

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 381
5350267

BETWEEN NZ AMALGAMATED
 ENGINEERING, PRINTING &
 MANUFACTURING UNION
 INC
 Applicant

AND TENIX ALLIANCE NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Anne-Marie McInally, counsel for Applicant
 Richard Harrison, counsel for Respondent

Investigation Meeting: 31 August 2011

Determination: 5 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant NZ Amalgamated Engineering, Printing & Manufacturing Union Inc (EPMU) has applied to the Authority, asking it to resolve a dispute about the interpretation and operation of a collective employment agreement (CEA) the Union is party to with the respondent Tenix Alliance New Zealand Ltd (Tenix).

[2] The CEA provides for an Impairment Procedure to apply if there is suspicion that Tenix employees are not able to carry out their duties safely due to medical reasons, fatigue, alcohol or drugs. The Impairment Procedure, or Policy as it is also called, is expressly a part of the CEA.

[3] Tenix has also formulated and published another policy or procedure under the title "Fitness for Work: Drugs and Alcohol" which the company wanted to introduce

from July 2011. There is no dispute that the particular contents of the Drugs and Alcohol Policy are not expressly incorporated into the CEA.

[4] In relation to the two policies the EPMU has stated the problem for the Authority to resolve as being:

... whether the Tenix Impairment Policy, which is part of the collective agreement, precludes the adoption of the Fitness for Work and Drug and Alcohol Testing Policy, or aspects of this, in the absence of a variation to the collective agreement.

[5] The CEA makes provision at clause 3 for its terms and conditions to be varied by written and signed agreement of the parties. In relation to company policies, provision is made for them in the CEA by the expression in the document of an expectation that employees will work within general policies and approved procedures of the company in relation to employment matters including safe work practices. Tenix also expressly retains the right to update its policies from time to time, but that right is qualified by the following in the CEA echoing clause 3:

... it is acknowledged that the contents of this CEA are binding on the Parties and therefore cannot be altered in any way without the mutual agreement of the Parties.

[6] EPMU seeks from the Authority a declaration that the Tenix Fitness for Work: Drugs and Alcohol Policy, as published most recently on 24 August 2011, insofar as it purports to contain terms and conditions of employment breaches the CEA's Impairment Policy.

[7] EPMU and Tenix intend obtaining mediation assistance as soon as the Authority has given a determination of this dispute. The matter has been afforded urgency and in the circumstances the Authority accepts in this case that mediation should follow determination rather than the other way around as is more usual.

[8] The Impairment Policy at clause 8.2 of the CEA is expressed to form part of the agreement. As such it is among the contents of the CEA expressed to be binding on Tenix and EPMU and, as provided by clause 3, it cannot be altered without the mutual agreement of those parties.

[9] The company's view of its Drugs and Alcohol Policy is that it is separate to the Impairment Policy in the CEA. Tenix considers there is "some overlap" between

the two and it also views them as “complementary,” but Tenix does not accept that the Drugs and Alcohol Policy has altered the Impairment Policy in any material way.

[10] Generally, to alter means to change, and something may be changed by adding to it or taking away from it.

[11] In the Drugs and Alcohol Policy, with reference to its purpose, it is stated that the policy “forms part of the wider policies and procedures that are currently in place.” The purpose of the Drugs and Alcohol Policy is expressed to be:

To support Tenix New Zealand and the Pacific’s (Tenix) Zero Harm goals. Through Zero Harm, Tenix seeks to put in place initiatives that enhance a safe working environment.

[12] The purpose of the Impairment Policy in the CEA is stated to be:

The purpose of this Procedure is to maintain a working environment in which people do not place themselves or others at risk by working while they are impaired by drugs, alcohol or illness.

[13] I find the “wider policies and procedures” that the Drugs and Alcohol Policy is purportedly part of includes the Impairment Policy.

[14] I consider that the Impairment Policy in the CEA and the Drugs and Alcohol Policy are not provisions or policies about disparate matters but are addressed to the same matter of health and safety in the workplace, with particular focus on impairment through drug and alcohol use by employees. The CEA’s Impairment Policy is part of the CEA which, the parties have agreed, cannot be altered in any way without their mutual written consent.

[15] Whether the alteration to the Impairment Policy is a change by addition or by taking away is not the test, which is whether the Impairment Policy has been made different.

[16] The two policies are clearly distinct things and one is not identical to the other or does not simply repeat what the other says. If after July 2011 one was to form part of the other, that other was changed by the rearrangement.

[17] I agree with EPMU that the Drugs and Alcohol Policy is broader in scope than the CEA’s Impairment Policy, to the extent of constituting a material change.

[18] It seems reasonable to assume that the Drugs and Alcohol Policy was intended to change the procedures available under the CEA's Impairment Policy, otherwise there would be no point in its introduction.

[19] There are a number of aspects of change which I agree Tenix has purported to bring about through introducing its Drugs and Alcohol Policy. They include the introduction of random drug testing. Since July 2010 the CEA's Impairment Policy has provided for testing by a medical practitioner to determine whether an employee is "impaired by drugs, alcohol or illness." This may be required in the event of the employer having a reasonable suspicion of impairment following an incident or accident. 'Random' testing is not expressly provided for. Tenix considers it should be and wanted from 18 July 2011 to add it and the circumstances in which it is performed to the limited testing specified as being available under the CEA. The addition purports to be a change to the CEA but one EPMU has not yet agreed to.

[20] The Authority was referred to the Employment Court's decision on random testing in the *Air New Zealand* case brought by EPMU against that airline employer; [2004] 1 ERNZ 614. It is distinguishable in my view as it was found by the Court, at paras [179] and [180] of the judgment, that there was nothing in law or in any contract or collective agreement binding on the employer to prevent it from imposing a comprehensive policy on drugs and alcohol in its workplace. The employer was found not to have purported to vary a contract when it issued a policy collateral to the applicable contract.

[21] It is a different situation in the present case, as in the CEA there is already a policy on impairment and testing to detect that, and the policy the employer seeks to introduce collaterally under its management prerogatives alters the existing contractual policy. Such change to the CEA is required to be brought about by mutual consent.

[22] I do not see this case to be any attack by EPMU on the concept and worth of random testing. There are other areas of change created by the Drugs and Alcohol Policy which were also closely examined in submissions by counsel Ms McNally and Mr Harrison. I view this case as being an action brought by a party to an employment agreement wishing to have its terms and conditions observed and kept free from unilateral variation by another party to the agreement. Subordinate policies should not displace contractual terms and conditions.

[23] It is hard to see the purpose of having 22 pages of detailed provisions in the Drugs and Alcohol Policy as being other than to narrow or widen, and thereby change, the Impairment Policy provisions of the CEA.

[24] I find that employees bound by the CEA may be required to comply with its current provisions, but insofar as Tenix wants to change those provisions then it must do so by variation of the CEA. That exercise may be carried out by Tenix extracting from the Drugs and Alcohol Policy as currently written, the parts which it considers are not already in the Impairment Policy and seeking the agreement of the Union for those parts to be included in it by variation of the CEA.

Determination

[25] I therefore agree with EPMU that the Drugs and Alcohol Policy provisions cannot be imposed on Tenix employees as terms and conditions of employment without also breaching the requirement under the CEA for any change to that agreement to be made in accordance with the clause 3 variation provisions. Remedies are available under the Employment Relations Act to rectify such breaches.

[26] As indicated EPMU and Tenix intend from this point to obtain mediation assistance.

[27] There is no issue as to costs.

A Dumbleton
Member of the Employment Relations Authority