

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 415  
**3115932**

BETWEEN

LIAM SCULLIN  
Applicant

AND

AIRWAYS CORPORATION OF  
NEW ZEALAND LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Ryan, counsel for the Applicant  
Charlotte Parkhill and Charlotte Evans, counsel for the  
Respondent

Investigation Meeting: 1 October 2020

Determination: 12 October 2020

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Liam Scullin, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Scullin's offer of employment with the Respondent, Airways Corporation of New Zealand Limited (Airways) was withdrawn and his employment terminated as the result of his failure to comply with a condition of his employment offer, being the failure to complete a satisfactory pre-employment drug test.

[3] Mr Scullin claims that he was unjustifiably dismissed from his role as Air Traffic Controller (ATC), and is seeking reinstatement on both an interim and a permanent basis.

[4] Airways claims that the withdrawal of Mr Scullin's offer of employment was justifiable and followed a fair and reasonable process. Airways resists the claim for interim reinstatement and the substantive claim.

[5] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Mr Scullin. Affidavits were also filed in opposition by Airways.

[6] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, on affidavit evidence, and on submissions from the parties.

#### **Note**

[7] As permitted by s.174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[8] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by Mr Scullin and witnesses on behalf of Airways.

[9] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

#### **Principles**

[10] I granted Mr Scullin's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 127 (1) and (4) of the Act which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.<sup>1</sup>

[11] At the Investigation Meeting, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application.<sup>2</sup> Those principles fall to be addressed by the answers to the following questions:

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<sup>1</sup> Employment Relations Act 2000 s 3.

<sup>2</sup> *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

(a) whether or not Mr Scullin has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:

(b) Is there a serious case in relation to the claim for permanent reinstatement?

[12] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting an order for interim reinstatement, and the overall justice of the matter.

## **Background**

### **Brief Background Facts**

[13] Airways is a state-owned enterprise established under the State-Owned Enterprises Act 1986 and a registered company. It provides air navigation services in New Zealand as certified by the Civil Aviation Authority (CAA) in accordance with the Civil Aviation Act 1990. It is currently the only entity certified by the CAA to provide air traffic services in New Zealand.

[14] The provision of air traffic services consists of information and instructions to pilots to keep aircraft apart from each other and to ensure the safe navigation of air traffic.

[15] Air Traffic Controllers (ATC) give information and manoeuvring instructions to aircraft pilots to prevent collisions and expedite and maintain an orderly flow of traffic. As such, any errors in the instructions given by an Air Traffic Controller (ATC) can create a risk of collision or other safety incident. As a consequence the role of an ATC is particularly safety sensitive.

[16] The Civil Aviation Rules require that all ATCs hold a Class 3 Medical Certificate without which they are unable to work as an ATC. In addition Airways has an obligation to implement procedures to ensure that ATCs do not provide air traffic services unless they hold a Class 3 Medical Certificate.

[17] An ATC must satisfy rigorous general health requirements in order to hold a Class 3 Medical Certificate which may be withheld or revoked in light of a history or diagnosis of psychoactive substance use.

[18] Airways implements a number of processes which aim to mitigate the safety risk including:

a) Restricting the number and length of shifts; and

- b) Requiring ATCs to successfully complete a pre-employment drug and alcohol test and consent to random drug and alcohol testing during the term of employment.

### *Mr Scullin Employment*

[19] In August 2018 Mr Scullin applied for the air traffic control training programme at Airways Training Limited. Airways Training Limited is a separate but related entity to Airways.

[20] Mr Scullin was made a conditional offer for a place in the air traffic control training programme which he accepted with his training commencing in November 2018 and continuing until December 2019.

[21] Mr Scullin was posted to Gisborne control tower at the end of the training period for on-the-job training. His final performance assessment was completed in March 2020.

[22] On 19 March 2020 Mr Scullin was made a conditional offer of employment by Airways, one of the conditions of which was the satisfactory completion of a pre-employment drug and alcohol test. The letter headed: 'Conditional Offer of Employment and Consent to Pre-Employment Checks' stated:

This offer and your subsequent employment, remains conditional on the satisfactory completion of all required pre-employment screening checks. This offer will lapse, or your employment may be terminated, in the event that any check returns a negative result or a result that is unsatisfactory to Airways which it may determine at its sole discretion.

[23] Mr Scullin was also sent a position description, a copy of the collective agreement between Airways and The New Zealand Air Line Pilots Association INC (the Collective Agreement), a copy of the Airways Code of Conduct, and Airways Drug and Alcohol policy.

[24] The Airways Drug and Alcohol Policy states at clause 7.3:

All preferred job applicants for permanent employment with Airways who successfully complete the selection process will be required to sign a written consent to having a drug test, with any job offer being conditional upon the return of a negative test result.

[25] The Code of Conduct stated:

#### **3.8 B Development and Performance of Duties**

- Carry out your duties in an efficient and competent manner and comply with Airways policies, values, standards and guidelines for the performance of your role.
- Take responsibility for your own development and actively participate in performance reviews, which are designed to support our people to develop and perform.

- Fully commit your time and energy to Airways work during work hours.

#### **4.5 Misconduct is**

1. Failure to observe safety, health or hygiene rules/instruction, which don't reach the level of serious misconduct.

[26] An ATC licence was issued to Mr Scullin by the CAA on 21 March 2020 and the following day Mr Scullin accepted the conditional offer and commenced employment as an ATC at Gisborne Airport's control tower.

#### *Drug and alcohol test 6 April 2020*

[27] On 6 April 2020 Mr Scullin undertook a drug and alcohol test in accordance with which The Drug Detection Agency (TDDA) sent a hair sample from Mr Scullin to Omega, a US-based entity which tests samples taken by TDDA for the presence of drugs.

[28] TDDA wrote to Airways on 15 April 2020 informing it that Mr Scullin's hair sample taken by TDDA on 6 April 2020 had tested positive for the presence of MDMA (Ecstasy).

[29] On 17 April 2020 Airways telephoned Mr Scullin and informed him that his hair sample test had returned a positive result for the presence of drugs. Airways offered to hold a meeting to discuss the result on Monday 20 April 2020, however Mr Scullin wished the meeting to take place that same day.

[30] A meeting was held by Skype on the afternoon of 17 April 2020 to discuss the results. It was attended by Mr Bruce Borthwick, Manager – Human Resources Business Partnering and Mr Tim Bradding, Business Manager North for Airways, and by Mr Scullin.

[31] During the meeting Mr Scullin was provided with a letter from TDDA notifying him of the positive test result, the Omega 5 Drug Panel Test Result Report indicating the positive result, and the Omega Drug Testing Custody and Control Form signed by him at the time of giving his hair sample.

[32] Mr Scullin was asked if he had any initial comments on the test result in response to which he explained that it could only be an error or mistake in the testing process.

[33] Airways then explained that a process would be followed which would involve further meetings and consultation.

#### *Meeting held on 24 April 2020*

[34] A further meeting was held on 24 April 2020 attended by Mr Bradding and Mr Borthwick and by Mr Scullin supported by his union representative. During the meeting Mr Scullin told Airways that (i) he would never voluntarily consume drugs, (ii) he had attended the

Rhythm and Vines festival at New Year and whilst there had become intoxicated and (iii) there was a realistic possibility that someone had slipped drugs into his drink or offered him a drink that already had drugs in it.

[35] Airways asked Mr Scullin if he could recall experiencing any effects he would not normally associate with alcohol, but Mr Scullin said he had no such recollection due to the amount of alcohol he had drunk.

[36] Mr Scullin also advised Airways that he had voluntarily booked an additional drug test with TDDA. Following the meeting Mr Scullin stated in his untested affidavit evidence that Mr Bradding had emailed him asking that the results of the second voluntary test be sent to him and Mr Borthwick.

[37] In his untested affidavit evidence Mr Borthwick stated that it had been made clear to Mr Scullin during the meeting on 24 April 2020 that if he did obtain a second test this was by his request and own cost. It was not a request of Airways.

[38] Following the meeting Mr Borthwick stated in his untested affidavit evidence that he had wanted to understand if Mr Scullin's explanation could be true and whether the result was suggestive of one-off use. He had therefore telephoned the Health and Safety department at Airways to obtain a contact at TDDA to discuss the result with them.

[39] He stated he had subsequently spoken to a General Manager at TDDA who advised him that:

- a) Methamphetamines and Ecstasy can be contained or concealed in a drink;
- b) Normally the drug stays in someone's system and shows on the hair follicle test for 12 weeks;
- c) A one-off event of sharing drinks would not appear on the hair follicle test. The hair follicle test shows a 'lifestyle' approach to drug use;
- d) While the result was not huge, it did reflect a previous history of drug use;
- e) TDDA did not believe that this was the result of a one-off use; and
- f) The test Liam was subsequently intending to take might take him below the limit given that the drug stays in a person's system for a limited period of time and the additional time that had passed between Liam's initial and subsequent tests. However over all Liam's test result was unlikely to reflect a one-off incident.

[40] A Medical Advisor of Airways notified the CAA of Mr Scullin's positive drug test.

[41] As a result of the positive test result, Airways withdrew Mr Scullin's employment due to his failure to satisfy a pre-condition of his employment. In a letter dated 8 May 2020 Airways confirmed that :

Having reviewed all the information, I regret to inform you that I will be withdrawing the offer of employment with Airways as an Air Traffic controller. This result is in breach of the Drug and Alcohol policy clause 7.3 and Airways Code of Conduct clause 3.8 and 4.5.1.

[42] Mr Scullin stated in his untested affidavit evidence that he was advised in a letter from the CAA of the disqualification of his Class 3 medical certificate.

[43] On 20 May 2020 Mr Scullin said he received by email the result of the second hair strand test which had provided a negative result for drugs and alcohol.

**Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?**

[44] As a matter of principle, Mr Scullin must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.<sup>3</sup>

[45] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious. As stated in *Western Bay of Plenty*:

[9] ... However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice ...<sup>4</sup>

[46] My findings expressed in this determination are solely for the purposes of resolving Mr Scullin's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

[47] Mr Scullin submits that an arguable case means a case of some serious or arguable, but not necessarily certain, prospect of success.<sup>5</sup> He submits that he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

[48] Mr Scullin submits that he should be granted reinstatement because there is no other employer in New Zealand apart from Airways for whom he can work in his trained role.

[49] Airways accepts that Mr Scullin was an employee for the purposes of the Act on the basis that he had been offered and accepted employment, on a conditional basis, at the time the

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<sup>3</sup> *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

<sup>4</sup> See n2 and n3 above.

<sup>5</sup> *X and Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863, 872-3.

offer of employment had been withdrawn, and that he had undertaken work for Airways between accepting his conditional offer of employment and this being withdrawn. On that basis Airways accepts that it was required to act fairly and reasonably in reaching any decision to withdraw Mr Scullin's offer of employment and submits that it has complied with those requirements.

[50] Airways submits that the safety sensitive nature of its business should be at the forefront of the Authority's mind when assessing Mr Scullin's claim for reinstatement, noting as relevant the observations of the Employment Court in *B v Virgin Australia (NZ) Employment and Crewing Ltd* that the Respondent operated in a safety conscious industry and that it: "cannot be criticised for adopting a conservative, risk averse approach to matters relating to public safety ...".<sup>6</sup>

[51] Airways submits that it takes its safety obligations seriously and should not be criticised for taking a risk averse approach to public safety that was both reasonable and proportionate in all the circumstances.

[52] It is submitted that a fair and reasonable employer could have found in the circumstances that:

- a. Mr Scullin failed to satisfy a pre-condition of his employment. Airways was therefore entitled to withdraw his offer of employment and terminate his employment.
- b. Even if determined that Airways was not entitled to withdraw Mr Scullin's offer of employment, a reasonable employer could have found in all the circumstances that Mr Scullin's actions amounted to serious misconduct and dismissal was justifiable.

[53] Mr Scullin accepted a conditional offer of employment from Airways on 19 March 2020 together with copies of the Collective Agreement, Code of Conduct and Airways Drug and Alcohol policy, and in doing so accepted that the employment could be terminated without notice in the event that Airways deemed the results of any of the required pre-employment checks to be unsatisfactory.

[54] Clause 7.3 of the Airways Drug and Alcohol policy states that any job offer is conditional upon the return of a negative drug test result. Therefore as soon as Mr Scullin returned a non-negative drug test result Airways submits that it was entitled to withdraw his

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<sup>6</sup> *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [134].

offer of employment. In the context of this case the substantive reason for the decision to withdraw the offer of employment to Mr Scullin was his failure to fulfil a condition of his employment.

[55] In the alternative, Airways submits that it had substantive justification for terminating Mr Scullin's employment for serious misconduct due to his having failed to produce a negative drug test as required by clause 7.3 of the Airways Drug and Alcohol policy and in breach of the Airways Code of Conduct. As such this resulted in Mr Scullin having fundamentally damaged or destroyed the trust and confidence which Airways was required to have in him.

[56] Airways submits that the principles in *B v Virgin Australia (NZ) Employment and Crewing Ltd* apply and as such it is self-evident that Airways must have the utmost trust and confidence in its ATCs.

[57] Moreover Airways submits that it followed a fair and reasonable procedure. In particular Airways submits that it was entitled to proceed without further investigation once Mr Scullin returned a positive drug test, but in fact took additional steps to understand what Mr Scullin's test results meant by contacting TDDA.

[58] I accept that the threshold in respect of whether there is a serious question is relatively low. Given the low threshold requirement, I find Mr Scullin has an arguable case for unjustifiable dismissal.

**Is there a serious issue to be tried for permanent reinstatement?**

[59] Mr Scullin must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[60] Reinstatement is now the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable.

[61] The onus of proof of practicability rests with the employer.<sup>7</sup> In this case Airways submits that Mr Scullin does not have an arguable case for permanent reinstatement on the basis that it is very unlikely he would be permanently reinstated to his role with Airways even if he was successful in his claim that Airways unjustifiably dismissed him. Mr Scullin had demonstrated as a result of the negative test at a very early stage in his engagement with Airways that he had engaged in drug use, and that is not compatible with the safety conscious environment that Airways must operate in.

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<sup>7</sup> *Lewis v Howick College of Board of Trustees* [2010] NZCA 320.

[62] Airways submits that reinstatement is not practicable for reasons including:

- a) Mr Scullin's role requires a high degree of trust in that he provides information manoeuvring instructions to aircraft pilots to prevent collisions and expedite and maintain an orderly flow of air traffic. Any impairment of him has the potential to compromise public safety;
- b) Any pattern of psychoactive drugs is incompatible with safe aviation. Given Mr Scullin's failure of a pre-employment drug test, Airways has no confidence that he will abstain from drug use;
- c) Mr Scullin's role is such that his consuming drugs has the potential to cause significant harm to the public;
- d) Mr Scullin cannot be reinstated to his role where he cannot perform the required functions due to the CAA disqualifying his Class 3 Medical Certificate. As such it is impracticable to reinstate Mr Scullin to a role that he is currently incapable of performing; and
- e) Mr Scullin's conduct raises serious concerns regarding his ability to perform work in such a safety conscious area that is subject to significant regulatory control. It is not in dispute that Mr Scullin failed a requisite drug test.

[63] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Mr Scullin has an arguable case that he was unjustifiably dismissed, I am unable to conclude that he has a more than weak arguable case that he would be reinstated permanently.

[64] Accordingly I do not find that Mr Scullin has a strongly arguable case for interim reinstatement.

### **Balance of convenience**

[65] As set out in the Employment Court case *X v Y Limited*<sup>8</sup> this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Airways who will have to bear the burden of an order reinstating Mr Scullin until the substantive case is heard, against the inconvenience to Mr Scullin who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

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<sup>8</sup>[1992] 1 ERNZ 863, at pg 10.

[66] Mr Scullin submits that he could not be adequately compensated by damages because he is not able to obtain employment as an ATC unless reinstated with any other entity in New Zealand.

[67] It is submitted that Mr Scullin is supported by his family and in a position to discharge his obligations under the undertaking if he is called upon to do so.

[68] Airways submits that this is not a case where the employee needs to be reinstated to preserve his or her position. The CAA has disqualified Mr Scullin's Class 3 Medical Certificate. In these circumstances, reinstatement would not preserve Mr Scullin's position because he cannot provide ATC services without a current Clause 3 Medical Certificate.

[69] It is submitted that case law supports the submission that an employee seeking interim reinstatement is usually expected to be in a position to perform his or her duties under their employment agreement and where this cannot occur, this will be a factor that falls in favour of the balance of convenience lying in favour of the employer.<sup>9</sup>

[70] In this case Airways submits that Mr Scullin cannot be reinstated on an interim basis because he would be entirely unable to perform his part of the duties under his employment agreement. On that basis, interim reinstatement would be solely to provide Mr Scullin with the benefit of money for the duration, and therefore damages would be an adequate remedy should Mr Scullin be successful at the substantive investigation.

[71] It was submitted during the submissions investigation meeting by counsel for Mr Scullin that he (Mr Scullin) will not be able to have a Class 3 Medical Certificate reinstated unless he is back in employment with Airways. Being placed on garden leave would achieve this position.

[72] Counsel for Airways has since informed the Authority that its instructions are that this is not correct, that Mr Scullin can seek to reinstate his Class 3 Medical certificate without being employed by Airways.

[73] There is no evidence before the Authority in support of either position, and therefore I have not taken that aspect into consideration for the purpose of this determination.

[74] In regard to Mr Scullin being placed on garden leave i.e. being restored to the payroll, Airways submits that account must be taken of the fact that Airways has important public responsibilities which must be given weight. As a state-owned enterprise it is accountable for its expenditure and cannot justify a payment of unworked salary to Mr Scullin. Moreover there

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<sup>9</sup> *Pacific Blue Employment & Crewing Limited v B* [2010] NZEmpC 112.

is insufficient evidence of Mr Scullin's ability to repay salary or meet his undertaking as to damages.

[75] Given the fact that Mr Scullin is not in possession of a Class 3 Medical Certificate and is therefore unable to carry out any duties for Airways as an ATC, Airways submits that it would not be feasible or practicable to put into place transitional arrangements that would see Mr Scullin perform alternative duties given that there are no suitable positions into which that he could be redeployed.

[76] This being a situation where Mr Scullin does not have the requisite medical certificate to undertake his duties, and there being no alternative position available for him to undertake, interim reinstatement could only be ordered to the payroll. In this situation Airways would bear the financial burden but without receiving any benefit for it in terms of a contribution to its operation.

[77] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Mr Scullin of not reinstating him, against the potential prejudice to Airways of doing so, I find that the balance of convenience favours not reinstating Mr Scullin on an interim basis.

### **Overall Justice**

[78] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:<sup>10</sup>

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[79] Mr Scullin submits that the overall justice favours him because the granting of interim reinstatement, albeit on garden leave, will enable him the ability to have his Class 3 Medical Certificate reinstated by the CAA.

[80] Airways submits that in addition to the issue of a serious question to be tried and the balance of convenience, it is pertinent to the overall justice that the fact Mr Scullin failed a drug test is not in dispute. Further that this relates to a period when he was undertaking practical training for a role and at a place where health and safety is critical.

[81] Airways submits that in his untested affidavit evidence Dr Payne has stated that it was highly improbable that a user of MDMA would be unaware of the ingestion and effects of it, and given the acute symptoms from MDMA, he would expect someone to seek medical assistance.

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<sup>10</sup> *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

[82] Given this evidence from Dr Payne, Airways submits that Mr Scullin had not put Airways on notice that he held any concerns that he may have been undertaking any actions while impaired. It therefore has serious concerns that Mr Scullin, albeit supervised as part of his training, may have been controlling an airspace while impaired by psychoactive drugs and without raising this as a concern with Airways.

[83] Airways submits that at a substantive level there is a possibility that Mr Scullin may be found to have contributed significantly to the situation and this may mean that he may be denied the remedy of reinstatement.

[84] Further that Mr Scullin does not currently hold a Class 3 Medical Certificate which is a requirement of the CAA and without it he is unable to perform his duties. Consequently reinstatement on a garden leave basis is the only possibility, unless Mr Scullin is able to have his Class 3 Medical Certificate reinstated.

[85] I observe that Mr Scullin is a young person at the start of his career and accept that unless he is able to continue working at Airways his career path is severely affected.

[86] I also take into consideration that Airways operates in a highly regulated and safety conscious environment and that reinstating Mr Scullin on an interim basis could only be to the payroll given his not having a Class 3 Medical certificate currently.

[87] Mr Scullin would as a consequence be unable to perform any duties which will place a financial burden on Airways which I find does not sit easily with the requirement on it as a state-owned enterprise to be fiscally responsible. I also note that there is no doubt of Airways ability to pay damages in the event that Mr Scullin is successful at the substantive investigation.

[88] I appreciate the impact of not being reinstated will have on Mr Scullin, especially when there is the possibility of a significant delay in the Authority being able to offer a date for the substantive hearing. However this a case in which safety has a paramount pre-eminence and having taken into consideration all the circumstances, particularly the health and safety implications, I find that the overall justice of the case subsists in declining the application for interim reinstatement.

### **Next Steps**

[89] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Scullin's substantive claims.

**Costs**

[90] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**