IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 375
5394259

	BETWEEN	ELECTRICAL UNION 2001 LIMITED First Applicant
		DEAN COWELL Second Applicant
	AND	MIGHTY RIVER POWER LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	L Yukich, advocate for applicants D France, counsel for respondent
Investigation meeting:	9 October 2012 at Rotorua
Determination:	17 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dean Cowell is employed by Mighty River Power Limited (MRP) at the MRP Geothermal Power Station at Kawerau. He is a member of the Electrical Union 2001 Inc (the union), and is employed as a geothermal production technician.

[2] In an email message dated 22 August 2012 MRP circulated to all employees advice that, as a result of a number of incidents, a recent amendment to MRP's drug and alcohol policy was to be applied to all of the company's operations. The amendment allowed for random drug and alcohol testing of employees. On 31 August 2012 Mr Cowell was advised that he had been selected to undergo a random drug and alcohol test. He declined to do so and was stood down.

[3] MRP took the view that the refusal was a breach of company policy and could be considered serious misconduct. The union took the view that the policy amounted to a unilateral variation of the terms of the Mighty River Power Limited and Electrical Union 2001 Inc collective employment agreement (the cea), which came into force on 1 July 2011 and covered Mr Cowell's work. The requirement that Mr Cowell undergo a drug and alcohol test without his consent was not lawful and reasonable.

[4] The union and Mr Cowell have sought declarations that the drug and alcohol policy as advised on 22 August 2012 breaches the terms of the cea insofar as it purports to contain terms and conditions of employment, and that in the absence of agreement MRP is not entitled to insist that employees covered by the cea submit to random testing. According to the statement of problem Mr Cowell also seeks compensation for the injury to his feelings caused by his being subjected to duress in respect of the attempted drug and alcohol test.

[5] The parties attended mediation, following which the Authority was asked to determine as a matter of urgency the preliminary questions of whether the workplace was a safety sensitive area, and whether Mr Cowell's position was a safety sensitive position. In that context, as set out in the submissions on their behalf, the applicants seek declarations that neither the geothermal power site at Kawerau nor Mr Cowell's position are safety sensitive to an extent that justifies random drug and alcohol testing.

[6] This determination addresses the preliminary questions and the declaration sought in respect of them.

The drug and alcohol policy

[7] The MRP Operations & Development Drugs & Alcohol procedures were developed in consultation with staff in November 2009. The procedures applied to: pre-employment testing or testing prior to transfer into a safety sensitive area; testing for just cause; and testing after an accident or serious incident.

[8] An amendment dated December 2011 read in part:

> *Designated 'Safety Sensitive Areas' will be a high priority for drug and alcohol testing.*

Ongoing formal risk assessments will be carried out to ensure assessment of 'safety sensitive areas' are identified

…

Testing of employees and contractors will be conducted under the following circumstances:

- *pre-employment*
- *just cause*
- *post accident/serious accident*
- *random at safety sensitive sites and upon general manager approval*
- *rehabilitation*

Random testing will be conducted if and when required. It is the intention of the company to control the risk of drug and alcohol misuse without resorting to random testing.

[9] The December 2011 amendment repeated at cl 5.9 the following definition of 'safety sensitive area or role', which also appeared at cl 3.4 of the November 2009 policy:

Any area or role where a failure to properly perform duties involved in the role would expose the person or others to a risk of injury, harm, serious harm, or damage to property, plant or equipment.

Safety sensitive areas include, but are not limited to construction work sites, any areas where machinery and/or vehicles are operating or work sites in proximity to the public.

[10] Another definition was included in the pre-employment and transfer provisions. The provisions read in part:

Safety sensitive areas include but are not limited to:
. operations
. project work sites
. well and reservoir sites

A list of safety sensitive areas can be found here [online link]

The identification of 'safety sensitive areas' will be ongoing reflecting the results of formal risk assessment

[11] The list of safety sensitive sites included MRP's geothermal power stations (including the power station and steam field at Kawerau), MRP's hydro power stations, and other named sites or areas.

[12] MRP's witnesses provided statements setting out the substantial safety risks associated with operating a geothermal power station. To summarise their already-summarised accounts of how such stations operate, geothermal steam or brine is extracted from a reservoir deep beneath the ground, with very high temperatures and pressures being involved. The energy in the fluid is converted into electricity either by being used in a turbine to turn a generator at very high rpm and making electricity at extremely high voltage, or by being used in an energy converter to heat up high volumes of the highly inflammable N-pentane to make electricity at the same extremely high voltage. The power is converted to even higher voltage and transmitted down transmission lines. An acid injection system is used on the Kawerau site, and to that end large volumes of sulphuric acid are stored on-site.

[13] A list of hazards at the site lists and assesses these and associated hazards. I accept that the exposure to hazards and risks is high, and the consequences of an accident or incident at the site could be catastrophic. Strict safety requirements apply at the site.

The applicants' argument

[14] I am unaware of what occurred in mediation to prompt the request that the Authority deal with the preliminary question of whether the Kawerau site and Mr Cowell's position were safety sensitive. However both the content of the declaration sought, and the approach taken in submissions for the applicants, indicate there was a strong underlying focus on whether random drug and alcohol testing is or should be permissible in principle.

[15] Some of the submissions for the applicants extended beyond whether the site was safety sensitive, and to the extent they did so I do not address them. Otherwise Mr Yukich submitted that the Kawerau site is not a safety sensitive area because:

- applicable case law has 'moved on' since the judgment of the full Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc & Ors v Air New Zealand*[1]*;*
- it lacks a key element of risk to public safety; and

[1] [2004] 1 ERNZ 614

- the site has not been identified as a safety hazard.

[16] Mr Yukich submitted further that Mr Cowell's position was not safety sensitive because neither the position nor Mr Cowell's behaviour has been identified as a hazard.

1. The *Air New Zealand* case

[17] The judgment in the *Air New Zealand* case addresses points of the kind Mr Yukich seeks to make against random (or even any) drug and alcohol testing of employees in general, and in particular that: the relevant employment agreements did not empower the employer to carry out the actions specified in the drug and alcohol policy; and the requirement to provide bodily samples for testing was in breach of the New Zealand Bill of Rights Act 1990, the Privacy Act 1993 and the Human Rights Act 1993. The court weighed those rights against the parties' obligations in respect of the management of safety hazards under the Health and Safety in Employment Act 1992, and found:

> *[246] We begin by according weight to the plaintiffs' and their members' concerns which they are entitled to entertain, as has been recognised in overseas jurisdictions and by the academic writers. We accept there is a natural and understandable reluctance on the part of some employees to provide specimens of urine for the purposes of drug testing.*
>
> *[247] We also accept that the Health and Safety in Employment Act and the general law impose absolute duties on employers to take all practicable steps to eliminate significant hazards to employees and others. Such hazards may include temporary manifestations of behaviour resulting from the taking of alcohol or drugs.*
>
> *[248] Because of the Act's accent on safety, it is reasonable that employers should be able to discharge this duty by a variety of available practical means, including drug testing in safety sensitive areas. ...*
> *...*
>
> *[251] This brings us to the difficult question of random testing which is testing that is suspicionless. In our judgment, the arguments that have weighed with us so far do not apply with the same force so as to describe as reasonable the random or suspicionless testing of all employees and cannot justify the random testing of employees working outside safety sensitive areas.... The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.*
>
> *[252] ... In our judgment the balance is to be struck in this case at the point at which the testing can objectively be said to have a sufficiently proximate connection*

> *between the impairment of employees by means of the consumption of drugs or alcohol or both, and operational safety. We hold that the necessary connection is capable of existing –*
> *(i) …*
> *(iv) in random drug testing in safety sensitive areas only, not across the board.*

[18] Mr Yukich submitted that the court's approach to the weighing of rights and obligations is no longer appropriate, saying case law has 'moved on' from this in reliance on the judgment of the Supreme Court in *Cropp v a Judicial Committee & Anor*[2]. That judgment concerned the validity of a random drug-testing regime for jockeys which was contained in the Rules of Racing of New Zealand Thoroughbred Racing. Mr Yukich relied on certain passages which were taken so entirely out of context that I do not detail them. They do not support his submission to any degree.

[19] The Supreme Court dismissed Ms Cropp's appeal against findings on the validity of the regime. In doing so it commented with approval on the conclusion in the *Air New Zealand* case to the effect that there was no reason to believe a particular occupational group was more likely to be abstinent than the general population, and the unfortunate consequences of taking drugs in the community were too well-known to require evidence. That consideration justified the random drug-testing of persons engaged in safety sensitive areas.[3]

[20] The court noted that horse racing was dangerous for jockeys and horses in particular and found in addition:

> *[31] The 'safety requirements' of race meetings on any sensible reading must encompass measures designed to eliminate, or at least minimise, the taking by jockey's by drugs which may induce unsafe riding practice or behaviour, both by detecting and deterring drug taking.*
>
> *[37] The legal obligations which exist in relation to the activity of horse racing include compliance with the Health and Safety in Employment Act 1992. Section 16 of that Act inter alia requires a person who controls a place of work to take all practicable steps to ensure that no hazard that is or arises in the place harms people who are in the place with the consent of the person.*

[21] In short, rather than disagreeing with the Employment Court's approach to the weighing of human rights and civil liberties on the one hand and safety requirements

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[2] [2008] NZSC 46
[3] at [30]

on the other, the Supreme Court took the same approach. I do not accept that the case law has 'moved on' from the approach in the *Air New Zealand* case.

