealand Bill of Rights Act 1990 (NZBORA).[36]

[87] There was another clause in the collective agreement providing that company policies did not form part of that agreement but, nevertheless, an employee was required to become familiar with them and to observe the current policies, practices and procedures where "these are fair and reasonable".[37]

[88] The Court accepted that there were sound reasons for the collective agreement to promote health, safety and security. It noted, however, that it provided limitations to ensure that those objectives were not pursued "at all costs to the exclusion of the rights and liberties of individual employees".[38] The judgment went on to say that the collective agreement, interpreted as a whole, sought to establish a balance between those considerations. The Court was satisfied that the collective agreement guarded against the unilateral imposition of extensions to the alcohol and drug policy such as by random testing.

[89] Mr Shaw sought to distinguish *Mighty River Power Ltd* by relying on two points of difference. The first one was that the collective agreement between LPC and MUNZ, unlike the one in *Mighty River Power Ltd*, does not contain any reference to s 11 of NZBORA.

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33 *Maritime Union of New Zealand*, above n 1, at [10].
34 At [52].
35 *Electrical Union 2001 Inc,* above n 28, at [2].
36 New Zealand Bill of Rights Act 1990, s 11.
37 *Electrical Union 2001 Inc,* above n 28, at [29].
38 At [39].

[90] The submission was that cl 10.3 does not contain any qualifiers, such as the requirement for an employee to consent to hearing, eyesight and respiratory testing. Further, it was said that the clause is not concerned with limitations on matters of health and safety or could otherwise be said to fall foul of the balancing exercise referred to in *Mighty River Power Ltd*; that is, LPC was not pursuing its policy at all costs to the exclusion of its employees' rights.

[91] The second point of different Mr Shaw mentioned, and perhaps the high point of these submissions, was that in *Mighty River Power Ltd*, the collective agreement contained a clause specifying how and when alcohol and drug testing could occur, which clashed with the proposed random testing.

[92] I do not accept those submissions. In *Mighty River Power Ltd*, the collective agreement specified the circumstances in which testing for impairment could be undertaken. The clause was a limiting one. It required a reason to ask for the employee to establish his or her fitness to work. That meant the agreement only authorised testing where there was a reason to suspect that the employee might not be able to work.

[93] Clause 10.3 is much the same, in the sense that it specifies what type of testing may be undertaken and when. Despite some overlap, the clause does not repeat the extensive list of subjects in the policy.

[94] The argument that this collective agreement does not contractually incorporate s 11 of the NZBORA is correct, but the implication from the submission is unattractive. Mandatory medical testing, by its very nature, engages fundamental rights of personal privacy and bodily integrity, principles which are affirmed and protected by the NZBORA.[39] The policy, in effect, is an expression of LPC's intentions. It has no contractual force but the implication was that LPC's desire to impose this policy must take priority over its employees' ability to decide whether or not they will consent to having personal information about their health collected by the employer and applied for its own purposes. Something far more compelling than pointing to the absence of a reference to s 11 of the NZBORA in the collective agreement, or other precise words

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[39] New Zealand Bill of Rights Act 1990, ss 11 and 21.

preserving the employee's right to not consent, would be required to shift the balancing exercise referred to in *Mighty River Power Ltd* in LPC's favour.

[95] Mr Shaw preferred the approach in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*.[40] That case was referred to in *Mighty River Power Ltd* and was also about the introduction of an alcohol and drug policy by the employer. The proceeding was an application for injunctions and declarations to restrain Air New Zealand from implementing aspects of what was then a recently announced policy on alcohol and drugs in the workforce.[41]

[96] The policy in the *Air New Zealand Ltd* case required employees to be at work not under the influence of alcohol or drugs, allowing for testing where there was reasonable cause to suspect impairment at work, and random testing.[42]

[97] Mr Shaw compared LPC's situation with *Air New Zealand Ltd*, given the company's case that there was no inconsistency and the work is safety sensitive.

[98] The submission overstates the judgment. The Court contrasted the proposed Air New Zealand policy with earlier cases about contractual terms procured by oppressive means, beginning with *Harrison v Tucker Wool Processors Ltd*.[43] In *Tucker*, the Court considered whether an employment agreement was harsh and oppressive within the meaning of s 57 of the (now repealed) Employment Contracts Act 1991. One of the provisions was that employees consented to undergo alcohol and drug testing procedures as and when required.[44]

[99] In *Tucker*, the Court held that the drug testing provision was harsh and oppressive.

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40 *Air New Zealand Ltd*, above n 31.
41 At [1].
42 At [19]–[20].
43 *Harrison v Tucker Wool Processors Ltd* [1998] 3 ERNZ 418. See also *Tucker Wool Processes Ltd v Harrison* [1999] 3 NZLR 576, [1999] 1 ERNZ 894; and *Harrison v Tucker Wool Processed Ltd* [2000] 1 ERNZ 572.
44 *Air New Zealand Ltd*, above n 31, at [124].

[100] In *Air New Zealand*, the Court was satisfied that the circumstances were distinguishable from *Tucker*.[45] As part of this analysis the Court in *Air New Zealand* accepted submissions from the airline that the appropriate approach to determine whether the actions of the company are fair and reasonable was to consider:[46]

(a) the nature of the industry and the relevant concerns to be addressed;

(b) the employer's mandate for testing by reference to legislative and common law considerations;

(c) the utility in testing;

(d) the reasonableness of the policy itself;

(e) the grounds of opposition raised by the unions and whether some or all of the testing should be prohibited;

(f) whether the outcome sits comfortably with other intrinsic material, including employment trends and expectations; and

(g) other legislation, and the position in comparable jurisdictions.

[101] The point of this discussion is that in *Air New Zealand* the decision did not turn exclusively on consistency with the collective agreement and the identification of safety-sensitive work.

[102] A significant part of the judgment responded to a submission for the employer that the company's policy did not contravene or purport to vary any term in the employment agreements.[47] In developing that submission, Air New Zealand submitted that there could be nothing objectionable in an employer adopting a policy requiring employees to be alcohol and drug free while on duty.[48]

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45 At [130].
46 At [132].
47 At [178].
48 At [178].

[103] The unions in that case could not point to a contractual right with which the policy was inconsistent. The only available argument they put forward, that testing acting on suspicion of impairment contravened an implied term of trust and confidence, was insufficient.[49]

[104] The Court accepted that the subject matter of the dispute was informed by the (now repealed) Health and Safety in Employment Act 1992 (HSE).[50] It commented that the HSE provided significant guidance about the lawfulness and reasonableness of the proposed testing regime. The Court analysed an employer's duty to take all practical steps to ensure the safety of employees while at work, including the identification and elimination, isolation or management of hazards.

[105] The Court also wrestled with considering employee's rights. It analysed the Human Rights Act 1993 and NZBORA. In the end, a balancing exercise was undertaken.[51] The Court started this part of the analysis by "according weight" to the employee's concerns about being reluctant to provide samples or specimens for testing. It accepted that the HSE, and "general law", imposed absolute duties on employers to take all practicable steps to eliminate significant hazards to employees and others. The Court was satisfied such a hazard included being under the influence of alcohol or drugs at work.[52]

[106] The Court went on to discuss the evidence about random testing before commenting that it acted as a "deterrent". It was persuaded to hold that in safety-sensitive areas, where the consequences can be catastrophic, objecting to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard, must give way to the overriding safety consideration. Those factors were also held to take precedence over privacy concerns.

[107] Towards the end of the judgment the Court cautioned that the observations were particular to Air New Zealand given the industry it is in.[53]

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49 At [179].
50 At [133].
51 At [246].
52 At [247].
53 At [267].

[108] What is apparent from the judgment, but not referred to in LPC's submissions, is that the ability to introduce these types of policies is nuanced and requires balancing issues including the rights of employees.

[109] In *Air New Zealand Ltd*, the Court was dealing with potential impairment while undertaking safety-sensitive work through consumption of alcohol and drugs. LPC placed considerable reliance on having identified safety-sensitive work. However, identifying the work in that way cannot be a complete response justifying any type of testing nominated by an employer. There is a qualitative difference between testing an employee for potential impairment at work through the consumption of alcohol and drugs, as in *Air New Zealand Ltd*, and the sort of testing contemplated here. What LPC wants is not to establish if a person who is at work on any particular day is temporarily impaired. Instead, it is attempting to monitor the health of employees and their fitness to work generally, something that is altogether different.

[110] Taking the balancing exercise referred to in *Air New Zealand Ltd*, a point must eventually be reached where the employee's interests are paramount. In particular, this requires consideration of the fundamental rights of employees to privacy and bodily integrity.

[111] The collective agreement only allows LPC to monitor its employees who are MUNZ members for hearing, eyesight and respiratory conditions. The medical checks in the maintenance and marine schedules are unlikely to qualify as monitoring in the same way as is contemplated by the policy LPC wants to introduce, but both are also confined; they apply only to those aspects of the work covered by the schedules.

