

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 2  
3091634

BETWEEN	VULCAN STEEL LIMITED Applicant
AND	MANUFACTURING & CONSTRUCTION WORKERS UNION Respondent

Member of Authority: Philip Cheyne

Representatives: Chris Patterson & Anneke Reid, counsel for the Applicant  
Lou Yukich, advocate for the Respondent

Investigation Meeting: 8 October 2020 at Christchurch

Date of Determination: 7 January 2021

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**DETERMINATION OF THE AUTHORITY**

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**A. The provisions of the applicable collective agreement entitle an employee who is required to undergo a drug test to choose whether to be tested in accordance with AS/NZS 4308:2008 or AS/NZS 4760:2019.**

**B. Costs are reserved, subject to the timetable set out in this determination.**

**Employment relationship problem**

[1] Vulcan Steel Limited operates a business of steel manufacturing, distribution, plate processing, coil processing and long products processing across twelve sites in New Zealand. It engages more than 350 employees and contractors in that business.

[2] Manufacturing & Construction Workers Union (MCU) is incorporated under the Incorporated Societies Act 1908 and is registered as a union. More than twenty of Vulcan Steel's employees at its Christchurch branch are members of the union.

[3] There is a collective agreement in force which binds and is enforceable between Vulcan Steel, the union and its members employed by Vulcan Steel. The current agreement has a term from 1 February 2020 until 31 January 2021. It includes provisions about workplace drug and alcohol testing. Predecessor agreements also contained similar provisions.

[4] There is a dispute between Vulcan Steel and the union (and its members) about the interpretation, operation or application of the workplace drug and alcohol testing provisions. Vulcan Steel says that the provisions entitle it to choose the method of drug testing, while MCU says that the provisions entitle the worker to choose the method of drug testing. Vulcan Steel prefers use of urine sample testing while MCU and workers prefer oral swab testing.

[5] Vulcan Steel seeks a declaration confirming its right to choose the testing method in accordance with the provisions. It also seeks a declaration that it may initiate a disciplinary process if a worker does not provide the type of sample required for the chosen testing method in absence of a reasonable excuse for that refusal or failure. It seeks a declaration that not providing a urine sample because the worker considers it demeaning, intrusive or an unreasonable intrusion into their privacy are not reasonable excuses for the refusal or failure.

[6] Costs are sought.

[7] MCU says that Vulcan Steel is in breach of the collective agreement by advising that only urine testing and not oral swab testing would be used. MCU also says that Vulcan Steel has engaged in deceptive and misleading behaviour in breach of good faith.

### **Dispute**

[8] Several applications and/or memoranda followed the original statements of problem and in reply. It is not necessary to canvass those procedural matters to determine this problem. The matter in essence is a dispute about who can select the

drug testing method given the provisions in the agreement. The dispute is resolved by this determination.

[9] No declarations are made in this determination about the right to initiate a disciplinary process or whether grounds advanced for any refusal are reasonable excuses. Those are issues which might arise in the future, once the parties' rights under the agreement have been determined, and which should be determined if they arise. It is also not necessary to consider whether there has been a breach of the collective agreement or a breach of good faith to date. The parties hold different views about their rights under the agreement. I will focus on resolving that dispute.

[10] Attached to the collective agreement as appendix one is Vulcan Steel's Drug, Alcohol and Substance Policy. The policy includes a further document titled Drug, Alcohol and Substance Procedure (DASP). When first developed, the policy statement covered procedure. These were later produced as separate documents. It is not necessary to describe those changes at present.

[11] To resolve the dispute, it is necessary to interpret the agreement. The principles of interpretation of a collective agreement are settled.<sup>1</sup> The proper approach is an objective one. I need to ascertain the meaning the agreement conveys to a reasonable person with the background knowledge which would have been reasonably available to the parties at the time. The ordinary and natural meaning of the text remains centrally important. However, the wider context may point to some other interpretation, even in the absence of ambiguity. Context may also assist in determining the intended meaning in cases of ambiguity or uncertainty.

### **Provisions summarised**

[12] By clause 3, the employer and the union agree that the agreement will be administered in accordance with the true intent of its terms and provisions. They commit to fullest co-operation to the end that harmonious industrial relations may be maintained. Under clause 4, the current agreement supersedes all other agreements.

[13] The index includes "Appendix one Attached drug and alcohol policy". Attached is a 2 page "Drug, Alcohol and Substance Policy" statement and a 16 page "Drug, Alcohol and Substance Procedure (DASP)" provision.