2. The element of risk to public safety

[22] Mr Yukich's submission regarding the risk to public safety appeared to be based on this passage in the *Air New Zealand* decision:

> *[261] In arriving at our conclusions we have accepted as valid the proposition … that persons employed in safety sensitive areas must have a lesser expectation of privacy and personal autonomy than employees charged with less heavy responsibility. Therefore it is reasonable to require them to co-operate with the employer when it desires, in the interests of public safety as opposed to general morality (…), to require the workplace to be kept free of the undesirable influence or risk of impairment through the taking of alcohol or drugs, …*

[23] That passage does not mean that, in order to establish that a site or a position is safety sensitive, it is necessary to show it poses a risk to public safety. The reference to 'public safety' is a reference to the public interest in workplace safety as it affects both the workforce and members of the public, as distinct from moral issues associated with the use of drugs and alcohol. I accept that risk to members of the public is a relevant consideration, but as Mr France pointed out, it cannot be the case that a workplace may be safety sensitive if hazards in it pose the necessary degree of risk to members of the public but not safety sensitive if hazards pose the same degree of risk to employees in the workplace although not to members of the public.

3. Identification of the site as a hazard

[24] Mr Yukich submitted that the application of the term 'safety sensitive' is a matter of fact and degree in respect of the existence of hazards, their ranking in terms of public impact, and the management of them. I accept that the question of safety sensitivity is one of fact and degree, but I do not accept the remainder of the submission. This is particularly so in respect of any requirement that a risk to public safety must be proved, or any requirement that the site itself must be identified as a hazard before it can be said to be safety sensitive.

[25] The relationship between hazard identification and drug and alcohol testing has been further explained by the Employment Court as follows:

- *The Health and Safety in Employment Act 1992 and general employment law impose absolute duties on employers to take all practical steps to eliminate significant hazards to employees and others including temporary manifestations of behaviour resulting from the taking of alcohol and drugs. It will be reasonable for employers to discharge those duties by a variety of available practical means including testing for the presence of drugs and alcohol in employees in the workplace.*[4]

[26] I do not accept that the mere failure to identify expressly in a list of hazards applying to a particular site the hazard posed by an employee who is temporarily incapacitated in that he or she is under the influence of drugs or alcohol, means the site is not safety sensitive. The hazard posed by drugs and alcohol in the workplace is, in any event, expressly identified in the drug and alcohol policy.

[27] The employer's obligation is to identify hazards and significant hazards, as MRP has done, and to assess them regularly with reference to whether they are significant hazards. Significant hazards must be eliminated if practicable; isolated if elimination is not practicable, or minimised where neither elimination nor isolation is practicable. Random drug and alcohol testing is a step that can reasonably be taken in the interests of elimination, isolation or minimisation of significant hazards in a workplace which is safety sensitive.

[28] Mr Yukich's submission did not go as far as to explain why the geothermal power station at Kawerau is not a safety sensitive site in that context. Certain allegations were made about the nature and extent of consultation on the safety sensitive nature of the site - and these were disputed - but I was not asked to address any issue regarding the adequacy of the consultation. Moreover, there was no reliance on an alleged absence of or any shortcomings in the consultation process in the submissions to the effect that the site was not a safety sensitive site.

[29] I do not accept the further submission that, by comparison with the Air New Zealand operation, the geothermal power station at Kawerau is not safety sensitive. No evidential basis was advanced for the submission. It appeared to be based on references in the *Air New Zealand case* to the high safety standards required of airlines, coupled with what amounted to a reference to dispute between the union and

[4] *Maritime Union of New Zealand & Ors v TLNZ Limited & Anor* (2007) 5 NZELR 87

MRP about whether a person in Mr Cowell's position should have an assistant. Although I do not in any event accept that the comparison with Air New Zealand is apt and I do not accept the logic applied in respect of the dispute involving Mr Cowell's position, beyond the personalised reference to that dispute no objective comment was made on the level of safety standards required at a geothermal power site.

