IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 543
5349475

	BETWEEN	NZ MEAT WORKERS & RELATED TRADES UNION INC Applicant
	AND	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Simon Mitchell, Counsel for Applicant Graeme Malone, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions:	14 December 2011 from Applicant 20 December 2011 from Respondent
Determination:	20 December 2011

DETERMINATION OF THE AUTHORITY

A **Matter 5349475 is removed to the Employment Court in its entirety pursuant to section 178(2)(d) of the Employment Relations Act 2000.**

Employment Relationship Problem

[1] NZ Meat Workers & Related Trades Union Inc ("the union") has disputed Affco New Zealand Limited's ("Affco's") right to introduce random drug testing at its meat processing plants. It also alleged Affco failed to consult with it over the introduction of its random drug testing policy.

[2] The union sought findings that:

a. Affco cannot legally random drug test employees;
b. Affco's policy was unreasonable in its approach to drug use and testing, and the consequences of positive testing;
c. Affco has breached its good faith obligations by introducing the policy and by introducing it without consultation.

[3] Affco's position was that random testing was essential in order to ensure the safety of persons and plant.

Union's removal application

[4] Subsequent to filing its Statement of Problem the union filed an application to remove the matter to the Employment Court. The removal application was filed on 10 August 2011 and the union relied on s178(2)(a),(b), and (d) of the Employment Relations Act 2000 ("the Act") in support of its application.

[5] The union's removal application stated that:

a. important issues of law were likely to arise in relation to the matter including the reasonableness of a Drug and Alcohol Policy providing for random testing in the meat industry;
b. the matter required extensive evidence, including expert evidence;
c. Unnecessary costs would be incurred if evidence was required in both Authority and Employment Court.

[6] The removal application was accompanied by a memorandum of counsel, which stated:

a. The nature of a safety sensitive work place had not been considered judicially;
b. The proposed expert evidence may involve overseas experts;
c. Other drug testing cases had involved extensive expert witnesses, at substantial cost to the parties;
d. It was appropriate for the matter to be heard in one forum due to the legal issue involved and the likely cost of the proceedings.

[7] The application for removal was withdrawn by Mr Mitchell on 15 August 2011 without prejudice to the filing of a fresh application. No new application has been filed.

Removal on Authority's own motion

[8] Subsequent to the union withdrawing its removal application, the Authority advised the parties that it proposed to consider whether it should order removal on its own motion under s.178(2)(a) and (d) of the Act. The parties were asked to advise the Authority of their views on that proposal.

[9] By letter dated 14 December 2011 Mr Mitchell advised that the union remained of the view that it was appropriate for the matter to be considered by the Employment Court in the first instance. Mr Mitchell advised that the union did not oppose random testing as provided for in Affco's Drug and Alcohol Policy but that its position was that random testing should be by way of a saliva test rather than by a urine test.

[10] Mr Mitchell submitted that the matter will require expert evidence which would be technical and expensive to provide.

[11] Mr Mitchell submitted that the Employment Court had not considered the issue of saliva versus urine testing within the context of random drug testing so the matter involved an important question of law pursuant to s178(2)(a) of the Act and that it was also appropriate to remove the matter under s178(2)(d) of the Act.

Affco's position on removal

[12] Affco filed a notice of opposition to the union's removal application on 17 August 2011. It stated that the union was going to meet on 5 September 2011 to decide whether or not to support random drug testing and that the matter should not be removed in case that meeting impacted on the removal issue.

[13] Although the Authority has made a number of requests for information about the outcome of the union's meeting on 5 September 2011, as it relates to the removal issue, no information was provided.

[14] Affco was invited to provide its view on the Authority's proposal to remove the matter on its own motion pursuant to s178(2)(a) and/or (d) of the Act.

[15] Mr Malone submitted that the matter involved questions of law of importance in the area of drug testing and would involve expert evidence from individuals based overseas. He further submitted that because the issue was of the upmost importance to both parties the losing party would be certain to file a de novo challenge.

[16] Mr Malone agreed that it would be appropriate for the Authority to remove the matter under s178(2)(d) of the Act to avoid the time and cost involved in bringing expert witnesses from overseas on two occasions.

Outcome

[17] The 01 April 2011 amendments to the Act gave the Authority the power to remove a matter to the Employment Court on its own motion.[1]

[18] I consider that removal is appropriate because "*an important question of law is likely to arise other than incidentally*."[2] Drug testing and in particular random drug testing is feature of many workplaces. The Full Employment Court in *NZAEPMU v Air New Zealand*[3] confirmed an employer's right to carry out consent based random drug testing in "*safety sensitive*" areas or operations only. The Court did not provide a definition of safety sensitive but left it as a matter for the parties to address during consultation.

[19] The Employment Court in *Martime Union of NZ Inc & Ors v TLNZ (Auckland) Limited*[4] briefly mentioned the issue of "*safety sensitive*" and stated *"the*

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[1] S.178(1) ERA
[2] S.178(2)(a)
[3] [2004] 1 ERNZ 614
[4] (2008) 8 NZELC 99,181

phrase "safety sensitive" alone is, if not meaningless, then less than entirely helpful." His Honour Colgan CJ commented that:

> *"If "safety sensitive" means that work is conducted in conditions in which there is an increased risk of harm than in other conditions in which people work, then I accept that the wharf limits […] delineate such conditions geographically."*

[20] The Court in *MUNZ* noted that there had been very little litigation in New Zealand about the reasonableness of drug and alcohol testing in employment despite drug and alcohol policies being widespread, including within unionised workforces.

[21] Although acknowledging that a determination of whether a workplace area or operation is safety sensitive necessarily involves factual considerations, I also consider it involves a legal question about what is meant by the use of the term "*safety sensitive*".

[22] The Court has not yet defined this term and I consider it would be helpful to many employers, unions, employees, and employment practitioners if it was given the chance to consider the matter in depth and to issue guidance on the meaning of "*safety sensitive*" in connection with random drug testing.

[23] I find this matter involves an important question of law which arises other than incidentally because it is likely to be decisive of the case and/or strongly influential in resolving the issue between the parties about Affco's right to implement random urine drug testing across its work sites.

[24] I also find that the question of the meaning and definition of "*safety sensitive*" is an important question of law because its resolution could affect large numbers of employees, employers, and unions across different industries within New Zealand given the widespread implementation of drug and alcohol policies noted by the Court in *MUNZ*.

[25] Because of the importance of the issue of random drug testing to both parties I consider it likely the unsuccessful party may challenge the Authority's determination. In which case the evidence, including expert evidence from overseas, before the Authority is likely to be replicated before the Court with increased costs being associated with that.

[26] Even if there had not been an important question of law in terms of s.178(2)(a), then pursuant to s.178(2)(d) I am nevertheless of the opinion that in all the circumstances the Court should determine this matter, for the forgoing reasons.

Outcome

[27] I consider it appropriate to exercise the Authority's discretion to remove this matter to the Court under s.178(2)(a) and (d) of the Act.

[28] I order the removal of the employment relationship problem between *NZ Meat Workers & Related Trades Union v Affco NZ Limited* (AEA: 5349475) be removed in their entirety to the Employment Court for the Court to hear and determine the matter without the Authority investigating it.

Costs

[29] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority