

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 612
3247759

BETWEEN ETHAN O'BRIEN
 Applicant

AND C3 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell KC, counsel for the Applicant
 Tanya Waikato, counsel for the Respondent

Investigation: On the papers

Submissions received and other information: 28 and 30 August, 2, 5 and 16 October 2023 from the Applicant
 22 September and 11 October 2023 from the Respondent

Date of Determination: 18 October 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Ethan O'Brien was employed by C3 Limited ("C3") as a Stevedore in Auckland on 22 June 2022.

[2] He was dismissed for serious misconduct on 16 August 2023, relating to an invalid urine sample he provided during a random drug and alcohol test undertaken on 27 July 2023. Mr O'Brien sought interim reinstatement to his employment pending the determination of his substantive unjustified dismissal grievance claim.

[3] C3 said its dismissal of Mr O'Brien was justified. It strongly opposed reinstatement on health and safety grounds and on the basis trust and confidence had been irreparably damaged, because it believed Mr O'Brien had not provided a fresh urine sample when he was tested.

The Authority's investigation

[4] By agreement with the parties, this application for interim reinstatement has been determined 'on the papers'.

[5] Mr O'Brien lodged his affidavit on 28 August 2023, an affidavit from Mr Michael Robertson - Director and Senior Consultant of Independent Forensic Consulting Australia on 30 August 2023, and from Mr Russell Mayn - Secretary/Treasurer of the Auckland Branch of the Maritime Union of New Zealand ("*MUNZ*") on 2 October 2023.

[6] C3 lodged affidavits from Mr Coleman - Operations Manager of C3 Auckland, Mr Jeremy Lowe - Testing Technician for The Drug Detection Agency ("*TDDA*"), Mr Rodney Dale - TDDA Group Technical Manager on 22 September 2023.

[7] Mr O'Brien lodged submissions on 5 October 2023 and C3 lodged its submissions on 11 October 2023. Mr O'Brien lodged reply submissions on 16 October 2023.

Material Facts

[8] Mr O'Brien was employed under the Collective Employment Agreement MUNZ had with C3 dated 31 March 2022 – 1 December 2022 ("*the CEA*"). Mr O'Brien was employed on Four Weekly Guaranteed General Duties in Auckland, which meant he was guaranteed a minimum of 128 hours of work every four weeks.

[9] C3 has a Drugs and Alcohol at Work Policy and Drug and Alcohol Programme ("*D&A Policy*") which provides for a random testing programme for drugs and alcohol. TDDA undertakes C3's testing.

[10] TDDA is an Australasian accredited drug and alcohol testing company. It complies with international standards relating to testing protocols for drug and alcohol urine analysis. TDDA provides services to private companies and government agencies.

[11] In his acceptance of the offer of employment with C3, Mr O'Brien ticked the box next to the declaration that said:

I have received, understood and agreed to abide by the employment agreement, Code of Conduct, drug and alcohol policy, and other company policies and accept them fully.

[12] Mr O'Brien signed the acceptance form at the bottom, indicating his agreement to the declaration.

[13] On 27 July 2023 C3 conducted random drug and alcohol testing at the Port site through its external testing agency, TDDA. Mr O'Brien was selected for a random drug and alcohol test. Before Mr O'Brien was tested he had to complete a document that contained an "*informed consent*" section, which he did.

[14] Mr O'Brien undertook a monitored test, which was conducted in the TDDA testing van. He said the TDDA Testing Technician was standing nearby. When Mr O'Brien gave the Testing Technician his urine sample, the Technician noticed that the cup did not feel as warm as it should have. He also saw that the temperature strip on the testing cup had not been activated, which indicated that the urine sample was outside the required temperature range. The sample provided also had an abnormal level of creatinine.

[15] The Testing Technician spoke to Mr O'Brien and to Mr Coleman, who was TDDA's onsite point of contact that day. The Testing Technician advised Mr O'Brien and C3 that the urine sample he had provided was outside of the expected temperature range and had an abnormal level of creatinine.

[16] Mr Browne, as the relevant manager, was called to authorise the Testing Technician to explain the invalid test. He did so in a speaker phone call with Mr Browne and Mr Coleman. The Testing Technician advised that Mr O'Brien's test was invalidated because the urine sample had:

- (a) A temperature reading that was not between the expected range of 33-38 degrees Celsius, meaning it was not warm enough to be body temperature, so the sample had been too cold to activate the temperature strip on the testing cup; and
- (b) An abnormal creatinine reading below the minimum level of 20. Creatinine is produced by the kidneys and fresh urine will have a level over the minimum of 20. The adulterant tab on the testing cup showed the creatinine level on Mr O'Brien's testing cup was abnormal.

[17] The Testing Technician said these issues meant the urine sample could not be processed, so the test was invalidated.

[18] C3 said that these factors indicated that Mr O'Brien's urine sample had not been freshly provided by him at the time of the test. Mr O'Brien disputed that and said that the Testing Technician was standing nearby observing him when he provided the sample, so it could not have been adulterated, as alleged.

[19] Mr O'Brien claimed that he asked the Testing Technician and then his manager, Mr Coleman, if he could do another test. The Testing Technician said in his affidavit that he did not recall that request being made, while Mr Coleman in his affidavit strongly refuted that any such request had been made.

[20] Mr Coleman discussed a proposed suspension with Mr O'Brien, who did not have anything to say about it. Mr O'Brien was then suspended on full pay while an investigation into an allegation that he had supplied a false urine sample was undertaken by C3. On 28 July 2023 he was given a letter confirming his suspension, which attached a copy of the TDDA testing request form and comments.

[21] C3 held a disciplinary meeting on 31 July 2023 that was attended by Mr Coleman and C3's Human Resources Advisor, Ms Brittany Cannon (who attended by Zoom). Mr O'Brien attended with Mr Mayn, and Mr Billy Shrimpton from MUNZ.

[22] Mr O'Brien told the disciplinary meeting that the urine he supplied was his own and that he could not have adulterated the sample as suggested, because the Technician was standing beside him at the time he provided the sample. Mr Mayn challenged the validity of the test and pointed out that if the sample was said to be false, then it should have been sent away for testing, and another sample obtained. However, that had not occurred, making C3's allegations unjustified.

[23] C3 wrote a "*Preliminary outcome*" letter to Mr O'Brien dated 2 August 2023. C3 said it considered that Mr O'Brien had been unable to provide a reasonable explanation for why his urine sample was outside of the expected temperature range, or why the creatinine level was abnormal. It did not accept his explanation that the urine sample was his own.

[24] C3 confirmed that the drug test was a monitored test which meant that the tester was required to stand near the person producing the sample, as one step to ensure the test was not tampered with, but that the most accurate measure and indicator was on the adulterant tab on the drug cup.

[25] C3 said that TDDA did not send invalid drug tests for further testing and there was no indication or comment from the TDDA that the drug cup was faulty, although there was a clear indication that the test was invalid, based on the adulterant strip.

[26] The preliminary outcome letter stated that Mr O'Brien had signed the TDDA paperwork prior to the drug test that specifically stated:

I also certify that I will not adulterate or attempt to cheat either of the tests and the information provided on the form is true and correct with proof of identify.

[27] C3 said that it considered neither statement was true nor correct. C3 also said that Mr Coleman strongly denied that Mr O'Brien had requested a second test.

[28] C3 said that based on the information it had, it considered the allegations had been substantiated and amounted to a breach of the Code of Conduct. In particular it found that Mr O'Brien had:

- (a) Falsified a document (being the consent form that said he would not adulterate or cheat the tests);
- (b) Engaged in acts that seriously affected safety; and
- (c) Falsified a urine sample during a random drug and alcohol test.

[29] C3 proposed dismissal, as it considered Mr O'Brien's conduct put his own safety and the safety of others at risk and that his "*attempt to deceive strikes at the fundamental requirement of honesty and good faith in the employment relationship*".

[30] Mr O'Brien was given an opportunity to submit feedback on the preliminary outcome by 4pm on 4 August 2023 and was advised that if there was no further comment, then his employment would be terminated on 4 August 2023.

[31] That deadline was extended to 4pm on 7 August 2023. Mr O'Brien's counsel provided written feedback in an emailed letter dated 7 August 2023, that was sent to the email address recorded on C3's 2 August 2023 letter. However, the email never got to the decision maker by the agreed deadline, due to various email/IT issues.

[32] Mr Coleman made the decision to dismiss Mr O'Brien on 8 August 2023, with effect from 7 August 2023.

[33] Mr O'Brien's counsel's feedback said the Australian and New Zealand Standard AS/NZS 4308:2008 Procedures for Specimen Collection and Detection and Quantification of Drugs of Abuse in Urine ("*the Standard*") which sets out the procedure that is required for a urine drug test had not been met. Clause 2.3.3(h) of the Standard states:

If the integrity of the specimen cannot be established, then another urine specimen shall be collected and both forwarded to the laboratory for drug and specimen integrity testing.

[34] Mr O'Brien therefore said his sample should have been laboratory tested, and that did not occur. It was therefore not reasonable to conclude that the sample was adulterated. C3 had not investigated the circumstances of the collection of the sample, including Mr O'Brien's opportunity to provide a false sample. The falsification of documentation allegation could not be relied on, as there was no basis for it.

[35] The feedback was seen by Mr Browne on 9 August 2023 and he said that, while he considered the points made, these did not change his decision to dismiss Mr O'Brien. Mr Browne said that the feedback letter raised many of the same issues that had been raised in the disciplinary meeting, plus three additional issues that were:

- (a) C3 had not taken further steps to investigate the matters raised by Mr O'Brien regarding whether he adulterated the test;
- (b) C3 was not compliant with the AS/NZS Standard 4038 in the Testing Procedure; and
- (c) C3 relied on an allegation of falsifying documentation, and there was no basis for a finding that a document had been falsified.

[36] In terms of his specific response to the feedback received, Mr Browne concluded that:

- (a) C3 was not required to take any further steps to investigate Mr O'Brien's claim that he did not adulterate the test. His explanation that the test could not have been adulterated because the Technician was standing next to him when he provided the sample was rejected, because the adulterant tab showed that the temperature and creatinine levels were abnormal, which C3 considered to be more accurate than the test monitoring by the Testing Technician;
- (b) C3 was not required to comply with the full AS/NZS Standard 4308 because it was a voluntary standard and not a mandatory legal requirement for drug and

alcohol testing. C3 had a comprehensive D & A Policy that had been developed in conjunction with TDDA. Although parts of the AS/NZS Standard 4308 were incorporated into the D & A Policy, not all of it was. Therefore compliance with the full AS/NZS Standard 4038 was not required;

- (c) Mr Browne considered that Mr O'Brien did falsify documentation because the testing consent form he signed contained a certification that he would not adulterate the test. Mr Browne said that was false, because the test had been adulterated. Mr Browne therefore concluded that Mr O'Brien had attempted to cheat the test, contrary to the certification in the consent form he had signed. C3 therefore believed that the 'falsification of the consent form allegation' and been proven.

[37] Mr Browne also pointed out that at no time during the process did Mr O'Brien say that he did not partake in drug use, or that he was willing or comfortable to undertake another drug test to demonstrate that. However, that ignores Mr O'Brien's affidavit evidence that when he was told the test was invalid he had twice asked for another urine sample to be taken.

[38] Mr O'Brien did not receive a dismissal letter, so only found out his employment had ended when he received his final pay and payslip on 16 August 2023.

[39] C3 said it had informed him in its preliminary decision letter dated 2 August 2023 that if he provided no further comment his employment would be terminated on 4 August 2023, so there was no need for a separate dismissal letter. However, there was in fact further comment, so he could reasonably have expected C3 to have responded to that.

[40] Mr O'Brien claimed his dismissal was procedurally and substantively unjustified. He denied providing a false urine sample, nobody saw him do anything regarding exchanging a sample and he did not keep a sample on him, contrary to what C3 had alleged was possible.

[41] Mr O'Brien said there was no reliable evidence of falsification and C3 should only have determined that the sample had been adulterated following analysis of the sample by a laboratory.

[42] He said C3 had not followed the correct procedure set out in the Standard, because it did not test the sample that had been collected and a second sample was not collected and tested. Mr Robertson, in his capacity as an expert witness, said in his affidavit in the absence

of collecting and testing in conformance with the Standard, no conclusion can be reached with respect to the authenticity of the provided sample, based solely on the events on 27 July 2023.

Relevant law

[43] In determining whether to order interim reinstatement, the Authority must apply the law regarding interim injunctions and have regard to the object of the Act, see s 127(4) of the Employment Relations Act 2000 (“*the Act*”). One of the objects in s 3 of the Act is to build productive employment relationships through promoting good faith behaviour in all aspects of employment relationships.

[44] The relevant principles that apply to an assessment of interim reinstatement involve a three step process: evaluating whether or not Mr O’Brien had “*an arguable case*”; assessing where the balance of convenience lay between now and when his substantive grievance would be determined; and assessing the overall justice of the matter.¹

[45] Because this is an interim reinstatement application, the Authority proceeded on the basis that Mr O’Brien, and his witnesses, will be able to prove the matters they have deposed to in their affidavit evidence.

[46] At the initial step, Mr O’Brien must show he has an arguable case, one with a possible (but not necessarily certain) prospect of success, meaning it must not be merely frivolous or vexatious.

[47] In Mr O’Brien’s case, to reach the threshold of an arguable case he must affirmatively establish that there was a tenable argument that the decision made to dismiss him, and how that decision was reached, did not meet the statutory justification test in s 103A(2) of the Act.

[48] Secondly, in the event that the Authority did conclude that he had been substantively unjustifiably dismissed, then did Mr O’Brien also have a tenable argument that he would have a realistic prospect of reinstatement as one of his remedies, to the same position or another position no less advantageous?

[49] The next step looked at the balance of convenience during the interim period until the Authority was able to determine his substantive unjustified dismissal grievance.

¹ XYZ v ABC [2017] NZEmpC 40 at [5] and [6].

[50] This factor involved an assessment by the Authority of the relevant impact on Mr O'Brien, C3 and others of granting or refusing to grant him interim reinstatement. Factors to be weighed will include the impact on third parties and whether other remedies that might ultimately be ordered would be adequate in the circumstances.

[51] The third step requires the Authority to stand back from the detail that has been assessed in the earlier steps to consider the overall interests of justice. This may include an evaluation of the merits of the case, insofar as they can be discerned at an interim stage.

[52] Pursuant to s 127(5) of the Act, the Authority may make any reinstatement order subject to any conditions it thinks fit.

C3's evidence that was challenged by Mr O'Brien

[53] Although the Authority has a wide discretion which is not constrained by legal technicalities to consider relevant evidence, it put to one side hearsay evidence provided by Mr Browne in his affidavit that related to information passed to him by other staff in confidence since Mr O'Brien's dismissal.

[54] C3 should have provided affidavits from those employees, if it believed they had credible and relevant information regarding this interim reinstatement application. That has not occurred, so it would be unfair to Mr O'Brien to have to answer such vague and non-specific implied criticisms of him by unidentified co-workers. Accordingly this evidence was not given any weight.

[55] Mr O'Brien challenged the expert status of Mr Dale, who is a former New Zealand Police Officer, a qualified Detective and someone who served in the Drug Squad while in the Police. Mr Dale is the Group Technical Manager for TDDA. Mr O'Brien said Mr Dale should not be viewed by the Authority as an expert witness because his opinion was not independent of the parties and pressures of litigation, because of TDDA's role in the matter.

[56] That submission was not accepted. Mr Dale's evidence was helpful and relevant, so it was appropriate that it be considered by the Authority.

[57] Mr Dale responded to Mr Robertson's affidavit. Mr Dale explained how the Standard applied in New Zealand. He also provided information about how there can be a number of valid practical reasons as to why an organisation administering testing (such as C3) may choose

not to obtain a second urine sample and send both samples for testing. He also gave information about upcoming changes to the Standard.

[58] Mr Dale confirmed that the testing process and the Testing Technician's actions, as described in his affidavit, complied with the legal requirements for workplace drug and alcohol testing in New Zealand.

Issues

[59] The following issues are to be determined:

- (a) Does Mr O'Brien have an arguable case regarding his substantive unjustified dismissal claim?
- (b) If so, does Mr O'Brien have an arguable case regarding the remedy of reinstatement?
- (c) If so, where does the balance of convenience lie?
- (d) What does the overall justice of the case require?
- (e) What if any costs should the successful party be awarded?

Does Mr O'Brien have an arguable case for unjustified dismissal?

[60] There is a material dispute between the parties regarding whether or not Mr O'Brien asked for a second urine sample to be tested. To that extent, there is also an arguable case as to whether or not the request was in fact made and if so, whether it was in the range of reasonable responses open to a fair and reasonable employer to decline such a request.

[61] There is also an arguable case as to whether or not C3 could fairly and reasonably have concluded that Mr O'Brien had adulterated the sample when the urine test was randomised and monitored. On the face of it there is an issue as to whether C3 properly investigated the reasons for the invalid test, and whether it adequately considered Mr O'Brien's response to the disciplinary allegations. There was no evidence provided by the Testing Technician regarding the nature or extent of the monitoring that occurred.

[62] Whether or not there is an arguable case is a low bar to clear. Mr O'Brien's claims are not frivolous or vexatious, because he denied the conduct for which he was dismissed. Mr O'Brien has established he had an arguable case regarding his unjustified dismissal claim.

Does Mr O'Brien have an arguable case for reinstatement, if his unjustified dismissal claim succeeds?

[63] Section 125 of the Act provides that reinstatement is to be the primary remedy, subject to it being reasonable and practicable. Because it is the primary remedy, and Mr O'Brien is seeking reinstatement, it follows that he has an arguable case that if his unjustified dismissal claim succeeds then he will be reinstated.

[64] Although C3 claimed that trust and confidence have been destroyed, if Mr O'Brien's arguments succeed, namely that C3 could not have fairly or reasonably concluded that he had adulterated his urine sample and/or that the consent form he signed was untrue, then the trust and confidence issues it relied on as a reason for not reinstating him would not be valid.

[65] Likewise, if Mr O'Brien's dismissal was held to be substantively unjustified then the health and safety concerns C3 have raised would likely no longer apply. Accordingly, Mr O'Brien has established he has an arguable case for reinstatement if his dismissal grievance succeeds.

Where does the balance of convenience lie?

[66] The balance of convenience requires the Authority to weigh the potential effects of failing to reinstate Mr O'Brien against the potential effects on C3 if interim reinstatement was granted. This comparison is sometimes referred to as a consideration by the Authority of the relative hardships to the parties and to any relevant third parties.²

[67] The period under assessment is from the date of this interim reinstatement determination until the date of issue of the Authority's substantive determination regarding Mr O'Brien's unjustified dismissal claim.

[68] An investigation meeting has not yet been set down, but it will not occur this year. The statutory deadline for the issuing of a determination is three months after the investigation meeting, or the last information lodged by the parties, whichever is the later. That means the interim period could be many months. That factor weights in Mr O'Brien's favour.

² *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

[69] An evaluation by the Authority of the relative strength or weakness of Mr O'Brien's case can assist when assessing the balance of convenience. This evaluation is reached from reading untested affidavit evidence and from considering the parties' submissions.

[70] At this stage of the Authority's investigation, conclusions reached are provisional only and therefore may be subject to change once the evidence can be fully tested through questioning at the eventual substantive investigation meeting by the Authority and/or cross examination during an investigation meeting by the opposing party.

[71] Mr O'Brien's argument that because his urine sample was invalid, C3 had to send it off to a laboratory for testing and/or obtain a second sample appeared to have some merit. The Standard sets the criteria for the collection and detection of onsite urine specimens to ensure testing integrity.

[72] A fair and reasonable employer would likely be expected to conduct the collection and testing of samples in a manner that ensures the same level of integrity for the samples its workforce provides, that the Standard sets.

[73] Mr O'Brien did not supply any financial information about his personal, family or living circumstances, other than saying he had four children and was separated from their mother. However, based on its experience of such matter the Authority considered it likely that Mr O'Brien would be adversely affected by the loss of his income.

[74] Mr O'Brien said he is a highly skilled stevedore who can drive cranes, top lifters, forklifts and other equipment. He is therefore able to be a valuable asset in the workplace, if he was interim reinstated. He also provided transport to his brother, who also worked at the Ports of Auckland, to get to and from work.

[75] C3 focused on the loss of trust and confidence inherent in the employment relationship and on the risk that Mr O'Brien presented to himself and others if he was returned to the high risk work environment of the Ports of Auckland, which has had a fatality occur in the previous year.

[76] The Authority put C3's trust and confidence concerns to one side, as that was in dispute and as yet untested.

[77] However, the health and safety aspect of C3's concerns was highly relevant, and warranted very careful consideration. Mr Browne stated in his affidavit that C3:

cannot accept the very real possibility that if Ethan is reinstated, his actions could cause serious injury or even a fatality. I do not trust him anymore and I believe that he tried to cheat the drug test.