Does the collective agreement prevent LPC from implementing the policy?

[112] From the analysis that has just been completed, it follows that any health policy going beyond the subject matter of testing in cl 10.3 is inconsistent with the collective agreement. Consequently, that agreement does not provide consent for the health monitoring required by LPC's policy. No provision of the collective agreement authorises the introduction of the policy.

Can the policy be implemented anyway?

[113] This analysis leads to the second part of LPC's challenge, namely that, if the collective agreement does not authorise the policy, can it be implemented anyway?

[114] When Mr Shaw introduced LPC's challenge he prefaced the company's response to interpreting the collective agreement with comments about the waterfront industry, the statutory framework within which LPC is required to work, what was described as the "clinical" justification for creating the policy and analogous industry comparators. The clinical justification referred to the prudence of undertaking tests especially by reference to occupational health advice available to the company.

[115] The industrial justification for the policy was LPC's need to promote a healthy and safe workplace to comply with HSWA, the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 (HSW Regulations) and WorkSafe's guidelines. He submitted that health monitoring was a way for LPC to check if an employee was being harmed from exposure to hazards while working, aimed at detecting early signs of ill health or disease and to show if control measures are working effectively. The nature of the work that might cause employee ill health was not discussed by Ms Baird.

[116] The next aspect of this overview was LPC's response to an investigation undertaken under the Transport Accident Investigation Commission Act 1990. Under s 13, when an accident is investigated, recommendations may be made to increase transport safety.[54] It was under this legislation that the TAIC investigation was conducted into the 2022 fatality at the port. Mr Shaw stopped short of submitting that the recommendations produced by that report were mandatory, but nevertheless he said that the company had no alternative but to implement them. The inference invited was that the policy responds to TAIC's recommendations.

[117] I do not accept Mr Shaw's submission which was to the effect that because LPC must comply with the HSWA, there is a lawful basis to impose the policy regardless of its subject matter and the collective agreement.

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[54] Transport Accident Investigation Commission Act 1990, s 13.

[118] Certainly, duties are imposed on LPC under HSWA requiring it as an employer in charge of a business or undertaking to ensure employees' health and safety at work. However, the HSWA stops short of conferring on LPC the lawful right to require an employee to submit to any and all health monitoring required by an employer as a condition of being at work.

[119] I do not accept the submissions that the HSW Regulations, or the WorkSafe Guidelines assist LPC. While it is correct to say that the regulations deal with health monitoring, the context in which that type of monitoring takes place is different from what LPC wants to achieve. Under those regulations, exposure monitoring means the measurement and evaluation of exposure to a health hazard experienced by a person at work and includes biological monitoring to ascertain if an employee's health is compromised.[55] In addition, health monitoring is defined as monitoring an individual to identify any changes in his or her health status because of exposure to certain health hazards.[56]

[120] Those circumstances, appearing in regs 28–32 (inclusive), are where employees are exposed to substances hazardous to health in the workplace. The policy designed by LPC, however, checks the health of the employees to undertake the work, not whether something in the workplace might be affecting the health of the employees.

[121] The WorkSafe workplace guidelines do not assist LPC's case. They actually state that health monitoring is not a wellbeing check, but LPC's policy reads as if that is exactly what is intended. The WorkSafe guidelines specifically exclude testing employees for cholesterol, which is one of the tests in LPC's policy, or to promote healthy living, or fitness for work, which are also dealt with in the policy.

[122] Finally, Mr Shaw referred to other industries as comparators to justify the policy and its testing: New Zealand Police and seafarers. The analogy is misplaced. The ability to prescribe relevant standards for both the police and seafarers is

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55 Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, reg 3.
56 Regulation 3.

controlled by legislation: s 72 of the Policing Act 2008 and ss 36(1)(o) and 36(1)(u) of the Maritime Transport Act 1994 respectively.

A lawful and reasonable instruction?

[123] The last ground of LPC's challenge is an alleged failure by the Authority to consider whether the plaintiff's actions amounted to a lawful and reasonable instruction. LPC's instruction was not lawful because it was contrary to the collective agreement and has no other lawful basis. Further, given that the instruction infringes upon employees' fundamental rights, it is difficult to conclude that it is "reasonable".

Outcome

[124] LPC has failed to establish that there were any material errors of law in the Authority's determination. The challenge to the Authority determination is unsuccessful and it is dismissed.

[125] MUNZ is entitled to costs. If they cannot be agreed, memoranda may be filed.

K G Smith
Judge

Judgment signed at 3.15 pm on 15 September 2025