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<sup>1</sup> See *Kiwirail Limited v Mobbs* [2020] NZEmpC 139.

[14] I first summarise the policy. Vulcan Steel is committed to ensuring employees can perform their duties in a safe, productive and healthy manner. Possession or use of illegal drugs and/or alcohol in the workplace creates unacceptable risks, so Vulcan Steel has a policy of zero tolerance to illegal drugs and alcohol in the workplace. The policy together with the procedures, sets the requirements for identifying and managing the hazards arising from employees (and others) under the influence of drugs or alcohol in the workplace. All employees have access to EAP, as some employees may require support for a drug or alcohol problem. Employees who believe they have a problem with drugs or alcohol are encouraged to confidentially advise their manager and arrangements for leave and counselling/rehabilitation services will be made. Employees undertaking rehabilitation will be tested prior to returning to work and will not be disciplined because of admitting a problem.

[15] There is a statement about the policy's scope and aims. It covers the consumption and misuse of illegal drugs, prescription drugs and alcohol where such use creates a potential or actual risk to health and safety. It has wide application to all Vulcan Steel's employees and places of business operation.

[16] There are statements about the application of the policy. Vulcan Steel strictly prohibits possession, consumption, sale or transfer of drugs or alcohol on its property. Such conduct amounts to serious misconduct, even without testing. Vulcan Steel strictly prohibits reporting to work under the influence of drugs, alcohol, or prescription medication that impacts performance, judgement or behaviour. Vulcan Steel strictly prohibits employees from driving/operating work vehicles having consumed alcohol. Vulcan Steel strictly prohibits interference with the integrity of any specimen taken pursuant to the policy and associated process.

[17] Expectations are set out. Potential employees must undergo a test and a positive illegal drug test will exclude the potential employee from employment. Random, reasonable cause, post incident and return to work testing will be conducted. The provision then reads:

3.3 Drug testing will utilise hair and/or urine and/or saliva test techniques, as outlined in the DASP

3.4 All employees must report to work, and remain throughout the working day, in a fit and safe condition to undertake their duties and must not be under the influence of drugs, alcohol, or any other substance of abuse.

3.5 An employee will be considered under the influence of drugs, alcohol, or any other substance of abuse if they have a result above zero of alcohol per litre or positive detection of a drug/metabolite from an accredited testing laboratory.

[18] The provision goes on to say that a refusal to provide a sample “as per the DASP refusal section”, without reasonable excuse, may be treated as a breach of the policy. Employees shall not knowingly “cover-up” for a colleague’s misusing a drug or alcohol. There is an expectation of responsible consumption of alcohol if employees are representing Vulcan Steel at onsite or offsite events where alcohol is provided.

[19] Breach of the drug and alcohol policy following a disciplinary process outlined in the DASP may result in disciplinary action, including dismissal.

[20] I now briefly summarise the DASP. It starts with a statement repeating Vulcan Steel’s commitment to a policy of “zero tolerance to drugs and alcohol in its workplace”. The DASP is to be read in conjunction with the policy, but the policy takes precedence in the event of any conflict.

[21] Various terms are defined. “Drugs” is broadly defined but includes drugs listed in the Misuse of Drugs Act 1975, any drugs listed in *AS/NZS 4308:2008: Procedures for specimen collection and quantification of drugs of abuse in urine* and *AS 4760:2006: Procedures for specimen collection and quantification of drugs in oral fluid* (or successor standards). Vulcan Steel is authorised to include drugs other than those listed in the Standard. “Specified Limit” is defined for alcohol as zero micrograms per litre of breath, and for drugs by reference to the Australian standard for each substance.

[22] The DASP repeats and enlarges on policy aims, prohibitions and expectations. It is not necessary to set out these provisions. Alcohol testing standards and procedures are set out in clause 7. Testing is by breath-alcohol testing device that complies with AS 3547-1997 or successor standards. There is no choice of procedure so the present issue does not arise for alcohol testing. The DASP does not expressly require the donor’s consent but does require both the employee and the person administering the test to sign an acknowledgement of the test time and result.

[23] Clause 8 of the DASP sets out the “Drug Testing Standards & Procedure”. On-site testing is conducted through the “collection and analysis of a urine or hair or

saliva specimen using a urine/hair/saliva testing device that meets the current Australian standards.” Testing is done in a “confidential and private manner” generally at Vulcan Steel’s expense. Testing will be carried out in accordance with the “strict criteria of either AS/NZS 4308:2008 or AS 4760:2006 or successor standards.” Under the heading “Procedure”, clause 8.3.1 says “Prior to undergoing a test, a test consent form will be signed by the employee consenting to the relevant method(s) of testing”. The specimen is subject to a screening test. After testing, the employee “will be asked to read, sign and date the chain-of-custody statement certifying the specimen is theirs and has not been changed or altered at the time of collection”. If a non-negative result is obtained, the specimen is sent to a laboratory for a confirmation test.

[24] The DASP then covers pre-employment testing, reasonable cause testing, post incident testing and “Random Testing and Saturation Testing”. It permits Vulcan Steel to require random testing up to four times in a calendar year “as a deterrent to alcohol and drug misuse”. The DASP proscribes test and sample cheating or tampering. If a specimen is “diluted”, the employee is given a further opportunity within 24 hours to provide a specimen that is not “diluted”. The employee “may have to reduce his/her fluid intake during this period”. A second “diluted” sample is treated as a “failed test”. “Diluted” is not defined.

[25] The DASP covers a refusal to undergo a drug or alcohol test. It sets the time within which a specimen must be provided. Fifteen minutes is provided for alcohol testing and an hour for drug testing. Results are provided to Vulcan Steel. With the employee’s consent, results may be provided to a client if the client had initiated the test. Results may be used in evidence or disclosed in disciplinary or legal proceedings, but otherwise must be kept confidential. A non-negative drug test may result in a stand-down, pending the confirmation test results. A non-negative initial and confirmatory alcohol test will result in a stand-down. Disciplinary processes follow a failed test. Possession, use or supply of drugs and alcohol at work is serious misconduct, without any requirement for a test.

[26] The DASP provides for “Confidentiality and the Privacy Act 1993”. It states “All information gathered as a result of testing... is collected for the purpose of implementing this Policy and achieving its objectives.” Except as required by law, no testing information can be disclosed to an external party without the employee’s consent.

[27] The DASP includes several appendices. Appendix 4 is a flow diagram of the test process. It starts with “Employee asked to take a D&A test”. The first decision point is “Employee consents to test?”.

[28] The DASP requires drug testing in accordance with AS/NZS 4308:2008 or AS 4760:2006 or successor standards. I will summarise these standards.

### **AS and AS/NZS Standards**

[29] AS 4760:2006 is an Australian standard setting procedures for specimen collection and the detection and quantification of drugs in oral fluid. AS 4760:2006 was succeeded by AS/NZS 4760:2019. It is a joint Australian/New Zealand standard. In a preface it says that its objective is to ensure that the detection of drugs in oral fluid meets the expectations of testing for applications such as the workplace. The foreword says that an oral fluid specimen may be used to provide an indication of relatively recent drug exposure at a workplace or in other circumstances. It is not appropriate to relate the presence of drugs in oral fluid to impairment, but rather to relatively recent exposure. Specimen collection and testing shall be conducted only after the donor signs a written informed consent form. The consent form can be separate from or a component of a chain-of-custody form.

[30] AS/NZS 4308:2008 is the joint standard for procedures for specimen collection, detection and quantification of drugs of abuse in urine. Its objective is to ensure that the detection of drugs in urine meets the expectations for testing of specimens for purposes including the workplace. There is no specific requirement for written informed consent for the collection and testing of the specimen. The sample chain-of-custody form does not include an explicit test consent statement.

### **The ordinary and natural meaning of the text**

[31] I am referred to various exchanges between the parties at the time the policy was first developed, when it was later separated into policy and procedures statements, and as the dispute developed. It is not necessary to canvass these exchanges to the extent they can be regarded as subjective views of the parties about the intended meaning of the policy and procedures.

[32] I note also that clause 4(a) of the current collective agreement which expressly states that the agreement supersedes all other agreements or employment contracts which have applied.

[33] The words at clause 3.3 of the policy do not expressly say who has the right to choose the testing method which employees and potential employees must undergo in the circumstances described by clauses 3.1 and 3.2 respectively. No other words in the policy expressly say who has the right to choose. However, the policy must be read together with the DASP, subject to the primacy attributed to the policy in the case of conflict.

[34] Clause 8.2 of the DASP requires testing for drugs to be carried out in accordance with AS/NZS 4308:2008 (urine testing) or AS 4760:2006 (oral swab testing), or the successor standards. AS/NZS 4760:2019 was approved by the appropriate authorities in Australia in February 2019 and in New Zealand in January 2019. It was published in March 2019. It therefore succeeded AS 4760:2006 from early 2019. The current collective agreement was signed on 9 June 2020. The current DASP must be read as requiring testing for drugs in accordance with AS/NZS 4308:2008 (urine testing) or AS/NZS 4760:2019 (oral swab testing).

[35] The DASP goes on to provide:

**8.3 Procedure**

8.3.1 Prior to undergoing a test, a test consent form will be signed by the employee consenting to the relevant method(s) of testing

8.3.2 A drugs testing custody and control form will be completed.

8.3.3 The employee will provide a hair or oral fluid sample for testing or, in private, a urine specimen.

8.3.4 The specimen will be tested ...

...

8.3.8 The employee will be asked to read, sign and date the chain-of-custody statement certifying the specimen is theirs and has not been changed or altered at the time of the collection.

[36] The requirement for the employee's consent to the "relevant method(s) of testing" points to the employee having the right to choose which method of testing they will provide a specimen for.

[37] *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*<sup>2</sup> concerned the union's objection to the company's application of an alcohol and drug testing policy. The testing procedure in that case was AS/NZS 4308:2001. The employee's consent was required in the various circumstances which the policy provided that the employer might require a test. The union's case in part was that the drug testing regime could not be said to be consent based, given the likely consequences for an employee who did not consent. Despite observing that the point was not without merit, the Court was persuaded that the application of the policy could not work if it was purely voluntary, so that the consent given could be said to be a true consent. The Court noted<sup>3</sup> that the formal consent was also a safeguard for the laboratory collecting the specimen.

[38] *Air New Zealand* did not involve the interpretation of a collective agreement. The employer's policy did not engage the applicable employment agreements, the policy not being based on and there being no inconsistency with those agreements. The principles of interpretation of collective agreements did not arise. Consent was for the test as there was no choice of method.

[39] Mr Patterson submits that the consent required of the employee by clause 8.3.1 of the DASP is for the drug test and no implication arises that the employee may choose the method. I do not agree. Clause 8.3.1 expressly requires the employee's consent to the relevant method of testing. If the employee's options were to consent to the method of test stipulated by Vulcan Steel, or to refuse a test, clause 8.3.1 would have simply read "... a test consent form will be signed by the employee." Meaning is given to the words "consenting to the relevant method(s) of testing" only if the employee has the right to choose between AS/NZS 43308:2008 and AS/NZS 4760:2019.

[40] I am reinforced in this view by the absence of any requirement for consent for testing for alcohol. While the requirement to expel breath for the purpose of testing its content for the presence of alcohol intrudes less into personal privacy, it nonetheless is still part of a test under the policy and DASP. If clause 8.3.1 should be read as just consent for the test, one might expect the DASP to include a similar consent requirement for alcohol testing.

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<sup>2</sup> [2004] 1 ERNZ 614.

<sup>3</sup> At [239].

**Wider context**

[41] Vulcan Steel argues that terms are implied into the DASP confirming it has the right to elect the method of testing it will require employees to provide a specimen for.

[42] There is evidence about the safety sensitive nature of Vulcan Steel's work, the importance of health and safety to the company and the process it adopted to develop and later amend the policy, including professional advice and consultation with employees and the union.<sup>4</sup> It is not necessary to canvass whether all the work performed by the union's members could properly be regarded as safety sensitive as the policy and DASP appended to the collective agreement makes no distinction. For present purposes, I accept that Vulcan Steel is motivated to meet and exceed compliance with applicable legal obligations.

[43] There is evidence about the use of oral swab rather than urine testing at Vulcan Steel's Christchurch branch. Vulcan Steel's evidence is to the effect that this was allowed once only and did not amount to an ongoing agreement that Vulcan Steel would not require the union's members to provide urine specimens. The union has a different account of the interactions. However, it is not necessary to reach any conclusions about this dispute as I do not consider that the parties' conduct assists with interpreting the terms of the collective agreement.

[44] While the policy has always included both AS/NZS 4308:2008 and AS 4760:2006 as the drug testing standards, earlier iterations explicitly stated urine testing under AS/NZS 4308:2008 was Vulcan Steel's preferred manner of testing. There is evidence for Vulcan Steel that this statement was removed from later versions to avoid any dispute if the company elected to use oral swab testing. This is evidence of Vulcan Steel's subjective intentions and it plays no part in reaching an objective interpretation of the current policy and DASP.

[45] There is expert evidence from Dr Lewis and Dr Robertson, called by Vulcan Steel and the union respectively. Vulcan Steel also provided expert evidence from Mr Dick, the managing director of The Drug Detection Agency (TDDA), the company engaged by Vulcan Steel to conduct its onsite drug and alcohol testing.

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<sup>4</sup> I note that Vulcan Steel's preference for urine testing, the union's preference for oral swab testing and the respective reasons for these views were advanced as part of that process.

[46] Dr Lewis and Mr Dick in their evidence support the efficacy of urine drug testing over oral swab testing to meet the aims of the policy and DASP. In summary, urine testing detects a wider range of drugs, across a longer window of time since drug use, with fewer false negatives. Mr Dick also explains how onsite urine testing is conducted to minimise intrusion into the donor's privacy while ensuring the integrity of the specimen collection. A difficulty with confirmation testing of non-negative oral swab specimens is that samples have to be sent to Australian laboratories as no New Zealand laboratories provide that service at present.<sup>5</sup>

[47] Dr Robertson's evidence is that urine testing and oral fluid testing each have acknowledged and well-understood strengths and weaknesses. His opinion is that when knowledge of "recent use" is more important than knowledge of "any use", oral fluid testing is more useful. The converse also applies.

[48] The point perhaps is that an employee who never uses illegal drugs offers no risk of being "under the influence of drugs... in the workplace", apart from prescribed medications. An employee who uses illegal drugs away from work poses a risk of being "under the influence of drugs... in the workplace", especially if one includes "hangover impairment" and "chronic impairment" as being "under the influence". The longer window greater range of detection offered by urine testing gives an employer such as Vulcan Steel more chance of identifying use of illegal drugs away from work.

[49] However, the expert evidence from both sides confirms that the strengths and weaknesses of urine testing and oral fluid testing to achieve the scope and aims of the policy was part of the background knowledge which would have been reasonably available to the parties at the time they incorporated it and the DASP into the collective agreement. The respective strengths and weaknesses cannot cause the adoption of a meaning other than the ordinary and natural meaning of the text used by the parties.

[50] The same is true of the Health and Safety at Work Act 2015, enacted for the purpose of providing a balanced framework to secure the health and safety of workers and workplaces.

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<sup>5</sup> Mr Dick refers to a "Canterbury Health" laboratory which is in the process of setting up to be able to offer oral swab confirmation testing for some drug classes.

[51] I am referred to several decisions of the Fair Work Commission which uphold employers' procedures and policies requiring employees to provide urine specimens. Findings were made which support a number of Vulcan Steel's submissions about why its preference is for urine testing and why it, and not its employees, has the right to determine the method of testing deployed. Decided cases between unrelated parties in other jurisdictions do not assist with interpreting the collective agreement between Vulcan Steel and the union.

[52] Both the policy and the DASP are directed at hazards arising from employees' possession or use of drugs in the workplace, or reporting for work under the influence of drugs (and alcohol). Oral swab testing produces information relevant to whether an employee has reported to work under the influence of drugs. There is a New Zealand standard covering that method. Mr Dick confirms that oral swab testing devices are available and used by TDDA, despite limitations compared to urine testing.

[53] Understood in the context of the policy and DASP as part of the collective agreement, clause 8.3.1 points to the employee having the right to choose whether to be tested in accordance with AS/NZS 4308:2008 or AS/NZS 4760:2019.

[54] Nothing about the background or context under which the parties negotiated the collective agreement points strongly to clause 8.3.1 having a different meaning.

### **Conclusion**

[55] I conclude that clause 8.3.1 of the DASP gives the employee, not the employer the right to choose the method of drug testing.

[56] Vulcan Steel submits that terms should be implied into the policy and DASP confirming it has the right to choose the method of drug testing it will require employees to undergo, when permitted to make that request. However, given my conclusion that clause 8.3.1 gives the employee the right to choose whether to be tested in accordance with AS/NZS 4308:2008 or AS/NZS 4760:2019, the implication of a term vesting that right in Vulcan Steel would be inconsistent with clause 8.3.1.

[57] I am asked to reserve costs, even though at the end of the investigation meeting I queried whether the proceedings as a dispute is the type of case where costs should lie where they fall. If either party seeks costs, they should lodge and serve submissions within 28 days. The other party may lodge and serve submissions within

a further 14 days. I will then determine costs. If issues about costs are resolved between the parties, it would be helpful for them to communicate that to the Authority.

Philip Cheyne  
Member of the Employment Relations Authority