Employment Court of New Zealand

Kenmare v Fulton Hogan Limited [2014] NZEmpC 96 (17 June 2014)

Last Updated: 20 June 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2014] NZEmpC 96

CRC 10/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for interim reinstatement
BETWEEN	JESSE KENMARE Plaintiff
AND	FULTON HOGAN LIMITED Defendant

Hearing: (oral submissions by telephone on 4 June 2014)

Representation: A Sharma, counsel for the plaintiff
B Scotland, counsel for the defendant

Judgment: 17 June 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The plaintiff challenges the determination of the Employment Relations Authority (the Authority) refusing to grant him interim reinstatement pending the investigation and determination of his personal grievance of unjustifiable dismissal by the defendant.1 Subsequently the Authority also declined an application for removal of the proceeding to this Court.2

[2] From 2007 Mr Kenmare was employed as a construction worker under a collective agreement between Fulton Hogan Limited (Nelson Region) (Fulton

1 *Kenmare v Fulton Hogan Ltd* [2014] NZERA Christchurch 63 [Interim reinstatement determination].

2 *Kenmare v Fulton Hogan Ltd* [2014] NZERA Christchurch 76.

Hogan) and the Nelson Collective Union Incorporated (the Union); the term of the agreement is from 2013 to 2015.

[3] The employment agreement provides for random drug and alcohol testing. Mr Kenmare returned a positive test for cannabis which he says followed the consumption of two cupcakes at a party which he consumed unaware that they contained cannabis. Following two meetings and related correspondence, the employer concluded that the recording of the positive result constituted serious misconduct justifying termination of Mr Kenmare's employment.

Chronology

[4] On 11 February 2014, Mr Kenmare was selected for a random drug test. After providing a urine sample, he was informed that his result was non-negative. Pursuant to Appendix B of the collective agreement, Mr Kenmare was stood-down pending the results of further testing.

[5] On 13 February 2014, Mr Kenmare received a telephone call from Fulton Hogan's Safety, Quality, Training and Employment Relations Manager, Mr Peter Denton, informing him that the Institute of Environmental Science and Research Ltd (ESR) had confirmed a failed test. The test purportedly recorded Mr Kenmare as having a tetrahydrocannabinol (THC) level in excess of 300 nanograms.

[6] The same day, Mr Kenmare collected a letter from Fulton Hogan's Regional Manager for Nelson, Mr Andrew Allen, informing him that he may have breached its Disciplinary and Dismissal Policy in respect of allegedly being under the influence of alcohol or drugs when reporting for work and for recording a positive result under the company's alcohol and drug policy. Mr Kenmare was invited to attend a disciplinary meeting the following day, 14 February 2014. The letter concluded by noting that in light of the allegations and possible disciplinary sanctions, including dismissal, it was recommended that he exercise his right to have a support person present.

[7] Mr Kenmare attended the disciplinary meeting the following day without a support person. Mr Denton and Mr Allen attended on behalf of Fulton Hogan, along with Construction Divisional Manager, Mr Nick Hill, and the Civil Divisional Manager, Ms Mary Falconer. The notes of meeting record that when asked by Mr Denton as to whether he intended to have a support person present, Mr Kenmare replied that he was "fine without one."

[8] Mr Denton provided Mr Kenmare with the positive ESR results. Mr Kenmare explained that, the weekend before the test, on 9 February 2014, he had attended a party, where, on leaving, he consumed two cupcakes which unbeknownst to him were laced with cannabis. Mr Kenmare attributed any impairment from the drug to the excess alcohol he had consumed that night. He said that it was only after failing the test that he discovered through his friend that he had taken cannabis. Mr Kenmare claimed that the last time he had taken the drug was over the Christmas/New Year Period.

[9] The notes further record that Mr Kenmare alleged that a friend, J, who was in attendance at the party on 9 February 2014 also consumed the cupcakes and had similarly failed a drug test on his return to work that Monday. Mr Allen in his affidavit states that, towards the end of the meeting, he informed Mr Kenmare that further enquiries would need to be conducted into the explanations provided. Mr Kenmare is reported to have said that J's employer could be contacted in order to verify his story. The meeting adjourned, with both sides agreeing to reconvene at a later date.

[10] Following the meeting and on an unknown date, Mr Denton sought the advice of ESR, Nelson Nursing and two other drug specialists all of whom maintained that the level of cannabis allegedly consumed by Mr Kenmare over the holiday period and on 9 February 2014 was inconsistent with the excess levels present in his urine sample. Enquiries were also made by Mr Allen of J's employer who denied conducting any random drug testing in the months prior.

[11] On 18 February 2014, counsel for the plaintiff, Ms Sharma, wrote to

Mr Allen informing him that she had been instructed on behalf of the Union to act

for Mr Kenmare. Requests were also made for the availability of Mr Kenmare's ESR

results and the notes from the meeting.

[12] On 20 February 2014, Mr Allen wrote to Ms Sharma providing her with the requested documentation. The letter further recorded Mr Kenmare's explanations had been considered and that he would be advised of their decision at a meeting scheduled for 26 February 2014.

[13] On 25 February 2014, Ms Sharma wrote to Mr Allen objecting to what she considered to be an "outcomes meeting" and that Mr Kenmare was entitled to a "continued opportunity to be heard" given the lack of a support person in attendance on 14 February. Mr Allen responded to Ms Sharma the same day noting that Mr Kenmare had declined to have a support person present. Requests by Ms Sharma were also made for further information and documentation which were duly provided.

[14] On 26 February 2014, Mr Kenmare and Ms Sharma attended the meeting with Mr Allen and Mr Denton for Fulton Hogan, together with Ms Karen Connor, National HR Advisor and Mr Clive Lane, Surfacing/Transport Divisional Manager.

[15] Ms Sharma raised a number of concerns which were also outlined in a letter tabled at the meeting. These related to the fairness of the selection process for random drug testing, the lack of evidence to support the allegation that Mr Kenmare was under the influence at the time of testing, the failure of those in attendance at the 14 February meeting to believe Mr Kenmare's explanations, and issues in relation to Mr Kenmare being stood down without pay.

[16] On 28 February 2014, Mr Allen wrote to Ms Sharma stating that after considering Mr Kenmare's explanations and the concerns raised in the 26 February letter, the company had come to a preliminary view that Mr Kenmare should be dismissed for serious misconduct as a consequence of recording a non-negative result under the Company Drug and Alcohol Standard.

[17] On 7 March 2014, Ms Sharma responded on behalf of Mr Kenmare rejecting the grounds for dismissal as being substantively unjustified. On 10 March 2014, Mr Allen replied to Ms Sharma in response to her letter.

[18] That same day, Mr Allen wrote to Mr Kenmare informing him that his actions constituted serious misconduct justifying termination and that he was dismissed from his employment effective from 11 March 2014.

[19] On 14 March 2014, Mr Kenmare received results from an independent drug test taken by Nelson Nursing Services on 5 March. The results recorded a positive test with a THC level of 47 nanograms. On 17 March 2014, Mr Kenmare provided a further urine sample to the New Zealand Drug Detection Agency which recorded a negative result.

[20] On 17 March 2014, Mr Kenmare notified Fulton Hogan of his intention to apply to the Authority for urgent interim relief in

connection with his claim of unjustified dismissal. On 24 March 2014, the plaintiff filed an urgent application for interim relief and a statement of problem in the Authority setting out the grounds of his personal grievance claim.

The Authority's decision

[21] After reviewing the evidence, the Authority determined:

a) There was an arguable case that the dismissal was unjustified, although some elements of the plaintiff's claim were not as strong as others. The Authority held:

- There was not a strong arguable case that on the basis of relevant employment documents that Fulton Hogan was required to offer the opportunity of rehabilitation in the event of a first non-negative test

for cannabis.[3]

3 Interim reinstatement determination, above n 1, at [39].

- There was an arguable case that the plaintiff's representative was not provided with all information which had been obtained to conclude that Mr Kenmare's explanation was not credible, before the second disciplinary meeting.[4]

- It was strongly arguable that the names of those spoken to were not provided to Mr Kenmare before his employment was terminated, this being a matter which was relevant to the continuation of Mr Kenmare's employment.[5]

- There was an arguable case as to whether there was a proper selection of names for random testing.[6]

b) The Authority considered whether there was an arguable case for permanent reinstatement and concluded that there was a "tenable arguable case" for permanent reinstatement in the event that Mr Kenmare was found to have been unjustifiably dismissed.[7]

c) When assessing the balance of convenience, the Authority concluded that the untested affidavit evidence supported a conclusion that Mr Kenmare's arguable case for unjustified dismissal was stronger than his arguable case for permanent reinstatement.[8] The Authority accepted that Mr Kenmare wishes to return to work and that there would be inconvenience to him if he is not reinstated on an interim basis and then found to have been unjustifiably dismissed. It was accepted that the alternative remedy of damages would not be adequate, although Fulton Hogan was in a position to pay such a sum.[9] The Authority accepted that as Fulton Hogan operates in a safety sensitive environment, and because of the high THC readings, there would be a need to assume Mr Kenmare

was a potential hazard to himself and other employees in the workplace

4 At [42].

5 At [43].

6 At [46].

and he would need to be supervised very closely.[10] There would be considerable inconvenience to Fulton Hogan if they therefore had to accommodate Mr Kenmare returning to work until the substantive matter can be dealt with.[11] Accordingly, the balance of convenience favoured Fulton Hogan.[12]

d) In considering overall justice, the Authority proceeded on the basis that it could carry out the investigation promptly and offered the parties' dates on 20 and 21 May 2014. On that basis the Authority was satisfied that

the overall justice required the decline of interim relief.

Issues

[22] The principles by which applications for interim reinstatement are to be decided are well settled and not in dispute. They are:

a) Is there an arguable case of unjustified dismissal and if, after a substantive hearing, the dismissal is found to be unjustified, is there an arguable case for permanent reinstatement?

b) Is there an adequate alternative remedy such as damages?

c) Where does the balance of convenience lie?

d) What does the overall justice of the case require?

Arguable case

[23] As is often the case, those involved in the events which led to Mr Kenmare's dismissal have differing perceptions on some matters, and have drawn different conclusions about the meaning and significance of documents. This challenge proceeds on the basis of untested evidence. Whilst untested material is appropriately considered for the purposes of interim relief, it will be for the Authority following an

investigation meeting once all matters have been explored to conclude where the truth lies, particularly with regard to credibility issues of which there are a number in this proceeding.

[24] It is necessary to start with the provisions of the employment agreement, and the company's allied Drug and Alcohol Policy.

[25] Appendix B to the agreement sets out a regime for regular and random drug and alcohol testing throughout the Nelson Region, the purpose of this being to improve the safety of employees and worksites by removing, or at least significantly reducing the hazard that drug and alcohol abuse can present. The Appendix states that sampling and testing are to be carried out by a suitably qualified and trained health professional in a manner that is consistent with the National Drug and Alcohol Policy. It goes on to provide that after testing:

Employees that return a "negative" drug test will return to work. A "non-negative" result will be dealt with in accordance with the Fulton Hogan national Drug and Alcohol Policy. This policy includes an opportunity for the parties to enter into a rehabilitation programme.

...

Rehabilitation

Employees who enter the company rehabilitation programme will be stood down. While stood down they will be required to take either annual leave or leave without pay.

The length of the stand down period will be agreed between the employer and the employee but will typically be up to four weeks.

A negative result must be achieved before a return to work is permitted. Failure to achieve a negative result within the stand-down period will be considered serious misconduct and could lead to dismissal.

