**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2013] NZERA Auckland 107
5394259

| | | |
|---|---|---|
| | BETWEEN | ELECTRICAL UNION 2001 INCORPORATED<br>First Applicant |
| | | DEAN COWELL<br>Second Applicant |
| | AND | MIGHTY RIVER POWER LIMITED<br>Respondent |

| | |
|---|---|
| Member of Authority: | R A Monaghan |
| Representatives: | L Yukich, advocate for applicants<br>D France, counsel for respondent |
| Investigation meeting: | 29 November 2012 at Rotorua |
| Determination: | 28 March 2013 |

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This determination follows the determination of the Authority in *Electrical Union (2001) Inc & Anor v Mighty River Power Limited*[1] (the first determination). There I found that Mighty River Power's (MRP's) Geothermal Power Station at Kawerau, where Dean Cowell is employed, is a safety sensitive site.

[2] That question arose in the wider context of a dispute between Mr Cowell and the Electrical Union 2001 Inc (the union), and MRP. The dispute centred on MRP's instruction on 31 August 2012 that Mr Cowell submit to a randomly-imposed requirement to undergo a drug test. Mr Cowell refused to undergo the test, although he later provided a certificate of fitness to work which he obtained from his own

[1] [2012] NZERA Auckland 375

doctor. He also underwent a drug test privately and on his own account. The test was negative. There was no suggestion that Mr Cowell was under the influence of drugs or alcohol at the relevant time. Mr Cowell says, and it is accepted, both that he was fit to work and that he was not exhibiting any symptoms of a lack of fitness to work.

[3] MRP issued the instruction in reliance on its workplace drug and alcohol policy (the policy), which among other things purported to permit random drug and alcohol testing of employees on safety sensitive sites. Mr Cowell and the union say the instruction was not lawful and reasonable because it was contrary to the Mighty River Power Limited and Electrical Union 2001 Inc Collective Agreement 2011 – 2013 (the cea), which is binding on the parties. Further, any attempt to impose a regime of random drug and alcohol testing amounted to an unlawful attempt to vary the terms of the cea.

[4] The parties have addressed that dispute before pursuing any disciplinary process in respect of Mr Cowell's refusal.[2] Mr Cowell remains in his employment and no sanction has been imposed on him.

**Relevant provisions**

[5] Clause 32.1 of the cea reads:

> *Evidence of fitness for work*
>
> *In accordance with its responsibilities to effectively manage all hazards the employer is required to ensure employees fitness for work*
>
> *Subject, at all times, to the principles of s 11 New Zealand Bill of Rights Act 1990 the employer may, with reasonable just cause, require in writing, that an employee produce evidence of fitness for work.*
>
> *Any request for such evidence shall detail the specific reason and circumstances for the request and the behaviours demonstrated by the employee, reasonable just cause, that the employer has relied upon in justifying the request.* (sic)
>
> *At the point that such a request is received the affected employee shall be stood down from duty and not required to attend normal work, without loss of normal pay, until the employer is satisfied with the evidence supplied.*
>
> *Any costs incurred by the employee in meeting the employer request for evidence of fitness for work shall be met by the employer.*

[2] In accordance with the expectation discussed in *Sky Network Television Limited v Duncan* [1998] 3 ERNZ 917

[6] Section 11 of the New Zealand Bill of Rights Act 1990 (NZBORA) reads:

> *Everyone has the right to refuse to undergo any medical treatment.*

[7] The applicants also rely on cl 37 of the cea, which reads:

> *Privacy*
>
> *The principles of the Privacy Act 1993 (the Privacy Act) will apply*
>
> *With the employee consent (on a case by case basis) the employer may collect and retain personal information, concerning the employees employment, directly from the employee or any third party where practical.*
>
> *The employer will obtain only such information as is reasonably necessary.*
>
> *The employee has rights and obligations and in particular the right of access to, and the right to request correction of, personal information (except for evaluative material in so far as it relates to any exception provided by the Privacy Act.)*

**The issues**

[8] The applicants' approach to this employment relationship centres on their objections in principle to random drug and alcohol testing[3] and their view of the application of the cea. The issues in respect of the application of the cea are:

- does cl 32.1 prevent MRP from requiring union members to undergo random drug and alcohol testing;
- does a refusal to undergo a random drug or alcohol test amount to 'reasonable just cause' for a requirement under cl 32.1 to provide evidence of fitness to work;
- what may amount to satisfactory evidence of fitness for work;
- does cl 37 fetter MRP's ability to require union members to undergo random drug and alcohol testing.

[9] Additional matters were also raised.

---

[3] To the extent they asserted for the purposes of the first determination that the judgment in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand* [2004] 1 ERNZ 614 is no longer good law.

[10] The first is that Mr Cowell says he was forced under threat of disciplinary action to provide to MRP the result of the drug test he underwent privately. He says he was not obliged to provide that information and that he did so under duress. He seeks compensation.

[11] Secondly, certain allegations of breach of good faith were made during the investigation meeting although they were not included in the employment relationship problem as the applicants defined it, nor were they the subject of or incorporated in any request for a remedy. The alleged breaches were:

- MRP failed to consult with its employees and with the union; and
- MRP acted in a misleading and deceptive manner.

[12] When asked about the purpose of the allegations Mr Yukich advised they were being made in response to certain statements MRP had made about its implementation of the policy, rather than because they were being relied on as concerns in themselves. However the matter of good faith was raised in the applicants' submissions, to which MRP replied, so I comment on the allegations later in this determination.

## A. The disputed interpretation of the cea

### Does cl 32.1 prevent MRP from requiring union members to undergo random drug and alcohol testing

[13] The judgment of the full Employment Court in *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Air New Zealand*[4] is clear to the effect that random drug and alcohol testing is not permissible if it is contrary to the terms of an agreement. The applicants say MRP's instruction to Mr Cowell was contrary to cl 32.1 the cea.

[14] They have based their approach to the application of the cea on an understanding that the result of the test would be seen, without more, as evidence of fitness for work. The view was based on their understanding of the wording of cl 32.1, and was supported by a statement contained in a draft amendment to the policy

[4] See note 3

which was tabled at a meeting on 6 December 2011. The draft introduced provision for random drug and alcohol testing into the policy. The sentence '*fitness for work will be determined by drug and alcohol testing*' was included in what appeared to be a summary or overview of the policy.

[15] The sentence is unfortunate, although at least the body of the policy provides that *'a positive test indicates that a person has an impermissible amount of drugs or alcohol in his/her system.*[5] The body of the policy does not go further and provide that a positive test will in itself be regarded as evidence of a lack of fitness for work.

[16] In general the parties acknowledged during the investigation meeting that the test Mr Cowell was being required to undergo was no more than a test for the presence of certain elements in his urine. The test could not identify what quantities of substances containing those elements had been consumed and when. It is not a test of impairment. Accordingly Mr Yukich was correct in saying during the investigation meeting that the test may be evidence of previous drug use (or alcohol as appropriate) but was not evidence of impairment at the time of testing. It is correct, too, to say a negative test is not evidence of fitness to work. There is simply no direct relation between the two.

[17] As has been acknowledged in the case law, random testing as it relates to drug and alcohol use has an important deterrent role[6]. That is a significant reason why it proceeds on a suspicionless basis rather than on the basis of a belief that an individual may be unfit for work.

[18] Accordingly, while there might be exceptions in particular circumstances, testing the actual fitness of an employee to work at the time a random test is to be carried out is not the immediate concern. That concern might arise later, and might prompt the application of cl 32.1. Because Mr Cowell's circumstances involved a refusal to undergo a drug test required on a random basis, rather than a concern about his fitness to work, I find cl 32.1 does not apply. For similar reasons I find it does not apply in a blanket way to prevent MRP from requiring union members to undergo random drug and alcohol testing.

---

[5] At cl 5.5

[6] See the *Air New Zealand* case at [251] and *Cropp v A Judicial Committee & Anor* [2008] NZSC 46 at [31-32]

[19] I find as a corollary that the introduction of random drug and alcohol testing does not amount to an attempt to vary cl 32.1 without the applicants' agreement.

**Does a refusal to undergo a random drug test amount to 'reasonable just cause' for a requirement under cl 32.1 to provide evidence of fitness to work**

[20] The question of whether a refusal to undergo a random drug test can amount to 'just cause' for a requirement to provide evidence of fitness to work under cl 32.1 arose during exchanges between Mr Cowell and his team leader, after Mr Cowell's refusal to undergo the test. It appears Mr Cowell and his team leader debated whether the refusal amounted to 'just cause' to require evidence of fitness to work, with the team leader asserting that it did.

[21] A stand-off developed and Mr Cowell was stood down.

[22] The parties met to discuss the matter on 3 September 2012. By then Mr Cowell had consulted his own doctor. He advised at the meeting that his doctor had found him fit for work and produced a medical certificate certifying as much. The certificate did not contain any further information, although Mr Cowell said during the investigation meeting that the doctor had conducted various tests before certifying to his conclusion.

[23] The parties also discussed the fact that Mr Cowell was not exhibiting any signs of impairment when he refused to be tested, and the union's view that there was no basis for the test as there was no 'just cause' for seeking evidence of fitness to work. MRP restated the view that a refusal was behaviour of a kind amounting to 'just cause' to require evidence of fitness to work under cl 32.1.

[24] According to the policy a refusal to undergo testing may lead to the employee's suspension[7], and a refusal will be viewed as serious misconduct which may result in disciplinary action up to and including dismissal.[8] On that approach the existence of evidence of fitness to work is not the point in the context of random testing, rather the focus is on the refusal to undergo testing. Any disciplinary response would require an investigation into the reason for the refusal. Beyond that it

[7] Cl 5.1.1
[8] Cl 5.1.5

is not possible, for example, to determine in advance the justification for disciplinary action MRP might take as a result of Mr Cowell's refusal.

[25] Otherwise the policy is silent on the relevance of a refusal to undergo a test, and in particular on how a refusal to accept a randomly-imposed instruction to undergo a test will be viewed.

[26] Returning to the question posed, there must be a nexus between the reasonable cause and the fitness to work, as the fitness to work is seen as corroborative of the reasonable cause.[9]

[27] Random drug and alcohol testing is a way of managing the risk to health and safety caused by employees who may be impaired by drug or alcohol use and are not exhibiting any sign of impairment, but because it is suspicionless it is capable of casting its net beyond any question of actual impairment. In a random testing regime employees may react understandably, as Mr Cowell did, on the basis of a genuine sense that personal rights are being infringed or the terms of an employment agreement are being breached. There may be other genuine reasons for refusing to undergo a test. I do not accept it is open to an employer to infer or assume from such a refusal that the employee's fitness to work may be impaired. For those reasons I do not in turn accept there is sufficient nexus between the refusal and the employee's fitness to work to amount to 'just cause' for requiring evidence of such fitness.

[28] Matters might be different if, during an investigation into an employee's refusal to undergo testing required on a random basis, information calling into question the employee's fitness to work was obtained. The information might amount to 'just cause' for a requirement that evidence of fitness be provided, but the required nexus would lie in that information rather than the original refusal.

**What may amount to satisfactory evidence of fitness for work**

[29] Questions posed under this heading included whether a certificate of fitness to work issued by a registered medical practitioner amounted to satisfactory evidence of fitness to work.

---

[9] To borrow from the formulation of the link between reasonable cause and testing, in *Hooper v Coca Cola Amatil Ltd* [2012] NZEmpC 11, at [34] and [35]

[30] The question arose out of Mr Cowell's production of such a certificate at the meeting in September 2012. Since I have found Mr Cowell's refusal to undergo the drug test did not amount to 'just cause' for requiring evidence of fitness to work, there is no need to answer this question.

[31] I note, however, that cl 32.1 has a broad wording and would apply to questions of fitness for work following accident or illness for example. It is unlikely that a bare certificate like the one Mr Cowell produced would suffice to establish fitness for work in those circumstances, and conceivable that a number of detailed medical reports would be required in order to do so. Similarly it is conceivable that one or more detailed reports would be required to establish fitness for work where drug and alcohol use may be involved. I do not accept any blanket proposition that a bare certificate of fitness to work could suffice on its own for the purposes of cl 32.1, particularly if an employer had no information about what functions were tested and how.

[32] A second question posed under this heading was whether a negative drug and alcohol test amounted to satisfactory evidence of fitness to work. As already discussed, a negative test would be evidence only that the elements tested for were not found to be present in the sample tested.

**Does cl 37 fetter MRP's ability to require union members to undergo random drug and alcohol testing**

[33] The applicants say cl 37 incorporates the principles in the Privacy Act 1993 into the cea so that the principles are terms of the cea.

[34] I will assume for present purposes that is correct. In saying cl 37 fetters the ability to require union members to undergo random drug and alcohol testing the applicants rely on principles 1 and 4 of the Act. Principle 1 provides that personal information may not be collected by an agency unless the information is collected for a lawful purpose connected with a function or activity of the agency. Principle 4 provides that personal information may not be collected by unlawful means, or means that are unfair or unreasonably intrusive.

[35] I turn first to what is meant by 'personal information'. According to the Employment Court, neither breath nor urine samples are themselves 'personal information' under the Act. The results of tests on alcohol or drug metabolite content amount to personal information about the individual from whom the sample was taken, as is information associated with requiring, conducting, recording and following up drug and alcohol tests.[10] I apply that definition.

[36] Mr Yukich submitted that principle 1 was breached in that it is not necessary to collect the information to demonstrate fitness for work. However that was not the purpose of the collection and I do not accept the submission. No fetter of the kind contended arose through the application of principle 1.

[37] Mr Yukich submitted that principle 4 was breached because - in Mr Cowell's case at least - the information was sought under duress in the form of the threat of disciplinary action. It was not clear whether he was referring to the instruction that Mr Cowell undergo a test on 31 August, or the requirement that Mr Cowell provide the result of the test he underwent privately. In any event, with reference to principle 4, Mr Yukich submitted that any requirement to produce such information was unlawful, unfair and unreasonably intrusive.

[38] The Employment Court dealt with arguments of this kind in the *Air New Zealand* case. It accepted submissions of the Privacy Commissioner that: lawfulness was not likely to be an issue where testing took place with informed consent; and the presence of informed consent underpinned the fairness of the policy's operation. The Court also found that a certain level of intrusiveness may be justified in random testing in safety sensitive occupations.[11]

[39] Further to consent, the Court said:

> *[238] … the scheme could not work if it were purely voluntary. The consent given or withheld can be said to be, in form and substance, a true consent between alternatives about which adequate information is now given on the back of the consent form attached to the amended policy. … It remains open to employees who have some objection to undergoing the test, whether medical or conscientious, to refuse the test and take their chances on escaping adverse consequences if they can make their reasons for refusal appear to the employer to be tenable.*

[10] *Air New Zealand* at [222]
[11] At [227] and [228]

[40] Mr Yukich did not take issue with the consent form which the employees were required to sign, or with whether Mr Cowell's was an informed approach.

[41] In a further submission regarding the lawfulness of the policy, Mr Yukich said that it amounted to a breach of s 21 of the NZBORA. That section contains a protection against unreasonable search and seizure. The application of the NZBORA to MRP or the policy in question here was not discussed in any detail. To the extent that related considerations may be relevant in any event, the considerations were discussed in the *Air New Zealand* case and by the Supreme Court in *Cropp.*[12]

[42] The courts found that the requirement to provide a bodily sample, and have it tested, is a search. They also found, in the context of random testing for drugs and alcohol, that the importance of protecting safety in safety sensitive areas justified a testing regime intended to deter drug-taking. This was the result of balancing rights such as those in the NZBORA against safety considerations.

[43] I conclude that principle 4 did not create a fetter on MRP's ability to promulgate a drug and alcohol policy providing for random drug and alcohol testing.

**The alleged failure to consult**

[44] Employers are required to consult with affected employees over whether their positions are safety sensitive for the purposes of a policy providing for random drug and alcohol testing[13]. More broadly, statutory and any relevant contractual consultation principles will apply to the formulation and promulgation of a workplace drug and alcohol policy.[14]

[45] MRP's drug and alcohol policy was introduced in November 2009. A Project Team worked on its preparation. Employees were consulted on the draft, including on which sites were to be identified as safety sensitive sites for the purposes of the policy as it then read. No issue has arisen in respect of that part of the preparation and promulgation of the policy.

---

[12] See note 6
[13] *Air New Zealand* [253]
[14] *Maritime Union of New Zealand Inc & Ors v TLNZ Limited & anor*

[46] Consultation was also required on the addition of provisions for random drug and alcohol testing. When the draft update containing those provisions was provided to the union at the meeting of 6 December 2011, it responded by saying the policy dealt substantially with evidence of fitness to work and was an attempted variation to the cea. It said such variation could not be effected without its agreement and it would consider such proposed variations as were put to it. In doing so it sought to make the matter one of bargaining, rather than of consultation.

[47] On 2 February 2012 the updated policy was presented to the Geothermal Health and Safety Committee.

[48] On 28 May 2012 the amended policy was sent to staff, including members of the union, explaining the reason for the introduction of random testing and outlining a procedure for implementing the testing. Training sessions were to follow.

[49] The union responded in June 2012 by relying again on its view that cl 32.1 was the applicable provision, and conflating the requirement to undergo testing with the requirement that just cause be provided if MRP sought evidence of fitness to work. It continued to regard the introduction of random drug and alcohol testing as an attempted variation of cl 32.1 without its consent, and to see the matter as one for bargaining.

[50] The Authority's investigation has addressed the union's concerns on that basis. The Authority has not been asked to find the policy or any part of it is unlawful or inapplicable on the ground of lack of consultation. Had it been asked to do so a very different investigation from the one embarked on would have been required. As matters stand there is no reason to impeach the policy on the ground of lack of consultation.

**The allegation of misleading and deceptive conduct**

[51] The allegation of misleading and deceptive conduct concerned a conversation at the meeting on 6 December 2011. When Mr Yukich raised concerns that the policy amounted to a variation of the fitness to work provisions in the cea Jenny Oakley, MRP's human resources consultant, was said to have replied that the drug and alcohol policy did not apply to members of the union.

[52] Ms Oakley denied this. I consider it likely she said what she is recorded as saying again at a meeting in July 2012, and which the applicants recounted in evidence. That is, the cea prevailed over the policy. That does not amount to an express statement that the policy did not apply to members of the union. The applicants have applied their construction of the cea to give Ms Oakley's statements a meaning she did not intend.

[53] I do not accept Ms Oakley was guilty of misleading and deceptive conduct.

**Mr Cowell's claim for compensation**

[54] According to the statement of problem, Mr Cowell seeks compensation for injury to his feelings when he was subjected to duress in an endeavour to 'make him submit to an unreasonable search and seizure'. The search and seizure in question was the requirement at the September 2012 meeting that Mr Cowell produce the result of the drug test he had undergone privately.

[55] Arguably MRP was not entitled to require that information from Mr Cowell in the circumstances at the time. Equally arguably the information is relevant if a disciplinary investigation in respect of a refusal to be tested was contemplated or had commenced, and an employee would have to take the consequences of a refusal to provide it.

[56] In any event no legal ground was advanced for the claim for compensation. To the extent that the existence of a personal grievance can provide a legal ground for a claim for compensation, Mr Yukich accepted that no personal grievance was raised.

[57] There will be no order for compensation.

**Costs**

[58] Costs are reserved.

[59] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in

which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority