

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 356  
3245179

BETWEEN	FIRST UNION INCORPORATED First Applicant
AND	E TŪ INCORPORATED Second Applicant
AND	JUKEN NEW ZEALAND LIMITED Respondent

Member of Authority: Sarah Blick

Representatives: Peter Cranney and Grace Liu, counsel for the applicants  
Alison Maelzer and Bridget Perkins, counsel for the respondent

Investigation meeting: 21 November 2024 in Auckland

Submissions and information received: 28 November 2024, 10 December 2024 and 14 March 2025 from the applicants  
5 December 2024 and 26 March 2025 from the respondent

Determination: 19 June 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Juken New Zealand Limited (JNL) operates in the forestry and wood-processing industries, managing plantation forests in the East Coast and Wairarapa regions in the North Island, and operating three wood processing mills. Two of the mills are based in Kaitaia on adjacent sites - one is known as the Triboard Mill and the other known as the Northland Mill (the Kaitaia mills). This determination relates to attempts to institute a drug and alcohol policy at the Kaitaia mills.

[2] As early as 2014, the parties began discussions with a view to formulating a drug and alcohol policy. By 2018, a working party of employer and employee representatives had prepared and finalised a draft policy (2018 policy). The 2018 policy would have enabled oral saliva swab testing to be used as drug screening tests for possible illicit drug use, post-accident, reasonable cause, random testing and pre-return to work situations. It provided that urine testing would be used as “confirmatory” tests, in the case of an oral fluid test result being not negative. The applicants say the intention was that the 2018 policy would form the basis of a nationwide JNL policy.

[3] The 2018 policy was not confirmed and by June 2020, JNL produced another policy for consultation across all sites (June 2020 policy). The applicants objected to aspects of that policy, including its approach to testing, and it was raised as an issue during collective bargaining that year. At the conclusion of bargaining in November 2020, the parties signed a terms of settlement document (ToS) which outlined provisions to be included in the Triboard collective agreement (Triboard collective), and certain terms intended to remain outside it.

[4] The ToS acknowledged the parties were in a consultation process as part of JNL’s company-wide review of its drug and alcohol policy. Among other points, JNL agreed amendments would be made to the proposed drug and alcohol policy prior to implementation. The amendments included that the testing regime would consist of “first, an oral test followed by a confirmation test (urine)” in line with the applicable Australian/New Zealand Standards (Standards) for such testing. According to the ToS, this agreement (and other unrelated matters) was in the category of terms not to be incorporated in the Triboard collective. The applicants say the ToS was shortly thereafter ratified by their members. The Triboard collective was finalised and, as agreed, the terms relating to a policy were not referenced in it.

[5] By December 2020, JNL had redrafted the drug and alcohol policy which appeared at odds with the ToS in certain respects. The applicants objected to the policy (and subsequent amendments) and how they were formulated. JNL has over the years followed consultation processes and implemented a drug and alcohol policy at other sites, but despite indications it intended do so, has not yet implemented the policy the Kaitaia mills in light of the parties’ ongoing dispute.

[6] In its statement of problem, the applicants said JNL breached agreements reached in the 2018 policy and later its obligations under the ToS, by requiring urine testing to be used for

drug screening tests. The applicants further claimed JNL failed to comply with the relevant collectives by seeking to implement a policy without the review, discussion and decision by the Kaitaia mills' site safety committee and acted contrary to its duty of good faith in seeking to implement a policy in breach of the agreements and the collectives.

[7] By way of outcome, in their amended statement of problem the applicants sought a determination that JNL's proposed policy was "illegal", has no effect and imposes no obligations on the applicants' members. Compliance orders were sought requiring JNL to comply with the ToS and collectives in introducing, formulating or developing any policy, and to comply with the duty of good faith in doing so.

[8] The relief sought by the applicants has evolved and they now appear only seeking a determination that the employer is not entitled under the agreed terms to be provided with urine samples unless the worker concerned has first had an oral test.

[9] JNL says the applicants' claims are not clearly pleaded and have evolved. It denies breaching the collectives, asserting the applicants have overstated the meaning and effect of the relevant clauses. JNL also denies reaching any agreement in relation to the 2018 policy, and denies the ToS is enforceable. It says even if a breach or breaches have occurred, these were not breaches of good faith, as JNL consistently communicated and consulted extensively throughout the policy's various iterations.

### **The Authority's process**

[10] The Authority received witness statements from First Union organiser Garry Hetherington, JNL's General Manager - People and Culture Jo Carvill, along with its General Manager - Health and Safety Cathy Faulkner. Each gave evidence under oath or affirmation at the investigation meeting.

[11] As permitted by s 174E of the Employment Relations Act (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter. It has not recorded all of the evidence and submissions received but which has been considered.

## **The issues**

[12] The parties were not able to agree on the issues for investigation and determination. Having considered the parties' views the following issues fall for determination:

- (a) Do the relevant clauses in the collectives prevent JNL from implementing a drug and alcohol policy without agreement from the relevant Kaitaia mills committee(s)?
- (b) If so, has JNL breached the relevant collective clauses?
- (c) What is the status of the 2018 policy?
- (d) What is the status of the ToS and its terms?
- (e) Should any orders be made?

## **Background**

### *The Kaitaia Mills*

[13] JNL employs approximately 470 people across the country. Its "head office" is based in Auckland.

[14] The Triboard Mill produces Triboard, which is a manufactured three-layered wood product. Approximately 130 employees work at Triboard Mill. JNL has had successive collectives with First Union and E tū covering work performed at the Triboard Mill.

[15] The Northland Mill produces various grades of peeled Radiata Pine veneer. Around 74 employees work at the Northland Mill. JNL has had separate successive collectives with First Union covering work performed at the Northland Mill.

[16] A significant number of the Kaitaia mills' employees are union members covered by one of the collectives. Contractors, and temporary workers engaged through a labour hire company, also work at the Kaitaia mills.

### *Relevant clauses in the collectives*

[17] Clause 3.3(e) of the Triboard collective and clause 8.7 of the Northland collective have for a long time provided for consultative committee meetings, with the stated purpose of enabling discussion on employment-related issues and enhance communication between the parties. These are known as site committees, formed at each mill, comprising of employee and

JNL representatives who met regularly at all relevant times. Applicant union representatives including Mr Hetherington regularly attended site committee meetings.

[18] Triboard site committee meeting notes and minutes show the parties consulted and engaged cooperatively and in good faith on a wide range of matters affecting workers, including general business and health and safety issues.

[19] Clause 7.7 of the Triboard collective and clause 8.5 of the Northland collective are identical. They provide for monthly meetings of a “Site Safety Committee” which is a health and safety committee consisting of worker representatives and management representatives in which the committee shall, among other tasks, “review, discuss and decide corrective actions for site wide safety issues”. The applicants say a joint health and safety committee was formed between the mills who met regularly.

[20] Appendix One of the Triboard collective contains “Mill Rules” which employees are expected to abide by. An apparently long-standing rule, rule 13.6, succinctly addresses alcohol and drugs at the mill site and relevantly says an employee is not to report to work if they are unfit to carry out duties because they have been drinking alcohol or taking drugs. If they do attend work, they are deemed unfit because of the influence of alcohol or illegal drugs and will be ordered off the work site with loss of pay. Rule 13.6 does not address testing for alcohol or drugs on site or rehabilitation, and other matters one might expect to see in a modern drug and alcohol policy. There is no rule in the Northland collective equivalent to rule 13.6.

[21] Clause 8.4 of the Northland collective states JNL is entitled to institute reasonable policies and rules in relation to activities and conduct expected of employees. Where such policies or rules deal with matters of conduct of employees, including discipline and health and safety, JNL is required to consult with the site committee. Clause 8.5 address health and safety matters, including that JNL may require employees to attend a medical examination at JNL’s expense and be advised of the results. It says this may include “testing for drug and alcohol usage in accordance with the policies and rules adopted” by JNL. The applicants say the testing under clause 8.5 is confined to the situation of a “medical examination” and does not apply to other scenarios.

[22] The Triboard collective does not contain clauses similar to 8.4 or 8.5.

*'One JNL'*

[23] From around 2014, General Manager of People and Culture Ms Carvill says there was a concerted effort to work as “One JNL”. This meant changing a number of management structures, policies, and operating procedures to ensure JNL’s various sites were in line with its overall mission, vision, and values. Part of this “One JNL” drive was to have policies that applied across the whole company. JNL says it believed it should have one drug and alcohol policy and procedures across the country, not the individual sites.

*JNL proposes policy in 2014*

[24] JNL says its Gisborne and Wairarapa sites have had drug and alcohol policies in place since at least 2014, which included urine testing for drugs and breath tests for alcohol. The Kaitaia Mills did not. JNL says there was a growing realisation of the dangers posed by drugs and alcohol in the workplace, especially in high-risk environments such as timber-processing mills. In JNL’s view, the status quo was insufficient to manage the risk of employees working while potentially impacted by them.

[25] Triboard site committee meeting minutes provide background to the parties’ discussions regarding the development of a drug and alcohol policy over an extended period from 2014. Mr Hetherington says the parties agreed to develop a policy together via the Triboard site committee.

[26] As far back as April 2014, minutes refer to JNL having raised the issue of a policy at the Triboard site committee, of which a draft appears to have been provided to the applicants (2014 draft policy). Minutes record the applicants had concerns with parts of the 2014 draft policy and would provide a joint formal response to it.

[27] The topic of a policy continued to be raised at committee meetings, and a formal response was provided by First Union in November 2014, by letter to JNL’s Assistant Mill Manager at the Triboard mill. The letter said union delegates had highlighted concerns and questions regarding the 2014 draft policy and invited a response. These concerns included:

- testing methodologies and thresholds, with members wishing to see indicative testing conducted by way of the “oral swab method” as less invasive and a more appropriate test of impairment;

- rehabilitation would be the primary option in the event of a failed test;
- any agreed policy shall be attached by way of variation to the collective agreement and any contradictory clauses removed.

[28] Progress in relation to developing a policy was slow, due to other pressing issues or priorities in the business. Amendments to a policy being discussed in committee meetings during 2016. Versions of a draft policy exist from November 2016, June, November and December 2017.

#### *2016 and 2017 draft policies*

[29] At Appendix 1 of a draft policy (2016 draft policy), employees may be required to undertake drug or alcohol tests depending on what prompted the need for a test. For drug screening, it stated an oral saliva swab would be used in situations of possible illicit drug use, screening for post-accident, reasonable cause, random testing and pre-return to work testing. For drug confirmatory tests, urine testing would be used for probable illicit drug use testing, and confirmatory drug tests that identify drugs present and at what levels.

[30] Other relevant clauses included reference to JNL's discretion to use drug detection dogs to check the work site for drug activity; in the case of a "Positive Confirmatory" test result employees "shall" be offered the opportunity to participate in a rehabilitation programme, subject to a suitability assessment by the programme provider; and before testing, employees could request access to a rehabilitation programme without any direct disciplinary consequences.