[26] Although reference is made in the employment agreement to a "company Drug and Alcohol Policy" this appears to be a reference to a "Drug and Alcohol Standard" which referred to pre-employment testing, internal transfer testing, post accident/incident testing and reasonable cause testing. It has provisions which describe rehabilitation processes, including:

10.2 Compulsory rehabilitation

Employees returning a positive drug and/or alcohol test for the first time in internal transfer, post-incident or reasonable cause testing and who are offered the opportunity of continuing employment are required to join the company sponsored Alcohol and Drug Rehabilitation Programme. Failure to take part or complete the programme may result in disciplinary action including dismissal. *NB: Fulton Hogan reserves the right not to offer rehabilitation.*

[27] Mr Kenmare argues that the Drug and Alcohol Standard does not refer to random drug testing, and that the proviso reserving the right not to offer rehabilitation does not apply to such testing. He relies on what he says is standard company practice for a first positive test. He points to evidence obtained from staff to the effect that, ordinarily, an employee providing a non-negative result in a random drug testing context is offered an opportunity to sign a rehabilitation contract.

[28] For its part, the company submits the Drug and Alcohol Standard applies. In it the employer reserves the right not to offer rehabilitation. Its standard approach is that when employees are found to have failed a drug test they are invited to attend a disciplinary meeting to provide an explanation. Once an explanation is given, the company considers whether or not the employee is a suitable candidate for rehabilitation. If the evidence shows that the employee is a habitual user and this is admitted Fulton Hogan will keep the job open and allow the employee to undergo a rehabilitation programme; in that circumstance the employee will generally be given a final written warning, so as to reinforce the seriousness of the employee's actions.

[29] For present purposes I find that Appendix B dealt with a particular addition, namely random drug testing. That was in addition to the other types of testing covered by the Drug and Alcohol Standard. But having provided for the additional possibility of random testing, the parties agreed in Appendix B that a "non-negative" result would be dealt with in accordance with the company's policy, including an opportunity for the parties to enter into a rehabilitation programme. Logically, the reference to the policy must include a reference to cl 10.2. Although rehabilitation is said to be "compulsory", the company reserved the right not to offer rehabilitation.

[30] The evidence suggests, however, that the refusal is exercised in a consistent way, with a consideration of whether the employee is a suitable candidate for

rehabilitation under the policy. It is arguable that the company has a right not to offer the opportunity of rehabilitation in the event of a first non-negative test for cannabis, but that discretion is to be exercised having regard to the suitability of the candidate.

[31] In determining whether a candidate is suitable for rehabilitation, a fair process should be adopted. In this case, Fulton Hogan acknowledges that the issue of rehabilitation was not discussed at either of the disciplinary meetings.

[32] It is strongly arguable that this was a significant procedural error because it precluded the possibility of an outcome other than dismissal being explored. Fulton Hogan asserted that this did not occur because the view was held that there would be no value in offering rehabilitation given the absence of an admission as to a drug problem, or any desire on Mr Kenmare's part to seek help from Fulton Hogan.

[33] Mr Allen considered Mr Kenmare had been deliberately evasive and had lied to him about his drug use and the circumstances in which cannabis had been consumed. He also concluded that it was not possible that a one-off instance use of cannabis by consuming cupcakes could give a significant (more than 300 nanograms) non-negative result approximately 50 hours after the consumption. He determined that the scientific evidence meant that on balance, Mr Kenmare was not telling the truth.

[34] The issue of Mr Kenmare's credibility arose from the statement he made at the first disciplinary meeting on 14 February 2014, when he claimed (according to company witnesses) that his friend J was also caught in a random test at work the same day. J works at X.13 According to evidence placed before the Court, Mr Allen rang the Managing Director of X and asked whether a random drug test had been conducted in the previous two months. Mr Allen was told that X had not conducted any random testing in recent months, and that the allegations were therefore incorrect. A letter was placed before the Court from the Managing Director of X

confirming he provided this information to Mr Allen. This letter was produced by

13 The identity of the individual and his employer has been anonymised by the Court.

Mr Allen and the information from the Managing Director of X is therefore hearsay evidence.

[35] On the basis of the untested evidence summarised, it is strongly arguable that Mr Kenmare's statement that J was drug tested by his employer X is incorrect. Whether it was a deliberate lie on his part is another question.

[36] On the question of whether this serious allegation was properly put, there are several conflicts:

a) Witnesses for the company asserted that the issue was raised at the second disciplinary meeting on 26 February 2014, but were not agreed as to how this occurred. Ms Connor said that the information obtained by Mr Allen from X was conveyed and that no response for or on behalf of Mr Kenmare was provided. She does not say who presented this information at the disciplinary meeting.

b) Mr Lane stated that he believed it was Mr Allen who told Mr Kenmare at

the meeting that the explanation about his friend's test was not credible.

c) For his part, Mr Allen said he thought it was Ms Connor who told Mr Kenmare and his representative that the third party company had advised that none of their staff had recently undertaken a random drug test, as had been claimed – although he then said he could not remember who made this statement.

d) Mr Denton said that Mr Allen stated that he had contacted the third party, and had obtained confirmation that nobody had been randomly tested by X in recent months. He said neither Mr Kenmare nor his representative responded to this.

e) For his part, Mr Kenmare stated in his affidavit in reply that this issue was not addressed by Fulton Hogan at all during the meeting, and that he was not asked any questions about it. He also relies on the fact that the

topic was not referred to in the letter sent to him by the employer two days later.

[37] It was intended by the parties that each would record the meeting. Unfortunately this did not happen. Notes were taken for Fulton Hogan but there is no reference in them to this topic.

[38] It is seriously arguable that a proper opportunity should have been given to deal with the issue of whether Mr Kenmare was lying either at the meeting on

26 February 2014, and/or by means of the employer's letter of 28 February. The issue was relevant to the question of whether Mr Kenmare was a suitable candidate for rehabilitation.14

[39] A further inadequacy with regard to the employer's process related to the multiple enquiries that were undertaken as to whether Mr Kenmare's account was plausible. The issue was whether the consumption of one or two cupcakes would give rise to a THC reading in excess of 300 nanograms more than 50 hours afterwards. It later transpired that the company had communicated with a health nurse at the Nelson Nursing Service who conducted the testing, an independent local drug and alcohol addiction specialist, a toxicologist from ESR, and a representative of the New Zealand Drug Detection Agency. Opinions varied on whether consumption of cannabis-laced cupcakes could produce such a high result.

[40] The parties disagree on the question of whether the issue was properly raised. Mr Allen stated that he thought Ms Connor had advised Mr Kenmare and his representative at the second disciplinary meeting of 26 February 2014 that professional advice had been sought; Ms Connor does not refer to the fact that she made such a statement at all. Nor is this topic referred to in the notes that were

taken.

14 In *George v Auckland Council* [2014] NZCA 209 (CA), the Court of Appeal recently considered the issue of process when an untruth is told in the course of a disciplinary process; the question was whether a lie could, in and of itself, constitute grounds for dismissal. The Court's dicta at [35]-[36] may need consideration in this proceeding.

[41] In the letter sent following the meeting of 28 February 2014, there was a rudimentary reference to this matter when it was stated:

The professional advice we have received suggests that Mr Kenmare had consumed greater quantities and/or more recent consumption of cannabis than he has stated.

[42] In a subsequent letter of 7 March 2014, Mr Kenmare's representative confirmed that despite requests for information on this issue, no further information had been provided to substantiate the allegation. It was not provided prior to the employer's decision to dismiss.

[43] This was an important issue which affected the credibility assessment which the employer undertook in respect of Mr Kenmare, and the related issue of whether he should be offered rehabilitation.

[44] It is strongly arguable that the information which the employer had obtained should have been conveyed to the employee and a proper opportunity given to him to respond.

[45] Mr Kenmare also raises an issue as to whether the employer complied with its own processes for random testing. The process of randomly selecting names for the undertaking of the drug testing was carried out by Mr Denton and Mr Hoani Takao, Chairperson of the Union. Each of the 150 employees in the Nelson area was assigned a number; the numbers were placed in a receptacle for random selection. Mr Takao drew 10 numbers. Mr Denton wrote the numbers on a separate piece of paper in the presence of Mr Takao. It appears that Mr Takao left prior to the completion of the write-up of the list of employees who would undergo random testing by Mr Denton.

[46] The company argues that the obligation under Appendix B of the employment agreement is simply for the relevant Fulton Hogan Manager and a representative of the Nelson Collective Union to jointly draw the names to be tested, and that this occurred. For Mr Kenmare it is argued that the agreement is that the two persons involved in the selection process were to remain until the process was completed – i.e. presumably the completion of the writing up of the names of 10

selected persons. It was submitted that due to the fact that the two representatives were not present for the entire process of identifying the employees to be randomly tested there was accordingly now an issue as to whether Mr Kenmare's name was indeed randomly selected and thus whether the process was valid. On the untested evidence I consider that this issue is arguable, though it has only modest prospects of success.

[47] Although other potential points were raised for Mr Kenmare, in view of the conclusions I have reached it is not necessary to consider those further. They can of course be pursued at the investigation meeting. To this point I conclude that there is a strongly arguable case that the dismissal was not justifiable.

Arguable case as to permanent reinstatement

[48] The next issue is whether Mr Kenmare has an arguable case for permanent reinstatement. The main point of contention between the parties relates to whether Mr Kenmare is a habitual user of cannabis.

[49] On this point, Fulton Hogan relies on expert evidence obtained from Dr P Fitzmaurice and Ms S Nolan. They say that the level of the random positive test does not support an assertion that Mr Kenmare had ingested only one or two "pot-cakes"; and that an analysis of both that test and the later sample provided on

5 March 2014 which confirmed positive at a level of 47 nanograms suggests Mr Kenmare may use small quantities of cannabis regularly. It is asserted that these conclusions are not affected by taking account of Mr Kenmare's body size or by the fact that the cannabis was ingested in cupcake form as opposed to it being smoked.

[50] Mr Kenmare has obtained rebuttal evidence from Dr L N Nixon, an Addiction Medicine Specialist. He disputes the above conclusions, and states that on clinical as well as pharmacological grounds there is a strong possibility that Mr Kenmare's observed levels of urinary THC are consistent with his explanation.

[51] Each side casts doubt on the validity of the opinion expressed by the other

side's expert(s), having regard to relevant expertise, independence, and the logic of

the views expressed by the expert. At this preliminary stage the Court considers that each side has expert evidence that tends to support its views, but that the Authority will be able to determine which views are more reliable after the expert evidence has been tested.

[52] Other evidence which will need to be considered on this issue relates to the relevance of certain information on Mr Kenmare's Facebook page as well as the extent of Mr Kenmare's history of cannabis use. At this stage it is not appropriate to express a view one way or the other.

[53] Mr Kenmare has considerable support from work colleagues. At least two of them consider from their own experience that Mr Kenmare is not a habitual drug user, there being no discernible evidence of impairment.

[54] Having regard to Dr Nixon's evidence and the evidence of persons who know Mr Kenmare, it is arguable that Mr Kenmare is not a habitual drug user. However, given the evidence of Dr Fitzmaurice and Ms Nolan I do not consider the issue to be strongly arguable. The expert evidence will also be important in determining what rehabilitation steps would be necessary if the Authority were to conclude that Mr Kenmare should be reinstated and rehabilitation is to be undertaken.

Alternative adequate remedy

[55] There is convincing evidence from Mr Kenmare that he is in difficult financial circumstances; his dire financial situation has understandably been catalysed by the absence of income since 11 February 2014 to this point. His expenses have been met by support from relatives, bank borrowings and some income. He has obtained a rent holiday in the short term, but believes this is not sustainable for the long term.

[56] The ability of Fulton Hogan to meet any award of compensation is not in dispute. But it is submitted for the company that given Mr Kenmare's impecunious state, he would not be in a position to pay damages if he was reinstated on an interim basis and then subsequently found by the Authority not to be entitled to that remedy.

[57] I conclude that an ultimate award of damages will not meet Mr Kenmare's immediate needs. His ability to pay damages to Fulton Hogan would be difficult, though given a relatively short period until the matter is determined, the quantum of that sum should not be significant. I do not regard the possibility of repayment as being impossible for Mr Kenmare who has demonstrated initiative in dealing with his financial plight to this point.

Balance of convenience

[58] The first factor which arises with regard to the balance of convenience is Mr Kenmare's impecuniosity. Although Mr Kenmare is very concerned about this issue, he has taken steps to obtain appropriate support. If, however, the period to the Authority's substantive determination becomes prolonged, Mr Kenmare will suffer enhanced financial pressure.

[59] The defendant contends that it operates in a safety sensitive environment, and requires its employees to perform safety sensitive tasks. Mr Denton's evidence is that Mr Kenmare's daily duties involve working on vertical structures, often on and around the wharf at Port Nelson to strengthen or reinforce wharf piles and decking; that he has frequently worked heights or under the dock at Port Nelson, over water and in confined spaces. He has used a range of power tools and mobile plant. This evidence is supported by similar evidence from other company witnesses.

[60] Mr Kenmare himself confirms that he works in safety sensitive areas. He said that his team is probably the one department of the company which is most exposed to safety sensitive sites and that in the past he has been involved with several different critical risk areas on a daily basis. This evidence is supported by the Civil Department Manager who supervises him.

[61] It is clear that there are potential health and safety risks for employees such as Mr Kenmare. The company's concerns are premised on the basis that it cannot be confident, given the events that have occurred that Mr Kenmare would not be drug impaired. Representatives of the employer believe Mr Kenmare has a drug problem

and that his lack of candour or apparent understanding of the realities means that he should not return to work on an interim basis.

[62] Once again these are issues which will have to be fully tested at the investigation meeting.

[63] This issue has to be assessed in light of the uncontroverted evidence that there were positive drug tests for Mr Kenmare in February and in March. Any reintroduction to the workplace, were it to occur under an order of reinstatement, will have to be carefully managed. As has been asserted for the company, there may have to be a period of supervision. A rehabilitation programme may have to be considered by the Authority. That would be very difficult to implement on an interim basis for a relatively short period.

[64] The balance of convenience accordingly favours Fulton Hogan.

Overall justice

[65] At this stage it is necessary to refer to the issue as to when the investigation meeting will occur. The approach of the Authority was that the application for interim reinstatement should be declined, but that there should be a prompt investigation meeting. Dates were offered in late May 2014.

[66] The plaintiff, through his counsel, elected not to proceed with the investigation meeting on the original dates offered by the Authority. New dates were proposed for early June. However there were perceived problems relating to one witness. These should have been readily capable of being resolved. The Authority Member reasonably vacated that particular fixture.

[67] The most recent advice provided by counsel is that the investigation meeting will now take place on 29 and 31 July 2014. Allowing for a short period within which the Authority Member will prepare her determination, I consider that the period for which the order for interim reinstatement would be made is, in the circumstances, confirmed.

[68] In summary, although Mr Kenmare has a strongly arguable case for unjustified dismissal, particularly with regard to procedural matters, his claim for permanent reinstatement is only arguable having regard to the complexity of the technical issues which have yet to be fully explored, which go to the question of whether or not Mr Kenmare is a habitual user. The period of the proposed interim reinstatement is in my view a significant factor. It is regrettable that the Authority Member has not been able to conduct the investigation meeting by now, as was proposed. Even now the period to determination is such that I conclude this application for interim reinstatement should not be granted.

[69] I reserve the issue of costs with regard to this application. That topic will be considered after completion of the proceedings which are before the Authority.

B A Corkill

Judge

Judgment signed at 9.30 am on 17 June 2014