

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 725
3280479

BETWEEN BRENT KEITH
Applicant

AND ALLIANCE GROUP LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Codi Lilley, counsel for the Applicant
Shaun Brookes, counsel for the Respondent

Investigation Meeting: 23 August 2024 in Oamaru and by AVL

Submissions Received: 6 September 2024 from the Applicant
20 September 2024 from the Respondent

Determination: 5 December 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Brent Keith is employed by Alliance Group Limited (Alliance) as a reach truck driver at the Pukeuri plant in Oamaru.¹ He has been employed as a seasonal worker for about ten years. On 2 August 2023 Mr Keith was involved in several incidents in the workplace. The most serious incident was a minor collision or connection between his reach truck and a forklift about 10.30am on 2 August 2023. A subsequent drug and alcohol test was negative.

[2] About 3pm on 2 August 2023 Mr Keith was radioed to come to the landing where the processing manager and his senior supervisor were present. During the exchange he remained in his reach truck. There are disputes about what was said during the seven-to-ten-minute meeting. The processing manager had concerns about Mr

¹ A reach truck is similar to a forklift and is essentially an enclosed forklift.

Keith's wellbeing because of the incidents and how Mr Keith had responded to a question from his supervisor about how he was. Her concerns were heightened because of matters Mr Keith had disclosed to her about his mental health earlier. Mr Keith was told he would need to get a medical certificate before he could return to work.

[3] On 9 August 2023 Mr Keith obtained a medical certificate that provided he was fit to drive a forklift. On 10 August 2023 he raised a personal grievance with Alliance. The personal grievance letter was not provided to Alliance until 14 August 2023.

[4] On 14 August 2023 there was a meeting between Mr Keith, his union delegate, senior supervisor, and human resources. Mr Keith was permitted to return to work at the end of the meeting. He was paid in full for the period he was away from the workplace including for allowances that he would have received if he had worked. His sick day on 3 August was reinstated and payment was made. He was reimbursed for the cost of the medical certificate. Alliance did not agree to make payment of compensation sought in the personal grievance letter.

[5] Mr Keith seeks a finding that he was unjustifiably disadvantaged by virtue of being required to remain away from the workplace until he obtained a medical certificate and because of the process adopted. He says that it was an unjustified suspension. He alleges there were breaches of good faith because Alliance breached its own policies and failed to act in good faith. Mr Keith seeks compensation and costs.²

[6] Alliance do not accept that Mr Keith was unjustifiably disadvantaged or that there has been a breach or breaches of company policy. Alliance says it had genuine reason to be concerned about Mr Keith's wellbeing, and the safety of those working around the reach truck he was operating. It says that Mr Keith was paid for the time not worked and that the process was reasonable in circumstances where there were heightened health and safety concerns.

² The statement of problem additionally referred to a letter of apology as a remedy but this was not referred to in final submissions. It is not a remedy the Authority may provide under s 123 of the Employment Relations Act 2000.

The Authority's investigation

[7] The Authority enquired and there is no application for non-publication on behalf of Mr Keith.

[8] Mr Brookes has asked for anonymisation of Alliance's witnesses' names. The Authority agrees it is appropriate to refer to the positions the witnesses held at the material time rather than their names.³

[9] The Authority held an investigation meeting in Oamaru on 23 August 2024. The Authority heard evidence from Mr Keith and his wife, Sharon Keith. The processing manager who no longer works for Alliance gave evidence remotely by audio visual link. The senior supervisor and another Alliance employee who was involved in an incident on 2 August gave evidence in person.

[10] Alliance asked at a case management conference with the Authority on 13 June 2024 if submissions could be timetabled at the end of the evidence. Ms Lilley did not object. Submissions were duly timetabled and received after the investigation meeting.⁴ The submissions were comprehensive and helpful.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties but has stated findings of fact and law and expressed conclusions and made orders as required.

The issues

[12] These are the issues that the Authority needs to determine:

- (a) What were the concerns that resulted in Mr Keith being sent home on 2 August 2023 to obtain a medical certificate?
- (b) How should the Authority objectively assess what occurred on 2 August 2023?
- (c) Were Alliance's actions at the material time what a fair and reasonable employer could have done in all the circumstances?
- (d) Should there be a finding of a breach of good faith?

³ *MW v Spiga Limited* [2024] NZEmpC 147 at [96].

⁴ Directions of the Authority 13 June 2024.

- (e) If a personal grievance is established, what remedies are available?

What were the concerns on 2 August 2023 for Alliance?

[13] The first alleged concern on 2 August 2023 to come to the attention of the senior supervisor was that an employee complained Mr Keith had hit shoulders with him shortly after 6.30 am. Whilst the employee complained about this matter to the senior supervisor he did not want it taken further.

[14] There was another concern on 2 August 2023 that Mr Keith had lost product at height in the store freezer on one or two occasions. This was a reasonably rare event and only occurred around once a month. The Authority could not safely conclude there were two incidents of lost product, from the evidence, but there was no dispute there was one incident of lost product.

[15] The senior supervisor said in his oral evidence that he went to check on Mr Keith after these incidents came to his attention and asked him “what’s up.” His evidence was that Mr Keith just stared at him with a blank look and the senior supervisor thought that was strange at the time. He agreed when questioned by Ms Lilley that he knows now that it takes a while for Mr Keith to gather his thoughts and process information and that he did not know Mr Keith well at that time.

[16] The Authority heard evidence from an employee who was driving a forklift on 2 August 2023. The employee was also a health and safety representative. He said that at about 8 am that day he was told to take his product out from another door by Mr Keith who was using the other door. The other employee was concerned about the request but ultimately agreed to it. The door that employee was asked to use was heavily congested with foot traffic and other vehicles and he did not feel safe using the door. He could not see Mr Keith working in the area that was spoken about and was annoyed that he had been asked to use the other door. He then saw Mr Keith walking towards the smoking area. That was also the direction of the bathroom facilities. Mr Keith said he was using the toilet facilities not having a smoke.

[17] The employee felt like Mr Keith was playing a “schoolboy prank” on him. He went to talk to one of the managers in the office about it because he needed to move some of Mr Keith’s pallets away so he could reach the product he was moving. He said that he was not sure whether Mr Keith would complain or not about that. He thought that by the time he moved to a different work area Mr Keith had been away from the

work area for about ten minutes. Mr Keith did not accept that and said in his evidence that he was away for only a short period. The employee recalled a bit of discussion at the first break of the day between the employees about other incidents that Mr Keith had been involved in that day such as the alleged shoulder connection. The employee said he started thinking that maybe there was something going on for Mr Keith as his behaviour was unusual.

[18] Mr Keith then made connection in his reach truck with a forklift that was dealing with a heavy transition plate at about 10.30am. Neither vehicle was damaged in the collision, but the senior supervisor took the incident seriously particularly in light of the very heavy plate. The evidence supported that it is known that plates are heavy and dangerous and employees need to keep away from a forklift working with a plate. Neither the senior supervisor nor the other employee could recall a previous collision with a forklift dealing with a plate in the plant.

[19] When the other employee who was involved in the third incident heard about the forklift collision he spoke to the senior supervisor about the earlier incidents he had heard about and the one he was involved in. He said he was worried about Mr Keith and the health and safety of others.

[20] After this discussion the senior supervisor brought the incidents to the attention of the processing manager and mentioned the blank look and unresponsiveness of Mr Keith to a question asked of him.

How should the Authority objectively assess what occurred on 2 August 2023?

[21] There are different views about whether the instruction on 2 August 2023 that Mr Keith provide a medical certificate before he could return to work was a suspension.

[22] The employee handbook refers to suspension following an allegation of serious misconduct as below:⁵

Following an allegation of serious misconduct, and after consultation with you and your representative, if any, we may suspend you with (or without pay where appropriate such as breach of our drug and alcohol policy where an employee is impaired as a result of their own actions) and including where:

- In order for the company to carry out a comprehensive and fair investigation.

⁵ Page 25 of the handbook.

- You pose a risk to our business including the health and safety of yourself or others, our property or our reputation.
- Our investigation into any allegation is delayed for any reasons beyond the company's control, including as a result of police inquiry, investigation or prosecution, or any order made by a judicial body. These circumstances will make it more appropriate for suspension to be without pay.

[23] The evidence did not support that the processing manager considered what occurred on 2 August was a suspension following an allegation of serious misconduct. Her focus was about wellbeing and health and safety rather than an investigation into the incidents as disciplinary matters.

[24] Ms Lilley submits that what occurred was a suspension with reference to the Employment Court judgment in *Hong v Auckland Transport* and the definition of a suspension in that case:

... when an employee is prevented from working and is sent away from the workplace, but his or her employment remains on foot.”⁶

[25] Mr Brookes submits the requirement to obtain a medical certificate before returning to work was not a suspension. He refers to the Employment Court judgment in *FGH v RST* where an employer required absence until medical clearance was obtained, was considered justified.⁷

[26] In *Hong* the employee was suspended three times. The first suspension was for the employee to reflect on his actions following a workshop. No disadvantage was found to flow from the short suspension. The other two suspensions were related to disciplinary concerns.⁸ The situation in *Hong* is distinguishable from the circumstances the Authority is considering in this matter.

[27] In *FGH* the employer, in a letter, directed the employee commence a period of paid sick leave with immediate effect until a report was provided from an independent psychiatrist. The employee was not until then allowed in the workplace. This followed a pattern of behaviour that had given rise to serious concerns about the wellbeing of the employee and other staff members.⁹ The collective agreement in *FGH* contained a power to suspend on pay whilst an investigation was undertaken. That power was not

⁶ *Hong v Auckland Transport* [2019] NZEmpC 54 at [48] with reference to *Graham v Airways Corp of New Zealand Ltd* [2005] ERNZ 587 (EmpC) at [104]

⁷ *FGH v RST* [2022] NRNZ 1076 at [333].

⁸ Above n 7.

⁹ Above n 7.

invoked by the employer and the word suspension not used. The employer in that matter considered the employee should be on compulsory sick leave. Broad responsibilities for ensuring employees were healthy and safe in the workplace under the collective agreement and the statutory duties under the Health and Safety at Work Act 2015 were referred to.

[28] As Mr Brookes submits, whether the requirement to obtain a medical certificate is labelled a suspension or otherwise is not necessarily determinative of whether Mr Keith was unjustifiably disadvantaged. It is the decision and the process involved that will be determinative. Both *Hong* and *FSH* refer to the ultimate test in such circumstances as the fairness and reasonableness of the employer's conduct.

[29] In *Hong* there was a discussion about the rules of natural justice surrounding a suspension:¹⁰

The rules of natural justice also means an employee generally ought to be told a suspension is being contemplated and the reasons why and given an opportunity to be heard before a decision is made. These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer's conduct. The surrounding circumstances can include immediate safety issues as well as the length of the proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made.

[30] The Judge in *FGH* stated as follows:

In essence, a natural justice issue is raised. Ultimately the test must be the fairness and reasonableness of the employer's conduct.¹¹

[31] Mr Keith says that the action of sending him home to obtain a medical certificate and the process in doing so was unjustified and caused him disadvantage.

[32] Section 103(1)(b) of the Act defines an unjustified disadvantage grievance as below:

103 Personal grievance

(1)(b) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim— (a) ... (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the

¹⁰ Above, n4 at [50].

¹¹ Above n 6 at [332] and [333].

employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or ...

[33] To establish a grievance under s 103(1)(b) of the Act the action which, in this matter is the request to obtain a medical certificate, needs to affect Mr Keith's conditions of employment and result in him being disadvantaged. The action must be unjustifiable. Justification of an action is assessed by applying the test in s 103A of the Act whether Alliance's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action.

[34] Section 103A(3) of the Act sets out minimum requirements of a fair and reasonable process that the Authority must consider. This includes whether there was a sufficient investigation having regard to the resources available to the employer, whether concerns were raised with the employee before dismissing or taking any action, whether there was a reasonable opportunity to respond to the concerns and whether the response was genuinely considered. Defects in the process must not result in a finding that an action was unjustifiable if they were minor or technical and did not result in the employee being unfairly treated.

[35] A fair and reasonable employer could be expected to comply with good faith obligations that are set out in s 4 of the Act.

Were Alliance's actions at the material time what a fair and reasonable employer could have done in all the circumstances?

Earlier discussion about wellbeing

[36] In early to mid-2023 the processing manager had an informal discussion with Mr Keith, a union delegate and someone from human resources. There had been an incident that could have proceeded as a disciplinary matter at that time, but it was decided instead that Mr Keith and the processing manager would have fortnightly discussions. The processing manager put the timing of the discussion and the fortnightly catch ups that followed with her and Mr Keith a few months before August 2023. Mr Keith could not recall if it was 2022 or 2023. I conclude it was more likely 2023.

[37] Mr Keith accepted a wide range of matters were discussed at the time. There was some discussion about his wellbeing and mental health. Mr Keith says that was

limited to him attending counselling to work through some issues. He denied that he told the processing manager he had been to the doctor, was prescribed medication or had declined to take medication. His understanding was that the discussion was confidential.

Could Alliance have requested Mr Keith obtain a medical certificate that cleared him to work safely?

[38] The Authority accepts that Alliance in appropriate circumstances can request an employee provide a medical certificate confirming that they are able to undertake work safely before they returned to work. The plant is safety sensitive. Alliance has obligations to employees under the Health and Safety in Employment Act 2015 (H & S Act) to ensure their safety. Requesting a medical certificate was found in *FGH* to be a reasonably practicable step to take and one a fair and reasonable employer could have taken in that case to meet the obligations under the H & S Act.

Was it fair and reasonable to request a medical certificate from Mr Keith?

[39] Ms Lilley submits that the only incident that could give rise to a health and safety concern for Alliance was the collision with the other forklift.¹² She says that it would have been reasonable for the employer to speak to Mr Keith about that to ascertain details of the incident, ask how Mr Keith was feeling and assess any immediate safety concerns. She refers to Mr Keith continuing to work on his reach truck until 3pm with no concerns about his wellbeing after a drug test and no opportunity for a break or to see a plant connector.¹³ The evidence was unclear if there was a plant connector in the department Mr Keith worked in.

[40] The matter was not approached as a suspension preceding an investigation. It was dealt with as a concern about the wellbeing of Mr Keith and safety of others in the workplace. There had been a number of incidents on 2 August 2023 involving Mr Keith that had given rise to concerns, including for an employee who was a health and safety representative. The collision with another forklift incident was not the only one to have caused concern. This is illustrated by the attempts of the senior supervisor, when he was aware of the alleged shoulder incident and lost product to talk to Mr Keith to

¹² This submission was made with reference to the suspension clause in the handbook.

¹³ A person within each department who can provide guidance and look out if there is anything wrong. It was unclear if Mr Keith's department had a person in that role at the material time.

ascertain how he was. The senior supervisor was concerned about the absence of responses to his questions and a blank look. There was after that exchange the further incident with the forklift.

[41] An incident that had occurred before the forklift incident was brought to the attention of the senior supervisor after the other employee heard about the forklift incident. That employee who was a health and safety representative said there were concerns about Mr Keith's wellbeing because of the number of incidents. Often employees who work closely with each other are best placed to notice potential wellbeing and health and safety issues. At this point the senior supervisor escalated the broader concerns to the processing manager who had some knowledge from earlier conversations with Mr Keith about issues with his mental health. She was concerned about the blank look and limited responses. Mr Keith had at this time been driving his reach truck for a few hours after the collision incident.

[42] Ms Lilley has referred to the evidence that the senior supervisor said when asked that he would not have suspended Mr Keith. He also said it was "not his call." Ms Lilley submits the decision to send Mr Keith home was a subjective decision based on the processing manager's own personal experiences with mental health issues with a family member. Further, that the processing manager relied on incorrect information that Mr Keith had refused, or was not, taking medication. There were a number of incidents that day as well as the concern about the lack of a response to the senior supervisor.

[43] The evidence was that it was very unusual for one person to be involved in so many incidents in one day. Mr Keith agreed when questioned at the Authority investigation meeting that he could see "why they were concerned." The processing manager said that she observed Mr Keith was pale and not himself on 2 August and appeared agitated. She readily accepted in answer to a question that she was not a medical expert but said she needed to know that he was "ok." She said that she needed to be sure Mr Keith was fit to drive the forklift and wanted him to see a doctor as soon as possible. The Authority does not conclude the decision was made on a "purely emotional basis".

[44] There was a fair and reasonable basis for Alliance to request a medical certificate before Mr Keith could return to work. The evidence discloses genuine concerns about Mr Keith's wellbeing and the health and safety of other employees

flowing from the four incidents against a background of some disclosures made to the processing manager about mental health issues. It was a reasonably practicable step for Alliance to take in all the circumstances to address these concerns.

Was the process fair?

[45] As Mr Brookes submits, the Authority is required to look at substantive fairness and reasonableness in an objective manner to the standard of a fair-minded person. The process should not be subject to minute or pedantic scrutiny to identify procedural unfairness.

Alternatives to staying away from the workplace?

[46] Ms Lilley submits that there were other alternative duties such as carton handling work that Mr Keith could have undertaken rather than being away from the workplace for nine working days. The evidence did not support that Alliance initially envisaged Mr Keith would be away for such an extended period.¹⁴ The reasonableness of not considering alternative work at the time a medical certificate was requested should be considered in that light. The request was also made towards the end of the working day. I do not conclude the fact there was no discussion about alternative work on 2 August 2023 was unreasonable in those circumstances.

[47] The processing manager said in answer to questions at the Authority investigation that Mr Keith's union representative subsequently communicated that Mr Keith was not willing to do carton work. It was work at a lower pay rate.¹⁵ The Authority could not be satisfied from the evidence that Alliance did not act fairly and reasonably with respect to subsequently considering alternative work in the circumstances.

Discussion on the landing

[48] Mr Keith was concerned that the discussion took place on the landing. His evidence was that a group of employees gathered and watched, and he asked that the conversation be taken somewhere more private but the processing manager said there was no need for that. He agreed that due to the noise anyone observing the conversation

¹⁴ Email dated 5 August 2023 from the process manager to Mr Keith's union representative.

¹⁵ There was no reference to alternative work at all in the statement of problem or Mr Keith's original and reply evidence.

would not have been able to hear what was being said. Neither the supervisor nor the processing manager noticed any other workers actively watching rather than working. The senior supervisor said that he would have had his back to the place where Mr Keith said workers were watching but if he noticed a gathering he would have asked the workers to return to work. After the short exchange had finished the senior supervisor said that he could not see anyone standing nearby and he recalled the other workers were quite far away.

[49] The processing manager said at the outset she told Mr Keith the meeting could take place in the office. Her evidence was that Mr Keith was not agreeable to that until he knew what she wanted to talk about. The processing manager said that she was “forced to discuss the matter on the landing” because he refused to go to the office. The senior supervisor could not recall any discussion about discussing the incidents in the office or that Mr Keith asked the conversation be moved somewhere private.

[50] Having heard the evidence I conclude it more likely that the processing manager suggested at the outset moving to the office to talk. It is less likely the offer would not have been made in circumstances where she had an available office. Mr Keith is likely to have wanted to know what the discussion was about. He may not have heard the offer to talk in the office because of that focus. By the time he knew the reason he was called to the landing the discussion was likely all but over.

[51] Only those participating in the discussion were in a position to hear what was said. Any disadvantage is limited to the fact that workers saw a short discussion taking place after which Mr Keith left the workplace and embarrassment that Mr Keith felt about that. Mr Keith had a heightened sensitivity to others witnessing such an exchange because of some other workplace issues. The Authority is objectively assessing fairness and reasonableness from the standard of a fair-minded person. I do not conclude unreasonableness or unfairness in all the circumstances about the place of the discussion.

Not offered a union representative until part way through the conversation

[52] The process manager said that a union representative was offered at the start of the discussion. I conclude it likely it was after there was some discussion about the incidents. In any event, Mr Keith did not want the union representative who was available and wanted the union secretary who was not on site that day. Ms Lilley

submits that attempts could have been made to telephone the union secretary or postpone the meeting. She refers to the entitlement in the handbook to be represented by the union at Alliance.

[53] There was an available union representative. Mr Keith, as he was entitled to do, said he did not want to be represented by him. The short delay in referring to union representation was not significant given the overall length of the discussion. The processing manager wanted Mr Keith to get a medical certificate as soon as possible. Mr Keith subsequently obtained union assistance and there was communication from the union representative to the process manager within a few days of 2 August 2023. Mr Keith was represented at the next meeting on 14 August.

[54] There was a reasonable attempt to ensure Mr Keith had a union representative in all the circumstances.

Breach of privacy concerns

[55] A significant matter for Mr Keith is that he believed the processing manager had breached his privacy and there were misleading and incorrect allegations made against him with respect to medication. Mr Keith understood the earlier discussions were confidential.

[56] The concerns for the processing manager arose because of the four incidents on 2 August and the blank stare. She also had regard to the disclosures made in the earlier work discussion by Mr Keith about his mental health. No specifics were referred to on 2 August with the focus on wellbeing and health and safety. An employer could not be expected to have completely disregarded in a health and safety situation the disclosures made about mental health in assessing whether to request a medical certificate to ascertain fitness to work. Mr Keith's role is highly safety sensitive. The plant is safety sensitive.

[57] The processing manager had formed a different conclusion about medication (treatment) for mental health issues from the earlier discussions with Mr Keith. That would only have been understood by Mr Keith when he received the letter dated 2 August on 4 August 2023 which referred generally to mental health issues which the processing manager understood are untreated. Mr Keith was able to subsequently put his view about that to Alliance.

[58] The Authority does not have jurisdiction to determine breaches of the Privacy Act 2020. In any event, the circumstances do not enable the Authority to conclude there was a breach of privacy.

Opportunity to comment on request for a medical certificate

[59] This was not a situation in which there were allegations of a disciplinary nature to respond to. Mr Brookes' submission that the procedural requirements in the circumstances are less onerous is persuasive. Mr Keith confirmed that the process manager referred to the incidents that day. It is likely the discussion about them was not detailed. Mr Keith understood that there were concerns about his wellbeing and there was reference to the blank stare and unresponsiveness in engaging with the senior supervisor.

[60] The context in which the medical report was being asked for was raised with Mr Keith even if he did not agree with all matters raised. He likely had an opportunity for some response to the request for a medical certificate. In his written evidence he said that the process manager told him "You need to respond to me." He then got out of the reach truck and walked off advising he would get a medical certificate.

[61] I do not conclude, as submitted by Ms Lilley, that the information provided was confusing and misleading. Mr Keith did not deny there were four incidents that day and he accepted that Alliance could be concerned about that. The incidents and the blank stare and unresponsiveness to the senior supervisor were raised. What was required to establish fitness to drive a reach truck was really a matter for a doctor. In any event this was further clarified by the letter received from Alliance on 4 August 2023 before the appointment with the doctor on 9 August 2023. Ms Lilley questioned Alliance witnesses about Mr Keith having an assessment carried out at the medical centre on the plant. The evidence supported that it was not possible for this to occur.

[62] The process on 2 August 2023, applied flexibly to reflect the circumstances where a medical certificate was being requested, satisfied the procedural fairness requirements in s 103A (3) of the Act. To the extent that there were flaws in the process they were minor and did not result in Mr Keith being treated unfairly. As set out earlier a fair and reasonable employer could have requested a medical certificate in the circumstances. When a medical certificate was provided, Mr Keith was allowed to return to work and he was paid in full for the period he was away including allowances

he would have received if he had worked. The cost of the medical certificate was reimbursed.

[63] The unjustified disadvantage claim is not established.

Good faith breaches

[64] Alliance had some genuine concerns about the wellbeing of Mr Keith and broader health and safety concerns after an eventful day on 2 August 2023. Those concerns were the reasons for the request for a medical certificate. When the Authority looks at actions that were taken and how they were undertaken it does not measure against a standard of perfection. Obligations of good faith are important and need to be considered.

[65] I am not satisfied in this case that there were breaches of good faith for reasons in the main set out above. There was genuine concern about what occurred on 2 August 2023 and it was considered by Alliance, not unreasonably, that medical certification as to Mr Keith's fitness was required.

Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[67] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Brookes may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Lilley will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[68] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁶

Helen Doyle
Member of the Employment Relations Authority

¹⁶ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1