[31] Handwritten comments and tracked changes show the parties remained at odds on some matters, but all draft policies from November 2016, June, November and December 2017 provided for oral saliva swab screening tests, and urine tests for drug confirmatory tests.

#### *Drug and alcohol working party develops a 2018 policy*

[32] A Triboard-based working party, including management, employees and union representatives was formed. Meeting notes have been produced demonstrating they met, discussed and developed the drug and alcohol policy and ultimately reached agreement on a final document – the 2018 policy). Appendix 1 stated:

### **Drug Screening**

Test method-	oral saliva swab until oral swab is available as per AS/NZS 4760
Used for-	possible illicit drug use
Situations-	Screening Post accident Screening for Reasonable Cause Screening Random testing Pre Return to work testing

**Drug Confirmatory tests**

Test Method	Urine test until oral swab is available as per AS/NZS 4760
Used for	probable illicit drug use
Situations	Confirmatory drug tests that identify drugs present and at what levels

[33] Mr Hetherington says the applicants' position was that all drug testing should be oral testing, but they made a concession in relation to urine testing in order to reach agreement. He says there was consensus between JNL and the applicants that oral fluid testing was to be adopted for all drug screening tests, and urine testing would not be used if the oral specimen was negative. He explains that it was agreed the confirmation test would be transitioned into oral fluid testing as soon as the Standards and technologies allowed.<sup>1</sup> Reference to the use of drug detection dogs was removed from the 2018 policy.

[34] In terms of rehabilitation, the 2018 policy stated in the case of a "positive" confirmation test result, workers would be offered the opportunity to participate in a JNL supported rehabilitation programme. Before a formal offer was made by JNL, the worker's suitability would be assessed by the programme provider, and if considered unsuitable by the provider, no formal offer would be made. Workers who requested assistance voluntarily for a drug or alcohol problem before testing would be assisted towards a similar rehabilitation programme without any direct disciplinary consequences.

[35] In early May 2018 the Kaitaia mills' Services Manager, who was part of the working party, shared the 2018 policy incorporating the last of agreed changes with the rest of the working party, confirming it was now final. The manager stated his understanding was that the next stage was for JNL senior management to review, and subject to their agreement or request for clarification or changes, JNL would request a variation to the current collective to cross reference the new policy. The manager asked JNL's General Affairs Manager at the time whether that understanding was correct. It is not clear if a response was given.

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<sup>1</sup> The Authority understands from the evidence presented that at the time an Australian/New Zealand Standard for oral fluid testing was still in development (which later became AS/NZS 4760 2019, published in March 2019).

[36] JNL underwent restructuring in 2018, which appears to have impacted progress on a policy. In February 2019, the policy was raised at a site committee meeting. JNL managers are recorded as saying the “lawyers have come back with no major issues. Testing will apply to everyone. Final report is due soon, then process for ratification and CEA variation”.

[37] Triboard site committee meeting notes record that at a meeting in July 2019, JNL’s Kaitaia mills’ Services Manager mentioned that the 2018 policy developed at Triboard “had been adopted by the management steering committee to use it as bases for D&A policy for all NZ sites”.

#### *Developments in early-mid 2020*

[38] By January 2020, Ms Carvill had commenced employment as General Manager – People and Culture. That year JNL says a national health and safety working group was formed, consisting of senior managers and employees across JNL, tasked with reviewing a proposed Kaitaia mills’ policy, together with the existing JNL policy already in place at Wairarapa, Gisborne and across the forestry operations.

[39] The applicants became aware that JNL was carrying out this review and a draft policy existed (June 2020 policy). In June 2020 an E tū organiser involved in the earlier Kaitaia working party emailed Ms Carvill referring to the significant work that had been done on the 2018 policy and that consultation process ought to be put back on track. Ms Carvill responded that there was a need for a company-wide policy and there was no intention to implement a policy without consultation, which would soon be reinitiated. A copy of the June 2020 policy was provided. In respect of oral fluid testing, it said:

#### **10.2 Testing standard: AS/NZS 4760:2019**

...

Oral fluid testing is available through a competent Collection Agency although at present according to Collections Agencies within New Zealand there are no oral fluid testing devices that can achieve all of the cut off concentrations and drug types listed in AS/NZS4760:2019. Oral fluid sampling requiring a Laboratory confirmatory test cannot be completed within New Zealand.

[40] In relation to rehabilitation, the June 2020 policy stated that a JNL employee who returned a positive drug test and/or positive alcohol test for the first time, and who wishes to continue employment, “may” be given the opportunity to join a rehabilitation programme, at JNL’s “sole discretion”. It made no reference to workers voluntarily requesting help before

testing and assistance towards a rehabilitation programme. Further, the 2020 policy reinserted a reference to drug dog detection searches.

[41] In August 2020, JNL says it began consultation with all workers around the country about the 2020 policy. Applicant union organisers were provided with a copy. They were advised JNL was seeking feedback from JNL employees and their representatives. The E tū organiser's feedback was that there were significant differences between the earlier 2018 policy and the new policy. She suggested JNL return to the 2018 policy as this had buy-in from the workforce at the Kaitaia mills.

[42] JNL's health and safety manager at the time also sent the 2020 policy to staff, asking JNL managers and team leaders to discuss it with staff and make copies available on site. An article was published in a JNL employee newsletter advising of the consultation.

[43] Triboard site committee minutes from a September 2020 meeting recorded that positive feedback had been received on the 2020 policy, and that the feedback would be reviewed and incorporated where appropriate, and the policy would be sent out for further feedback.

[44] In September 2020, one of the union delegates involved in the working party forwarded the Kaitaia Service Manager's email from 10 April 2018 to Ms Carvill. The delegate stated he was told by JNL's General Affairs Manager that the 2018 policy would "form the backbone of the corporate policy". Mr Hetherington's evidence aligns with that understanding of the work of the working party and the 2018 policy it produced.

[45] Triboard site committee meeting minutes from October 2020 again recorded there had been positive feedback received, and that "Northland Mill is ready and policy can be applied".

[46] November 2020 minutes of the Triboard site committee record the following comments made by Mr Hetherington: "Misunderstanding from previous meeting, what I said was "company can implement D&A policy but consultation process still has to happen". I will then give ... feedback on the consultation."

#### *Collective bargaining and terms of settlement in 2020*

[47] The Triboard collective expired on 30 June 2020. Mr Hetherington says in order to preserve the significant work done by the parties in developing a mutually acceptable drug and alcohol policy, the applicants asked for a number of matters relating to drug testing to be agreed

and recorded as part of the collective bargaining. The applicants say JNL agreed. JNL says the policy was raised despite it not having been one of the claims submitted.

[48] The parties reached agreement in November 2020 for a Triboard collective, and the ToS was drafted. The ninth section is entitled “Terms of Settlement only” and includes matters relating to a leave procedure draft, driver training, a skills-based pay review, and the one at issue here. The relevant part states:

*Drug & Alcohol Policy*

The parties are engaged in a consultation process as part of JNL’s company-wide review of its Drug & Alcohol Policy. This isn’t yet completed and the parties have agreed that the following shall be amended prior to implementation of the updated Drug and Alcohol policy.

- any reference to drug dogs shall be removed.
- **the testing regime shall consist of first, an oral test followed by a confirmation test (urine).**
- **testing shall be to the AS/NZS4308, AS/NZS4760 2019 and shall be carried out by a trained collector.**
- at a facility level the selection procedure for random testing shall include observation from a nominated union representative.
- the rehabilitation option may be accessed at the employee’s initiative and shall be without any direct disciplinary consequences.
- Any current reference to rehabilitation “as appropriate” shall be removed from the draft.
- the Drug & Alcohol policy shall apply to all workers and contractors.

[49] The ToS was separated into two sections to reflect what would be included in the collective, and what would not. The “Drug & Alcohol Policy” points were in the latter category. Directly under the ninth section is Mr Hetherington’s signature on behalf of First Union, the E tū organiser’s signature, and JNL’s Executive General Manager at the time, with the date 24 November 2020.

[50] JNL says its position was that the drug and alcohol policy should not be part of the collective bargaining process, as it was a nationwide policy, and could not be tied into one site only. Mr Hetherington’s evidence is that JNL assured the applicants that it would not change its position on the agreed policy and the use of oral fluid testing. This is not Ms Carvill’s recollection – she says the ToS shows the testing methodology was still a topic for discussion. She says discussions in bargaining related to the 2020 policy, not to the 2018 policy developed by the Kaitaia working party.

[51] Ms Carvill explains that at the time of entering into the ToS, the JNL bargaining team believed it was possible and appropriate to have a testing regime which involved an oral test

for screening. If this test indicated that drugs were present in the sample, a confirmation test would be done by way of urine testing. JNL understood this accorded with the Standards.

[52] Mr Hetherington explains that the issue of rehabilitation was agreed and recorded such that any reference to “rehabilitation ‘as appropriate’” would be removed from the drug and alcohol policy. He says this was to allow employees to elect to participate in rehabilitation prior to any disciplinary process being contemplated and to make it available to all employees, not just when JNL deemed appropriate.

*Further policy version in December 2020*

[53] JNL produced a further iteration of a policy dated 18 December 2020 (December 2020 policy). JNL says this policy was intended to apply to all workers at all sites across JNL. The December 2020 policy provided for both oral fluid tests and urine tests although it stated:

**10.1 Testing standard: AS/NZS 4760:2019**

...

Oral fluid testing is available through a competent Collection Agency although at present according to Collections Agencies within New Zealand there are no oral fluid testing devices that can achieve all of the cut off concentrations and drug types listed in AS/NZS4760:2019. Oral fluid sampling requiring a Laboratory confirmatory test cannot be completed within New Zealand therefore urine sampling will be used where confirmatory testing is required.

[54] JNL explained that if the screening test shows the presence of drugs above the screening cut-off levels, then a confirmatory test would be required. JNL says confirmatory testing could only be done by way of urine sample (due to the unavailability of confirmatory oral fluid testing within New Zealand at the time).

[55] The December 2020 policy continued to state that a JNL employee who returned a positive drug test and/or a positive alcohol test for the first time, and who wished to continue employment, “may” be given the opportunity to join JNL’s supported drug and alcohol rehabilitation programme. The opportunity to partake in any rehabilitation was “at JNL’s sole discretion”.

[56] The December 2020 policy inserted a section relating workers voluntarily requesting assistance for drug or alcohol problem before testing, stating they “shall be assessed for suitability for support through a similar programme”, without any direct disciplinary

consequences. Reference to drug dog detection searches had been removed, as agreed in the ToS. JNL later published the December policy on its intranet on 18 December 2020.

### *Review*

[57] In January 2021, JNL employed a new health and safety manager (H&S manager) who is said to have identified the intended approach to screening and confirmatory testing would not meet either the AS/NZS 4308:2008 Standard (urine testing) or AS/NZS 4760:2019 Standard (oral testing). Ms Carvill says JNL was unaware of the scientific difficulty around oral screening followed by a urine confirmation test until this point.

[58] In January 2021, the E tū organiser emailed Ms Carvill regarding the policy, saying she had been advised it had gone live but her understanding was that the parties were still in consultation, having agreed to “key principles” in the ToS.

[59] Ms Carvill responded in February 2021 saying JNL had consulted nationally on the policy in August 2020, and it was now updated “following on from our discussions in November, and in line with the principles that we agreed” in the ToS. She attached the policy and advised it had been published on the JNL intranet and was in practice on all sites except the Kaitaia mills. JNL was said to be planning for implementation. The E tū organiser replied saying the policy did not reflect the agreements in the ToS, highlighting its failure to recognise the agreement to use oral screening testing. The email suggested JNL should withdraw all copies of the policy and cease education on it until there was compliance with the ToS.

[60] Meeting notes from the April 2021 committee meeting indicate that the policy was discussed, and that JNL reported difficulty in securing access to a laboratory for oral sampling.

[61] In May 2021, the H&S manager apparently took advice from a forensic toxicologist. The Authority was told verbal feedback was provided, which was incorporated into subsequent policy drafts. The advice given included that oral sampling for the screening test, and urine sampling for confirmatory tests would not comply with either of the applicable Standards. Essentially, the screening test and the confirmatory test needed to be done on the same sample. JNL says this was not possible if there is an oral fluid sample and a urine sample. JNL says it also received advice that extended panel testing was best practice, which could only be done by urine testing.

[62] The parties have provided a copy of another (different) draft JNL policy dated May 2021. This policy holds the trading name of the company operated by the toxicologist JNL sought advice from.

*Revised draft end of 2021/start of 2022*

[63] A revised draft policy was completed by JNL at the end of 2021/start of 2022, and JNL began circulating an updated policy (2022 policy), educating and consulting with its workers at all sites in February and March 2022, including with site meetings. Organisers for the applicants declined to attend on the basis of not agreeing with the policy being consulted on.

[64] On 9 March 2022, the E tū organiser sent an email to JNL, saying that the current version of the policy contradicted and undermined the ToS. The H&S manager responded stating that expert advice and best practice had evolved with respect to oral testing, as the toxicologist had explained at the site meeting. However, they said oral testing remained in the 2022 policy as an option for consideration.

[65] Mr Hetherington wrote to JNL on 17 March 2022 jointly raising the applicants' concerns that the policy directly breached the ToS, and in proposing a policy that breaches the ToS, JNL was deliberately and seriously breaching good faith.

[66] JNL responded on 6 April 2022, stating that the 2022 policy was a company-wide policy and not suitable for inclusion in a site-specific collective like Triboard's. It said the December 2020 policy had incorporated nearly all the points from the ToS, most of which remained in the 2022 policy. It reiterated that expert advice indicated that using oral fluid for screening and urine for confirmation did not comply with the Standards. Further, although some practical issues with oral testing had been resolved by early 2021, limitations remained - particularly around extended panel testing and detection of certain synthetic drugs and psychoactive substances. JNL retained oral testing in the policy to allow for future developments but emphasised the need for a consistent, company-wide approach to managing safety risks in high-risk environments.

[67] Mr Hetherington emailed JNL disputing points in the 6 April 2022 correspondence and requesting further details, including the expert advice JNL received. On 14 April 2022, JNL responded that most advice from the toxicologist had been verbal and was reflected in the 2022 policy. It was said JNL continued reviewing the policy in light of updated Standards, noting

that both screening and confirmatory tests must derive from the same sample - something not possible when using both oral fluid and urine. It maintained that extended panel testing represented best practice. JNL again invited feedback on the 2022 policy.

[68] Mr Hetherington replied on 29 April 2022 stating the 2022 policy should not be implemented as it was, and that to do so would be a breach of the ToS and the Act. He suggested mediation, sought written advice from the toxicologist and disputed JNL's position regarding testing.

[69] JNL responded in May 2022 saying, among other things, that a revision of the current policy completed with the toxicologist led JNL to consider that best practice included using extended additional drugs as part of their testing suite. It said JNL considered the costs and production time lost to supply multiple samples, and complete the relevant forms would be more invasive and time-consuming for workers and would result in increased costs. The collection process needed to be consistent with the relevant Standards, and JNL would rely on its independent testing provider to perform random tests using a mix of both sampling methods.

[70] Further, all JNL sites were considered to be high risk and therefore JNL repeated that it was appropriate to include extended panel testing for New Psychoactive Substances and other abused medications (including benzodiazepines), which were detectable in urine only. While AS/NZS 4760:2019 stated that benzodiazepines and other drugs can be tested in a lab (from an oral fluid sample) in reality the only oral fluid testing lab in New Zealand was not testing for any of the drugs outside of the standard panel. Therefore, the only specimen that could be tested for these additional drugs was a urine sample. JNL's policy allowed for a "hybrid" policy using a mix of oral fluid and urine sampling, with the advantage that if further advances were made in oral testing procedures, the policy would be adaptable.

[71] Mr Hetherington was provided a copy of written advice received from the toxicologist in May 2022. The advice critiqued the 2018 policy and reflected points made by JNL.

[72] Mr Hetherington, on behalf of First Union, wrote to JNL on 8 June 2022 restating its view that the 2022 policy breached the ToS. He suggested there was no reason for JNL to depart from its agreement that "the testing regime shall consist of first, an oral test followed by a confirmation test (urine)" and that the Union would take legal action if JNL breached it.

[73] On 20 June 2022, JNL replied stating it had entered into the ToS in good faith, believing it could comply with all of the bullet points, and had updated the policy to include them. The growing understanding of the Standards mean that JNL continued to review and update the policy. It reaffirmed its position that an oral fluid screening test followed by a confirmatory urine test did not meet either Standard, providing both oral fluid and urine samples for every test was more invasive and time consuming, would result in increased costs and be inefficient.

[74] On 23 June 2022, JNL received claims for bargaining for the Triboard collective, expiring 30 June 2022. The claims included a drug and alcohol policy and procedure. JNL agreed in bargaining to park this claim due to the agreement the parties had already reached to discuss these matters in mediation.

[75] The parties attended mediation in July 2022 but were unable to reach a resolution. Following mediation, JNL says it made further revisions to its policy, in part to take account of the applicants' concerns, and in particular around rehabilitation, disciplinary action, and oral fluid testing for random drug tests.

#### *Attempts to implement a policy in 2023*

[76] JNL undertook further consultation staff in relation to a revised policy in October 2022. In early 2023 JNL met with Mr Hetherington and union delegates and discussed the policy, after which it says it made some changes. JNL says at the meeting it was confirmed the policy would be implemented on 1 July 2023.

[77] "Safety Days" at the Kaitaia mills during April 2023 JNL presented the policy to employees and advised them the policy was now "live", albeit there was an amnesty period before testing was to commence.

[78] By August 2023 Mr Hetherington was advising members that if they were called on to provide a sample, they should only provide an oral fluid sample, providing reasons and an alternative consent form allowing for oral fluid testing only. In response JNL warned Mr Hetherington that his advice to members could breach the policy, the amnesty period was at an end, and it would be proceeding with random testing and workers would be reminded of their obligations. Mr Hetherington responded reasserting that the applicants did not accept JNL's position, the policy was formulated and promulgated contrary to the collective, the testing

method agreed between the parties, and the JNL's duty of good faith. The email said First Union would file proceedings in the Authority.

[79] A memorandum was shared to all staff at the Kaitaia mills on 7 August 2023. It made clear the policy was in place and pre-employment, post incident, reasonable cause and random testing would be commencing.

[80] The applicants lodged their original statement of problem in the Authority a few days later. In light of this, JNL made the decision not to commence testing on the Kaitaia sites.

[81] The parties attended further mediation in September 2023 but did not resolve matters.

[82] In April 2024, following meeting with the applicants, JNL agreed that it would allow the use of oral fluid tests for all random testing at the Kaitaia mills, but did not extend the use of oral fluid testing to other situations. JNL released an updated version of a drug and alcohol policy in May 2024. The applicants proposed amendments to it, including using oral fluid tests for random and reasonable cause testing, while maintaining urine tests for other scenarios, and rehabilitation, to be applicable only to the Kaitaia mills. These were not accepted.

[83] The parties continued discussions but ultimately sought an investigation meeting and determination to resolve their dispute.

## **Discussion**

### *Collective clauses regarding the committees*

[84] In the applicants' amended statement of problem, they alleged JNL failed to comply with clause 7.7 of the Triboard collective and clause 8.5 of the Northland collective. At the investigation meeting and in submissions, the applicants' focus shifted away those clauses, concentrating on the ToS. For completeness, the Authority has considered those clauses. Having done so, the Authority largely accepts JNL's submissions.

[85] In his witness statement Mr Hetherington asserted that the site committees have decision-making authority over day-to-day affairs and that the parties operate through a consultative, collaborative, and consensus-based approach via the committee. He says this approach is embedded in the collectives, making it contractually binding. Additionally, the site committee(s) was said to have the ability to "decide" on a wide range of matters.

[86] Ms Carvill explained in her evidence that the site committee is indeed a forum for consultation, but it is not the only forum, and the committee does not have decision-making power. She explained that decisions about JNL's affairs are made by the company, often with site committee input. She also explained that sometimes the authority to make a decision may rest with one of the managers in the committee, but this is not the same as the site committee having the decision-making power.

[87] JNL submits that the applicants' interpretation - that one or both of the committees must approve a drug and alcohol policy - is undermined by their past silence on similar nationwide health and safety policies. Ms Faulkner's evidence was that JNL has previously introduced comparable preventative policies following consultation, without any claim of breaching the collectives, and that this speaks against the applicants' current position.

[88] Further, in relation to the policy itself, documents provided by the parties (including those involved in the working party) indicate that JNL needed to approve the final 2018 policy, which is inconsistent with the applicants' position that the committee had decision-making power in relation to the policy.

[89] I agree with these submissions and that Mr Hetherington's evidence overstates the contractual position. The collectives do not require consensus to be reached between the parties in relation to a drug and alcohol policy.

#### *Status of the 2018 policy*

[90] In their statements of problem the applicants also appeared to refer to the parties having reached agreement in relation to the 2018 policy. As already noted, documents clearly show that the consensus or agreement reached in 2018 was within the working party/site committee, and that the "final" version was awaiting head office approval. There was not clear agreement between JNL and the applicants as to the form and content of a policy at that stage. The parties were clearly awaiting a further step - that is, review and approval from JNL's head office/senior management. No binding agreement had been reached on the 2018 policy, so there could be no breach of the 2018 policy.

#### *Terms of settlement generally*

[91] The Authority sought and received submissions from the parties regarding the status of the ToS. The nature of terms of settlement and the ToS itself needed to be analysed as part of

considering what effect its contents and their negotiation had on the obligations of the parties to one another and what obligations might arise from it.

[92] Terms of settlement such as the ToS are not afforded a statutory status under the Act. Whereas the Employment Contracts Act 1991 used the term “ratification of settlement”, an equivalent provision under the Act substituted this with “the collective agreement”.<sup>2</sup> What must be ratified under the Act is a collective agreement, which includes a number of statutory requirements to constitute a collective agreement. While “terms of settlement” such as the ToS between the parties may well be “ratified” by members in accordance with a union’s rules and processes, this would not constitute ratification under the Act. The ToS is clearly not a collective agreement as it does not meet the requirements of ss 51 and 54 of the Act. As such the ToS does not hold any statutory status in and of itself.

[93] Despite this, it is clear that terms of settlement have contractual force and encapsulate the “deal” struck between parties upon which unions and employers rely to conclude bargaining. Promises made in written terms of settlement form the basis for drafting or amending a collective agreement, and other documents, which reflect the compromises made by parties. Terms of settlement may also include other agreements reached at the bargaining table, which will not go into a final proposed collective agreement, as in the circumstances of this case.

[94] Despite having no formal status under the Act, the ratification of terms of settlement remains a significant step in concluding collective agreements as they are normally a document which union members have the opportunity to review and vote on in a proposed settlement. The implied term of trust and confidence present in all employment relationships carries the obligation to conduct employment related negotiations in good faith - that must involve a duty not to resile from settlements in whole or in part.

#### *Status of the ToS*

[95] The ToS in this matter was an agreement between JNL, a company, and the applicant unions. JNL has not expressly acknowledged in its submissions that the ToS constituted a

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<sup>2</sup> As noted in *Waikato District Health Board v The New Zealand Public Service Association Inc* [2008] ERNZ 80 at [32] and [34].

contract between the parties, although it clearly intended to be bound by its terms. It has instead focused on claims that the ToS is incapable of being complied with.

[96] The ToS was a signed agreement. There is no suggestion that at the time of signing that either party did not sign it in good faith. The ToS expressly stated it was “subject to Ratification by the Union parties”. Once ratified, the ToS would become binding on the parties.

[97] I accept the applicants’ evidence that the ToS was presented to union members at the Triboard mill for ratification by union members on 25 November 2020. I also accept Mr Hetherington’s evidence that members had the opportunity to review the ToS and voted in favour of settlement on the terms within in it. The next day, Mr Hetherington wrote to JNL confirming ratification was successful and that with some amendments the collective, it could be signed off. The Triboard collective was signed off shortly thereafter.

[98] The applicants submit that it does not matter whether the contractual terms at issue are in the ToS or the collective. The parties agreed that certain adjustments would be made to JNL’s policy, and the ToS imposes agreed obligations on JNL as to what was to be included or excluded from the policy then under discussion. It was clearly intended to impose carefully expressed obligations on JNL as to what was to be included and excluded in the policy. They recorded their agreement in writing and signed it. The applicants say those terms are therefore enforceable by the employees or the applicants and in any event would be enforceable as a matter of good faith. I agree.

*Relevance of a mistaken belief regarding testing*

[99] JNL says it entered into the ToS under a mistaken belief that the proposed testing sequence would comply with the relevant Standards. It says that the testing arrangements identified in the document were inconsistent with the relevant testing Standards.

[100] The applicants point to the three types of mistakes that may qualify for relief in s 24(1)(a) of the Contract and Commercial Law Act 2017 (the CCLA). It says none apply to this situation. The applicants’ response is that even if JNL entered into an agreement based on a mistaken belief, it is nonetheless bound by the ToS.

[101] The Authority sees little value in determining whether a mistake of the types in s 24(1)(a) has been made, as it is clear any such mistake has not resulted in a substantially

unequal exchange of values or in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a substantially disproportionate to the consideration for the benefit or obligation.<sup>3</sup> JNL has not clearly sought relief under the CCLA in any event.

[102] It must be noted that relief under the CCLA is discretionary, and even if a qualifying mistake under s 24 were proved (which it has not been), a party can still be denied relief. In exercising the discretion, courts and tribunals must take into account the extent to which the party seeking relief caused the mistake.<sup>4</sup>

[103] In my view, as a relatively large employer, JNL could reasonably be expected to have sought expert advice regarding the development of a drug and alcohol policy during the many years of discussions with the applicants. Despite having had several years of opportunity to do so prior to signing the settlement, JNL chose not to or omitted to do so. This decision not to obtain the expert guidance it now relies on does not absolve JNL of its obligations under the ToS. By proceeding without that advice, JNL accepted the risks associated with its decision and is therefore accountable for the commitments it has made. There would have been a compelling argument for denying relief in the circumstances.

*JNL curtailed its ability to develop a drug & alcohol policy*

[104] JNL, having chosen to negotiate and reach agreement with the applicants regarding specific content to be included in the policy, agreed to record its obligations in the ToS along with other matters bargained for. JNL was entitled to develop and promulgate its own drug and alcohol policy, provided it did so by engaging with workers in accordance with its engagement obligations under the Health and Safety at Work Act 2015. However, in relation to the matters recorded in the ToS, JNL voluntarily entered into binding terms of settlement with the applicants, specifically addressing certain matters to be included in the policy. By doing so, JNL agreed to resolve the relevant issues on a negotiated basis, rather than through unilateral policy formulation, on a consultation only basis.

[105] While the Triboard collective lacks a clause like clause 8.4 in the Northland collective - which expressly entitles JNL to implement conduct and health and safety policies after consultation - this does not give the company unrestricted prerogative to implement a policy

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<sup>3</sup> Contract and Commercial Law Act 2017, section 24(1)(b).

<sup>4</sup> Contract and Commercial Law Act 2017, section 27.

following consultation at odds with contractually binding obligations, such as those in the ToS. That this could or would create some inconsistency between JNL's policy on other sites and the Kaitaia mills is a consequence of the concessions it made in bargaining in November 2020.

*JNL to give effect to terms or renegotiate in good faith*

[106] Having entered into binding terms, JNL is obliged to give effect to them. This includes promulgating a policy that reflects and incorporates the terms agreed. Like all other terms in the ToS, whether they were included in the collective or sat outside of them, it was expected to stick to them upon ratification.

[107] It is important to recognise that the ToS is the result of collective bargaining. Agreements that result from collective bargaining are often the result of pragmatic rather than precise legal or technical drafting. The ToS is a good example of this.

[108] JNL has said discussions in bargaining related to the June 2020 policy, rather than the earlier 2018 policy. Clearly that was the case. JNL's obligation was to ensure the June 2020 policy was amended prior to implementation to reflect each of the points at section 9 of the ToS. However, the history of discussions, which includes the 2018 policy, provide context to understand what the parties intended in relation to contentious points in the ToS.

*Testing*

[109] While logistical issues associated with implementing the points involving testing appear not to have been contemplated at the time, the parties' intentions were clear. The agreed wording in the ToS required the use of oral fluid testing first in accordance with AS/NZS 4760:2019. It did not restrict the situations this applied to, and it did not permit JNL to choose to use urine testing as a first test. Urine testing was to be used secondarily, in the event of a not negative oral fluid test, in accordance with AS/NZS 4308:2008. That this would have involved taking both oral and urine samples must have been in contemplation by the parties.

[110] If JNL remains unwilling to implement oral testing first in all situations, the correct approach is for it to renegotiate these points in good faith, taking into account developments in oral fluid testing in New Zealand since agreement was reached. Various versions of the policy acknowledged the need for the policy to adapt and change over time for this very reason.

### *Rehabilitation*

[111] In relation to JNL providing rehabilitation under a drug and alcohol policy, there are two clear instances identified where it would be used in the various policy iterations:

- (a) when an employee voluntarily requested assistance for a drug or alcohol issue before testing; and
- (b) where an employee has returned a positive drug or alcohol test.

[112] The 2018 policy stated where workers requested assistance voluntarily before testing, they “shall be assisted towards a similar rehabilitation programme”. The June 2020 policy did not include or exclude this option. The ToS stated the “rehabilitation option may be accessed at the employee’s initiative”. It is not expressed as being at JNL’s sole discretion, or subject to an assessment for suitability. The December 2020 policy was amended to state a worker “shall be assessed for suitability for support through a similar programme”. The ToS appears to make the ability to access a rehabilitation programme an entitlement. JNL says there is a need for service provider assessment, which is outside of JNL’s discretion. If the parties intended for access to be subject to a suitability assessment by a service provider, this additional point would need to be renegotiated.

[113] In the case of a positive drug or alcohol test result, the 2018 policy stated workers would be offered the opportunity to participate in a JNL supported rehabilitation programme, subject to a suitability assessment by the service provider. If considered unsuitable by the provider, no formal offer would be made. In the June 2020 policy, a section explaining the purpose of the policy references rehabilitation “where appropriate”. The separate rehabilitation section goes on to state a worker testing positive for the first time “may” be given the opportunity to join at JNL’s “sole discretion”. The ToS agreed that references to rehabilitation “as appropriate” would be removed. However, the ToS does not go as far as preventing JNL from exercising its discretion about whether to offer rehabilitation in this situation.

### *Random selection procedure*

[114] In relation to the random selection procedure, the ToS stated the selection procedure for random testing would include observation from a nominated union representative. During the bargaining in November 2020, JNL says the concern was that JNL management may influence the selection or target specific individuals for random testing. Ms Carvill explained

that the inclusion in the ToS “at a facility level” for a union observer was to address this concern. However, JNL says this was adequately addressed by outsourcing the selection process to an external agency. In other words, JNL says the point was moot because it was no longer involved in the selection, and therefore union observers were not required. Although this be the case, the ToS contains what was agreed between the parties.

[115] In short, JNL remains bound by the ToS it signed. The specific matters addressed by the ToS would require a mutually agreed variation, where desired or needed. For the avoidance of doubt, the Authority’s findings do not mean that JNL must reach agreement with the applicants in respect of other content in its drug and alcohol policy.

*Compliance order(s) not available*

[116] The breaches of the parties’ collective agreements originally claimed by the applicants no longer appear to be part of their argument, nor are compliance orders now sought in any event. No compliance orders are made.

## **Outcome**

[117] The Authority considers the above meets the requirement to state relevant findings of fact, issues of law, and express its conclusions on the matters or issues it considers require determination in order to dispose of this matter.<sup>5</sup> Given my conclusions, no orders are made.

## **Costs**

[118] The Authority’s Practice Direction sets out certain categories of cases where there is a presumption that parties bear their own costs.<sup>6</sup> The present case likely falls within one of these categories: disputes about the application, interpretation or operation of a collective agreement or collective bargaining disputes. For this reason, my preliminary view on costs is that these should lie where they fall. If either party wish to be heard further on the issue of costs, they are to contact the Authority Officer.

Sarah Blick  
Member of the Employment Relations Authority

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<sup>5</sup> Employment Relations Act 2000, section 174E.

<sup>6</sup> <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>.