[78] The difficulty with that evidence was that it appeared to be highly speculative. Mr O'Brien did not test positive for drugs and there was no evidence he had ever been observed to be under the influence of drugs or alcohol in the workplace. He denied adulterating the sample and said he had immediately asked for another test to be done.

[79] Although C3 identified three documented health and safety incidents involving Mr O'Brien during the 16 months he had been employed, none of them had involved drug or alcohol related concerns. Nor were any of them serious enough to have resulted in a formal disciplinary process or disciplinary action. These incidents therefore did not make interim reinstatement unsuitable.

[80] C3 believed that granting Mr O'Brien interim reinstatement could potentially result in either serious injury or fatality to himself, a fellow worker or a third party at Ports of Auckland because his job required him to drive cranes, top loaders and forklifts. However, that presupposed he would have failed the random drug test, when the urine sample he provided was not actually tested. The sample was invalidated, for the reasons identified.

[81] The Authority is concerned that C3 has overstated what it described as a "*very clear and substantial risk to health and safety of others*" given the only evidence that was based on was the invalidated test, which Mr O'Brien said he was not responsible for. He is entitled to the benefit of the doubt in the intervening period.

[82] It was important that the Authority objectively weighed C3's health and safety concerns against the financial losses Mr O'Brien would suffer if his interim reinstatement application was unsuccessful, but he later succeeded on his substantive unjustified dismissal claim.

[83] The Authority acknowledged that the nature of Mr O'Brien's role (driving heavy machinery) and the safety sensitive work environment of the Port presented real and potentially very serious health and safety risks if employees who were under the influence of drugs or

alcohol were allowed to operate in the workplace. That was obviously not a situation that can be allowed to occur.

[84] However, the Authority has concluded that its power to impose conditions on an interim reinstatement order provides an adequate mechanism for addressing C3's health and safety concerns, by managing any perceived risk it has about Mr O'Brien in particular. This is discussed in paragraphs [88] to [90] and [94].

[85] After weighing all of the various factors, the Authority concluded that the balance of convenience weighed in favour of interim reinstatement.

What does the overall justice of the case require?

[86] The Authority did not accept C3's submission that Mr O'Brien would not be able to reintegrate back into the business because there had been a complete loss of trust and confidence in him as a result of his deceptive and dishonest conduct.

[87] Although C3 said his managers no longer trusted him as a result of his dishonesty, and the employment relationship was no longer viable, that is yet to be tested. Mr O'Brien denied the allegations against him and he is entitled to the benefit of the doubt in that regard during the interim period.

[88] Imposing a condition that Mr O'Brien had to pass a valid drug and alcohol test that had been conducted in the 24 hours before he returns to the workplace would appropriately meet the health and safety aspect of this matter.

[89] That would reassure C3 that Mr O'Brien was drug and alcohol free when he returned to work. C3 then had its normal powers under the D&A Policy, which also applied to all other employees, to require Mr O'Brien to undergo random drug and alcohol testing, for cause testing and post incident testing.

[90] That would enable C3 to adequately monitor and manage any potential health or safety concerns it had about Mr O'Brien after he returned to the workplace.

[91] The overall interests of justice in this case require that Mr O'Brien be allowed to return to the workplace in the interim.

Outcome

[92] Mr O'Brien's interim reinstatement application succeeds. He established he has an arguable case regarding his dismissal grievance and if successful for reinstatement as a remedy. The balance of convenience and overall justice also weighed in his favour.

[93] Accordingly, within seven days of the date of this determination (or alternative date the parties agree on) C3 is ordered to interim reinstate Mr O'Brien to the role he was dismissed from, subject to the condition below, until further order of the Authority.

[94] Mr O'Brien's interim reinstatement is subject to the condition that he must pass a valid drug and alcohol test in the 24 hours before he returns to work. After he returns to work, C3 may continue to manage, monitor and test him as it is permitted to do under the D&A Policy.

Costs

[95] Mr O'Brien as the successful party is entitled to a contribution towards its actual costs.

[96] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr O'Brien has 14 days within which to lodge costs submissions and C3 has 14 days from receipt of them to lodge its costs submissions.

[97] The Authority's preliminary view, subject to the parties' submissions, is that this matter should be treated as involving a half day investigation meeting, for the purposes of applying the Authority's usual notional daily tariff based approach to assessing costs. The parties are therefore invited to identify any factors they say should result in the notional starting tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority