IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 6
EMPC 387/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	C3 LIMITED Plaintiff
AND	ETHAN O'BRIEN Defendant

Hearing:	1 December 2023 (Heard at Auckland)
Appearances:	T Waikato and P Anderson, counsel for plaintiff S Mitchell KC, counsel and A Drumm, advocate for defendant
Judgment:	23 January 2024

JUDGMENT OF JUDGE M S KING

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[1] The plaintiff, C3 Ltd, challenges a preliminary determination of the Employment Relations Authority (the Authority) in which the Authority granted Ethan O'Brien's application for interim reinstatement.[1] This judgment resolves that challenge.

[2] The Authority's determination sets out the background facts in some detail.[2] The parties have filed further affidavit evidence with the Court. The key facts follow:

(a) C3 Ltd provides stevedoring services at the Auckland port operated by Ports of Auckland Ltd (POAL). Like any port, the workplace is

1 *O'Brien v C3 Ltd* [2023] NZERA 612 (Member Larmer).
2 At [8]–[52].

considered a high-risk working environment from a health and safety perspective. It is an environment where a large number of different parties interact within a restricted space and it involves the use of heavy machinery, overhead loads and vehicles. In the past decade, New Zealand has had 18 deaths and 397 reported injuries in its ports. As recently as 19 April 2022 a worker from another stevedoring company died after he was crushed under a container while working on a docked container ship at the POAL. This recent fatality, combined with the high number of fatalities and injuries on ports across New Zealand, highlights the very serious risks to worker health and safety within the POAL environment. In such a high-risk environment, drug and alcohol testing of workers is considered a critical health and safety measure.

(b) On 22 June 2022, Mr O'Brien commenced employment with C3 Ltd as a stevedore in Auckland. He had worked for the company as a stevedore for approximately seven years at another port. His role involved him operating heavy machinery such as cranes, top lifters and forklifts.

(c) During the 13 months Mr O'Brien had worked at the POAL site there had been some incidents:

(i) Within the first six months of starting work, Mr O'Brien was issued with a health and safety breach notice for driving a motorcycle on the port without a helmet or licence.

(ii) In May 2023, two further incidents occurred where Mr O'Brien made errors which resulted in damage being caused to client vehicles. C3 Ltd considers these incidents to also be health and safety breaches.

(iii) On 17 July 2023, Mr O'Brien attempted to enter the POAL site without his access identification card (access card) which is a

POAL site entry requirement; there are no exceptions.[3] Although, Mr O'Brien was denied entry by the POAL security staff, he attempted to surreptitiously enter the site again without his access card but was subsequently stopped by security.

These issues do not appear to have been treated seriously by C3 Ltd at the time. It did not commence any formal disciplinary investigation or take disciplinary action against Mr O'Brien in regard to any of the above incidents.[4]

(d) Due to the high-risk work environment, C3 Ltd has a Drugs and Alcohol at Work Policy and a Drug and Alcohol Programme (D & A Policy) which provides for random drug testing for drugs and alcohol. The relevant section of the policy is:

> **5.3 Not-negative or Positive test result (C3 workers)**
>
> If the alcohol test is positive or the drug test specimen returns a not-negative screening result, *or its integrity is suspect*:
>
> - *Advise the worker of a potential suspension and the consequences of a confirmed positive drug or alcohol result: disciplinary action, up to and including termination.*
>
> - *Arrange safe transport home for the worker.*
>
> Drug test confirmations are usually available in 2-5 days. C3 will notify the worker of the test result as soon as reasonably practicable.

(*emphasis* added)

(e) C3 Ltd incorporates some aspects of the Australian New Zealand Standard 4308:2008 *Procedures for specimen collection and the*

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3 POAL's requires workers to have an access card for entry into the POAL for health and safety reasons, as well as it being a Custom-Controlled Area and Biosecurity Area under its approved Port of First Arrival for sea craft. Workers must undertake a POAL health and safety induction in order to receive an access card and this has to be kept current.

4 Save for the issuing of a health and safety breach notice for the motorcycle incident at n [2(c)(i)] above which was issued without C3 Ltd undertaking any disciplinary investigation.

detection and quantitation of drugs of abuse in urine (Standard) into its D & A Policy as well as aspects of two other standards.[5]

(f) The Standard is a voluntary "best practice" model. The relevant clause of the Standard is cl 2.3.3(h) which provides:

> 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.[6]

C3 Ltd has accepted that, under the Standard, it is considered best practice that, where there are issues with a specimen's integrity that may indicate tampering (such as the use of fake urine or other types of adulteration), to request a second sample from the employee and to send both samples to the laboratory to be analysed.

(g) However, C3 Ltd elected not to include the full Standard into its D & A Policy. The D & A Policy does not require a second test to be taken and for the original sample which has suspect integrity to be sent to a laboratory to be analysed.

(h) On 27 July 2023, C3 Ltd conducted random drug and alcohol testing at its POAL site through its external testing agency, The Drug Detection Agency (TDDA). Mr O'Brien was randomly selected for testing. His manager, Bruce Coleman, drove to the ship where Mr O'Brien was working and advised him that he had been selected for random testing. He then drove Mr O'Brien to the onsite testing van.

(i) Mr O'Brien completed the testing consent forms and a TDDA technician explained to him the monitored urine testing process and handed him the urine test cup. The test cup is manufactured by

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5 Australian Standard 3547:2019 Breath Alcohol Testing Devices and Australian New Zealand Standard 4760-2019 Procedure for specimen collection and the detection and quantification of drugs in oral fluid.

6 The Standard was updated on 1 November 2023 after the event to amend the wording of cl 2.3.3(h) to provide: "… another urine specimen *should* be collected..." (emphasis added). Under the updated standard it is still considered best to request a second sample where there are issues with a specimen's integrity.

Nexscreen, USA. It has a thermal temperature strip that reacts to the temperature of urine and can measure temperature between 33 and 38 degrees Celsius, which is generally the temperature of the human body, plus or minus a couple of degrees. The test cup also has a colorimetric strip for measuring creatinine levels. Creatinine is produced by the kidneys. The minimum level of creatinine in a valid sample is over 20 and the test cup will indicate if this minimum level of creatinine is not present.

(j) When Mr O'Brien gave his urine sample, the technician stood behind and to the side of him, near the testing van's door. His evidence was that he was not able to see Mr O'Brien's genitals or urine stream as the sample was being provided. The technician could only see that he took the cup and that his arms were held in front of him in the region of his genital area while the sample was being provided.

(k) The technician's evidence was that the test cup was just over half full, and the cup did not feel as warm as it should have when Mr O'Brien handed it to him. The technician advised Mr O'Brien that the thermal strip had not been activated, which indicated that the sample was outside the required temperature range, so he was unable to continue with the sample, and would be invalidating the test. The technician did not inform Mr O'Brien that his sample had also failed to meet the minimum level of creatinine required for a valid sample.

(l) Mr O'Brien's evidence was that he asked the technician and then his manager, Mr Coleman, whether he could undertake another test. The technician does not recall that request being made and Mr Coleman strongly refutes that any request was made. Mr O'Brien was then sent home and suspended from work.

(m) On 28 July 2023, Mr O'Brien received a letter inviting him to attend a disciplinary meeting. He was informed that C3 Ltd was investigating the allegation that he had supplied a false urine sample. The letter

stated that "TDDA commented in the adulterant section that the collected sample is outside the expected temperature range (33-38 degrees) and the creatinine value is abnormal <20…".

(n) On 31 July 2023, C3 Ltd convened a disciplinary meeting. Mr O'Brien said at 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 monitoring him when he provided the sample. Mr O'Brien's union representative, Russell Mayn, challenged the validity of the test. He questioned whether the test cup was faulty, and the testing strips had failed. He pointed out that, if the sample was said to be false, then they should have requested a second sample and sent both samples away for testing.

(o) On 2 August 2023, C3 Ltd wrote to Mr O'Brien setting out its "preliminary decision". It considered 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 that the urine sample was his own. C3 Ltd accepted that the test was monitored by a technician standing nearby and that that was one step to ensure that the test was not tampered with. However, it considered the most accurate measure, and indicator of whether a sample had been tampered with, were the testing strips on the testing cup. C3 Ltd asserted that TDDA does not send invalid drug tests for further testing and that there was no indication that the drug cup was faulty.

(p) On 7 August 2023, C3 Ltd upheld its preliminary view as set out in its 2 August 2023 letter and dismissed Mr O'Brien.

The applicable principles

[3] There was no dispute between the parties as to the applicable law governing the plaintiff's challenge.

[4] Interim reinstatement is provided for in s 127 of the Employment Relations Act 2000 (the Act) pursuant to which the Authority may, if it thinks fit, make an order for the interim reinstatement of an employee pending the hearing of the employee's personal grievance. The Authority must apply the law relating to interim injunctions, having regard to the object of the Act.

[5] In considering an application for interim reinstatement, the Authority (or Court) must:[7]

(a) determine whether there was a serious question to be tried (or conversely whether the claim is vexatious or frivolous);

(b) consider the balance of convenience; and

(c) assess the overall justice.

[6] The test for whether there is a serious question involves two components:[8]

(a) whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal; and

(b) if so, whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

[7] The threshold in considering whether there is a serious question to be tried is low.[9]

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7 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]; and *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [6].

8 *Humphrey*, above n 7, at [7].

9 At [8].

There is a serious question to be tried on unjustified dismissal

[8] Mr Mitchell KC, on behalf of Mr O'Brien, submitted that there is a serious question to be tried about whether Mr O'Brien's dismissal was unjustified. The key elements of his submissions were:

(a) C3 Ltd has not acted as a reasonable employer could have, as it did not comply with the relevant Standard when Mr O'Brien's drug and alcohol test was undertaken.[10] The Standard provides that if the integrity of a specimen cannot be established, then another urine specimen shall be collected and both samples forwarded to the laboratory for testing. A fair and reasonable employer cannot pick and choose parts of the Standard they will follow and which parts they will not. There needs to be a very good reason to depart from the Standard, which is not the case here.

(b) C3 Ltd has not acted as a fair and reasonable employer, as it did not investigate Mr O'Brien's explanation that the urine sample he provided was his own and that his ability to provide a false or adulterated sample was extremely unlikely due to it being a random, monitored test. Nor did it take into account his denial that he had provided a false or adulterated test sample, his concern that the testing strips on the test cup were faulty and his offer to provide a second sample. Mr O'Brien's dismissal was based on the evidence of the testing strips without sufficient investigation by C3 Ltd into his explanations.

(c) Mr O'Brien's drug test was invalid. He has not tested positive for drugs. There is no evidence Mr O'Brien had ever been observed to be under the influence of drugs or alcohol.

(d) C3 Ltd's D & A Policy requires a not-negative drug test to be confirmed by a laboratory as positive before relying on it to justify dismissal. Mr Mitchell submits it is unfair, unreasonable and disparate that the D & A

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[10] See above at n 3.

Policy does not require laboratory confirmation for an invalid drug test, before C3 Ltd could rely on the test result to terminate Mr O'Brien's employment.

(e) If C3 Ltd considers that drug testing reduces risks in its workplace and provides it with comfort that a worker is safe, Mr Mitchell submits, that C3 Ltd will not have a problem with Mr O'Brien being reinstated on an interim basis, on the condition that drug and alcohol testing occurs prior to reinstatement and ongoing testing occurs, as the Court considers appropriate. It was submitted that such testing would ensure that Mr O'Brien was drug free and would pose no greater risk than any other employee employed by C3 Ltd during this interim period.

[9] C3 Ltd submits that its dismissal of Mr O'Brien was justified. It strongly opposed reinstatement, its key submissions being:

(a) The health and safety risks arising from Mr O'Brien being reinstated to the workplace are unacceptable in the high-risk POAL environment. His dishonesty during the disciplinary process has irreparably damaged the trust and confidence required in their employment relationship, making reinstatement impossible.[11]

(b) Health and safety are paramount considerations. Any difficulties that may be experienced by Mr O'Brien until the substantive hearing of his grievance can be addressed by way of compensation by C3 Ltd. However, the undertaking provided by Mr O'Brien for the damages that may be sustained by C3 Ltd through the granting of an order of interim reinstatement will be wholly inadequate if a serious injury or fatality results from his reinstatement.

(c) Mr O'Brien's employment record shows a propensity to flout health and safety protocols and a deliberate intention to deceive in order to

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[11] See [2(1)] above; C3 Ltd considers Mr O'Brien's claim that he requested to provide a second sample to be dishonest.

gain access to the POAL work environment. These factors escalate the health and safety risks associated with Mr O'Brien's reinstatement to the high trust, high risk, POAL environment to an unacceptable level.

(d) C3 Ltd's operations are 24 hours per day, seven days per week. Mr O'Brien, as a stevedore, works day and night shifts. There are significant costs and impracticalities if the Court were to impose weekly or more frequent drug testing. Further there is no expert evidence to assist the Court in determining what testing regime would be practical, safe and appropriate in the circumstances.

[10] There is an evidential dispute over whether Mr O'Brien offered to provide a second sample for testing when he spoke to the TDDA technician and Mr Coleman following his invalid drug test result. Mr Coleman strongly denies that any such offer was made, and the technician is unable to recall whether an offer was made or not. While this dispute will need to be considered in Mr O'Brien's substantive hearing, there is an arguable case as to whether or not Mr O'Brien offered to provide a second sample for testing, and it was open to a fair and reasonable employer to decline such a request in the circumstances.

[11] Even if it was to be found, in the substantive hearing of this matter, that Mr O'Brien had not offered to provide a second sample, it is arguable that C3 Ltd's failure to obtain a second sample to be tested on its own volition, was not within the range of responses open to a fair and reasonable employer in the circumstances. The circumstances include the Standard, which provides that it is best practice to obtain a second sample for testing in such cases, together with Mr O'Brien's denial that he had provided a false or adulterated sample and his limited ability to be able to do either during a monitored, random drug test.

[12] It is also arguable that C3 Ltd did not fairly or reasonably investigate Mr O'Brien's explanation that it was not feasible for him to provide a false or adulterated sample during a monitored, random drug test and his belief that the testing strip on the test cup was faulty. This is particularly so, given the expert evidence, which included:

(a) Mr O'Brien's expert witness, Dr Dougal Watson, gave evidence that a sample could conceivably return both a low temperature and creatinine results if, for example, the test subject added cold water to dilute their own urine. However, in his opinion, this possibility was extremely unlikely given the test was monitored. In the circumstances, he questioned whether there was some issue with the test cup or the methodology of testing.

(b) Rodney Dale, group technical manager of TDDA, provided evidence on behalf of C3 Ltd on the reliability of the test cup used.[12] He advised that TDDA monitored when temperature and creatinine results were outside of normal parameters via a reconciliation register that compared the onsite test with the laboratory test result. He noted that sometimes there is a slight difference between the two results and that the laboratory test was able to provide a more specific quantitated value for the creatinine than the onsite test. No explanation was given as to why Mr O'Brien's sample was not sent to the laboratory for testing as part of TDDA's reconciliation process.

[13] If C3 Ltd had collected a second sample from Mr O'Brien in accordance with the Standard and sent both samples to the laboratory for testing, this would have been a fair and reasonable step to take and likely address the concerns raised by Mr O'Brien over whether the test cup was faulty and whether the urine sample he provided was his own, unadulterated urine.

[14] The above matters may not turn out to be determinative of Mr O'Brien's personal grievance, but together they present a strongly arguable case that he was unjustifiably dismissed.

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[12] Mr Dale provided a copy of the compliance certificate, which showed that the testing cups used to test Mr O'Brien were compliant with the Standard.

Mr O'Brien has an arguable case for reinstatement

[15] Where an employee, who succeeds in his or her claim of unjustifiable dismissal, seeks reinstatement that must be provided for wherever practicable and reasonable.[13] It likely will be the most significant remedy claimed because of its importance to the grievant; it is often not enough for a monetary judgment to be substituted for the job itself.[14]

[16] Practicality and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the reimposition of the employment relationship to be carried out successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.[15]

[17] Issues have been raised by C3 Ltd that will be relevant to the practicality and reasonableness of permanent reinstatement. In particular, issues around workplace safety and the relationships between Mr O'Brien and his managers. However, these are disputed issues of evidence which are to be determined at the substantive hearing.

[18] Mr O'Brien, however, needs only to establish that he has an arguable case for permanent reinstatement. While he has only been employed by C3 Ltd at its POAL site for just over a year, he has previously worked for the company in other areas for about seven years. He is a skilled stevedore and believed, until this incident, that he was highly regarded. He still maintains his skills as a stevedore and could be practicably reintegrated back into the C3 Ltd stevedore roster.

[19] He has an arguable case for permanent reinstatement.

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13 Employment Relations Act 2000, s 125(2).

14 *Hong v Auckland Transport* [2019] NZEmpC 54, (2019) 16 NZELR 555 at [64] and *Smith v Fletcher Concrete & Infrastructure Limited* [2020] NZEmpC 125, (2020) 17 NZELR 517 at [18].

15 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [68].

Balance of convenience does not favour interim reinstatement

[20] Mr O'Brien has given evidence of the effect on him of the dismissal. Of importance for this application is the extent to which that effect cannot be rectified if he succeeds in his substantive proceedings.

[21] Understandably, the dismissal has had a significant financial impact on him. However, by agreement, C3 Ltd reinstated him to the payroll on 27 October 2023 pending the Court's determination of this proceeding on an urgent basis.

[22] Mr O'Brien is concerned that, the longer he is out of the workplace, the harder it will be for him to be reintegrated. However, there is no suggestion that he would not be able to return to the stevedoring work he had previously undertaken because of the gap in employment. His situation is not like some workers where ongoing experience is critical, either to maintain particular skills or because of external certification requirements. Accordingly, while Mr O'Brien's concerns are valid ones, they could be rectified in time should he succeed in his substantive claim, which is to be heard shortly by the Authority on 27 February 2024.

[23] C3 Ltd has given evidence that, given the findings in its disciplinary process, it would not have trust and confidence in Mr O'Brien's commitment to health and safety. It also submits that Mr Coleman and C3 Limited's branch manager who ran the disciplinary process, Shayne Browne, no longer trust him as a result of his dishonesty during the disciplinary process. C3 Ltd submits these concerns mean that the employment relationship is no longer viable. It points to Mr O'Brien's managers' evidence that they would refuse to work with him if he was reinstated. C3 Ltd submits that trust is critical in a high-risk work environment, where workers are not always immediately under the supervision of a manager, and to the health and safety of all workers at C3 Ltd and the POAL.

[24] While the Court must be cautious of statements about loss of trust and confidence from employers as a reason for not reinstating an employee, at an interim stage, the basis for that claim has not yet been tested. The dismissal may be found to be justifiable and the employer's claim of loss of trust and confidence may be valid.

[25] Likewise, claimed differences between employees, including suggestions that managers will refuse to work with the staff member if they return to work, must be treated with care. Even where such differences exist, once a dismissal has been found to be unjustifiable, it often is reasonable for employers to arrange for a reintegration process to smooth the employee's return to the workplace. However, at an interim stage, where the justification for the dismissal has not been properly tested, the practicality and reasonableness of such a reintegration process are considerably less.

[26] Mr Mitchell, referred me to *Humphrey v Canterbury District Health Board* and suggested that, like the Court in that case, I could impose conditions on an interim reinstatement such as directing regular drug testing.[16] However, unlike in that case, C3 Ltd's expert witness, Michael Cosman, is of the opinion that "there is a risk of serious injury or death if Mr O'Brien is reinstated to the POAL environment in his current position while there is uncertainty about his drug free status".

[27] C3 Ltd also submits that, given the nature of its 24 hours per day, seven days per week operations and Mr O'Brien working on a roster, it is impossible, impracticable and an expensive process for it to regularly drug test him, if the Court were to reinstate him on that basis. It also submits that the Court does not have any expert evidence to assess what type of drug testing would be appropriate and practical to allow Mr O'Brien to safely return to the workplace and that the Court should be wary of imposing testing requirements in the absence of such evidence. C3 Ltd finally submits that any risk of serious injury or death is too high a risk.

[28] The high-risk environment of POAL; Mr O'Brien's stevedoring position, which is safety sensitive; the expert evidence in the context of the substantial health and safety risks; the adequacy of reimbursement and compensation remedies for Mr O'Brien in the interim; and, if he succeeds in the substantive, these are considerations that point away from an order of interim reinstatement. Under this head it is usual to consider the prospective date for a substantive investigation. The investigation is due to be heard on 27 February 2024, which is also a factor that points away from an order of interim reinstatement.

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16 *Humphrey,* above n 7.

[29] In short, then, the detriment suffered by Mr O'Brien by not being reinstated pending the hearing of his claim can be substantively rectified if he succeeds. However, the concerns of C3 Ltd, if it succeeds, may not be able to be reversed. For those reasons, the balance of convenience does not support an order for interim reinstatement.

Overall interest of justice does not favour interim reinstatement

[30] Mr O'Brien appears to have a relatively strong case for unjustified dismissal. There are concerns with C3 Ltd's actions in failing to comply with the Standard, failing to obtain a second test and to undertake laboratory testing and failing to sufficiently investigate his explanations for the invalid test before making the decision to dismiss Mr O'Brien. These matters will go not only to justifiability but to remedies.

[31] The critical importance of health and safety in the POAL environment and Mr O'Brien's safety sensitive role, together with the lack of expert evidence before the Court on the conditions on which Mr O'Brien could safely and practicably return to the workplace, is a strong consideration that points away from interim reinstatement.

[32] Standing back from the matter, and considering the overall justice of the case, I am satisfied that full interim reinstatement to the workplace should not be ordered. C3 Ltd's challenge is successful; accordingly, the Authority's determination is set aside and this judgment stands in its place. However, in the circumstances, and based on the affidavit evidence before this Court that Mr O'Brien has a strongly arguable case, it is appropriate that I order Mr O'Brien to continue to remain on the payroll until the substantive determination of his claim by the Authority.[17]

[33] I am concerned that reinstatement to the payroll may be seen as creating a system of licensing unjustified dismissals. However, the expert evidence that there is a risk of serious injury or death if Mr O'Brien is reinstated to the workplace cannot be taken lightly by the Court.

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[17] See *McHardy v Mirotone (NZ) Ltd* [1996] 2 ERNZ 668 (EmpC); *Howe v The Internet Group (IHUG)* [1999] 1 ERNZ 879 (EmpC); and *Godfrey v Sensation Yachts Ltd* EmpC Auckland AC44A/99, 29 June 1999.

[34] Leave is reserved for the parties to seek further orders, if necessary, in relation to issues arising from reinstatement to the payroll.

[35] Costs are reserved. If they cannot be agreed, the matter can be referred to the Court by appropriate memoranda for a decision.

M S King
Judge

Judgment signed at 1.30 pm on 23 January 2024