[30] Moreover, I was referred to other legislative requirements including those in the Electricity Act 1992, regulations made under them, and applicable safety management standards. These support the notion that high safety standards are required.

[31] As for a definition of 'safety sensitive', I acknowledge that the court in *Air New Zealand* appreciated the expression was not easy to define, and considered at the time that the matter was one for the parties rather than the court to address.[5] Even so, while acknowledging the need for consultation on the matter of safety sensitivity, the court also acknowledged that the employer bears the liability under the Health and Safety in Employment Act, and the decision about safety sensitivity was one for the employer to make.[6] It has done so here.

4. The safety sensitive nature of Mr Cowell's position

[32] Mr Cowell's statement of evidence extended to a number of matters not related to the questions put to me regarding whether the site or his position were safety sensitive. Some points touched on in the statement concerned the procedure leading to the inclusion in the policy of random drug and alcohol testing, the circumstances in which Mr Cowell had been required to undergo such a test, and assertions that MRP's actions were in breach of the cea, but those matters did not form part of the preliminary questions for determination.

[33] Otherwise Mr Cowell asserted that nothing in his role had any features that were safety sensitive. He said the role was not listed in the list of hazards for the site, that the site poses no risk to public safety because certain safety measures have been

[5] At [255]
[6] At [253]

taken, that staff are highly skilled and are trained to eliminate isolate or minimise significant hazards, and there is an obligation to ensure the plant is configured in such a way as to make it safe for anyone to work on. No-one would work on a piece of plant or equipment unless it were safe. Thus the argument seemed to be that because certain hazards have been addressed as set out, no risk remains. Therefore neither the site nor Mr Cowell's position is safety sensitive.

[34] If my understanding of the argument is correct, then I do not accept the arguments. It does not address the role of drug and alcohol testing as one of the measures available to manage hazards, rather it asserts such testing is not necessary because sufficient measures are already in place. In doing so it begs the question of why the measures in place were put there at all – namely that they reflect the extent of the dangers associated with the site and why it is important to observe strict safety requirements. Moreover it does not address the employer's obligation to take all practicable steps in respect of the management of hazards.

[35] Mr Yukich said in submissions on Mr Cowell's position that 'safety sensitive' is defined as a circumstance where an individual's behaviour is identified as a source or potential source of harm to themselves or others, and once ranked as a hazard in respect of public safety is subject to the hierarchy of control in the Health and Safety in Employment Act and in the cea. For the reasons set out in this and the previous section of this determination, I do not accept that submission.

[36] Finally, a further aspect commented on in the *Air New Zealand* case was:

> *[253] … the … human resources advisors, in house lawyers, payroll staff and others may not be classifiable objectively as being in safety sensitive positions. Equally there will be pilots, aircraft engineers, flight planners and many others whose positions and tasks will make them employees in safety sensitive positions. There will be a myriad of other positions that may fall either way. It is not for this court to make any determination on a case by case basis. That is the employer's role, but after consultation with the plaintiffs and the affected employees and on an objectively verifiable basis. The employer bears liabilities under the Health and Safety in Employment Act and at common law and must make the decisions about safety sensitivity.*
> …

[37] Put more generally, it may be possible to distinguish for the purposes of safety sensitivity between employees engaged in office-based roles possibly on a separate

site, and employees engaged in roles that may pose a higher degree of risk to their own or the safety of others. Here, however, MRP has not made such a distinction between Mr Cowell's role and those of others at the Kawerau site, and nothing in the evidence I heard suggested there was any reason why it should do so. It has determined, as it is entitled to, that the whole site is safety sensitive.

[38] For these reasons I find both Mr Cowell and his role are safety sensitive.

The respondent's argument

[39] Mr France's submissions traversed the law in terms with which I agree and have applied in the foregoing discussion.

[40] I also agree with the submissions as to why the geothermal power site at Kawerau, Mr Cowell and Mr Cowell's role are properly regarded as safety sensitive.

Determination

[41] For the above reasons I decline to grant the declarations sought.

[42] The remaining matters are scheduled to be heard on 29 November 2012. However further mediation may be appropriate. The parties are directed to address me within 14 days of the date of this determination on whether a direction is necessary.

Costs

[43] Costs are reserved pending a determination of the remaining matters, or other resolution of the employment relationship problem.

R A Monaghan
Member of the Employment Relations Authority