

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

Determination number: AA 181/07
File Number: 5087162

BETWEEN

MARITIME UNION OF NEW
ZEALAND INC
First Applicant

HENRY NEE NEE and
HENRY TOLEAFOA
Second Applicants

TONY SMART
Third Applicant

AND

TLNZ LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: Simon Mitchell, Counsel for Applicants
Phillipa Muir, Counsel for Respondent
Submissions received: 12 June 2007 from Applicant
18 June 2007 from Respondent
Determination: 19 June 2007

**DETERMINATION OF THE AUTHORITY ON APPLICATION FOR
REMOVAL**

[1] This is an application by consent for an order under s 178 of the Employment Relations Act 2000 for the removal of an employment relationship problem to the Employment Court. The application relies on the following provisions:

- “(2) The Authority may order the removal of the matter ... to the Court if –
- (a) an important question of law is likely to arise in the matter other than incidentally; or
 - (b) ...
 - (c) ...

- (d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.”

The employment relationship problem

[2] TLNZ has developed a policy on testing for the presence of drugs and alcohol in employees and would-be employees, and says it consulted with the Maritime Union of New Zealand Inc (“MUNZ”) on the matter from May 2005. From its point of view the policy took effect from 1 March 2007. The policy provides for pre-employment, post accident or post incident, and reasonable cause testing for the presence of drugs or alcohol. Broadly speaking, urine testing is used for the presence of drugs and breath testing is used for the presence of alcohol.

[3] MUNZ says the policy is unlawful on a number of grounds. In particular it says:

- (a) TLNZ is seeking to impose it on stevedores who do not work in safety sensitive areas;
- (b) the policy provides for urine testing, which is unnecessarily intrusive;
- (c) the policy is oppressive, as other less intrusive avenues are open to it when it comes to dealing with employees in the workplace who may be affected by drugs or alcohol; and
- (d) the imposition of the policy alters the parties’ terms and conditions of employment, and the imposition is an attempt to enforce a variation without agreement.

[4] The application for removal is primarily concerned with (a) – (c) above, so I do not refer any further to (d).

[5] In addition MUNZ says the parties are currently bargaining for a new collective agreement in respect of Tauranga, and it has a proposed drug and alcohol policy which it seeks to incorporate as a schedule to the agreement. The statement of problem refers to the lawfulness of TLNZ’s imposition of the policy both in that context and in a general content, and TLNZ has replied. Since the application for

removal does not address those matters I merely record they have been raised as part of the employment relationship problem.

[6] TLNZ says:

- (a) all of its work sites are safety sensitive;
- (b) urine testing is not unnecessarily intrusive, and that in any event urine testing will not occur in the first instance in all cases; and
- (c) the policy is not oppressive.

[7] TLNZ has raised further issues in respect of what it says was an instruction by MUNZ - and the resulting actions of certain of its members - to refuse attend training courses on the policy. Those matters, too, have not been addressed in the present application so I merely record they have been raised as part of the employment relationship problem.

The application for removal

[8] Issues underpinning all of the above concern:

- (a) the definition of a 'safety sensitive workplace'; and
- (b) whether there has been technological change since the decision of the full Employment Court in **NZ Amalgamated Engineering etc Union Inc v Air New Zealand**¹ of such a nature that it is appropriate for the Employment Court to revisit the matter of workplace drug and alcohol testing in the context of the present problem.

[9] Regarding the definition of a safety sensitive workplace, it was said that the court would need to determine whether the **Air New Zealand** decision is applicable where 'safety issues rather than public safety issues' arise. This was expanded upon to refer to the need for the court to determine whether there is a connection in the waterfront environment between the impairment of employees and operational safety.

¹ [2004] 1 ERNZ 614

[10] Otherwise most of the emphasis in submissions was on whether the Employment Court should revisit the matter of workplace drug and alcohol testing in the light of technological change since the **Air New Zealand** case was decided.

[11] In turn the key issue is whether there has been a sufficient change in testing methods so that it is no longer appropriate for urine testing to be sanctioned. Counsel indicated there will be evidence to the effect that saliva testing is now of sufficient quality to be appropriate in the first instance, and there will accordingly be a question of whether urine testing can now be said to be unreasonably intrusive. He says the appropriateness of particular types of testing is a matter that is appropriately removed to the court.

[12] I accept these matters are of such significance that they should be removed to the Employment Court, particularly given the effluxion of time and the indication of the nature of technological developments since the **Air New Zealand** case was decided. Further, the matters raised indicate a need to address the relationship between drug and alcohol testing and workplace safety issues in the waterfront industry specifically, but in terms that may also extend to the wider public interest.

[13] I do not consider these matters should be severed from the wider employment relationship problem as filed in the Authority.

Order for removal

[14] For these reasons I order the removal of the entire matter to the Employment Court.

R A Monaghan

Member of the Employment Relations Authority