New Zealand Journal of Industrial Relations, **22(2)**: 159-169

Drug Testing in the Workplace

Cordelia Thomas*

"At this stage it would appear that random drug testing in the workplace is a solution looking for a problem."[1]

> **I was not informed of the test until I was walking down the hall towards the bathroom with the attendant. I thought no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was lead into a very small room with a toilet, sink and a desk. I was given a container into which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything that I did. I pulled down my pants, put the container in place - as she bent down to watch - gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar and that is exactly what it is . . .. I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt.[2]**

Introduction

The effects of drug and alcohol use in the community have the potential to endanger both the user and the general public. Recognition of this has lead to recent calls for the introduction of random drug testing of drivers and school children. Workers who are impaired by either drugs or alcohol may equally be a risk to safety and, in addition, their productivity may suffer. There are clear links between alcohol levels and impairment and the reliability of the testing process is well established. The procedure of breath testing is not intrusive. If the same could be said of drug testing, it would be relatively easy to justify on the grounds of public policy.

The reality, however, is that testing for drug usage by way of urinalysis or blood testing is intrusive and cannot show when or how much of a drug was used, or whether the user was impaired when the test was taken. This paper will consider the circumstances in which employment substance abuse testing (ESAT) might be used and the legal issues which arise. This issue involves the balancing of the rights of the worker, the employer and the public. Public policy demands the protection of personal safety and the economic advantages of high productivity, while the individual has the right to protection from unwarranted personal intrusion.

* Senior Lecturer in Law, Wellington Polytechnic

1 B. Slane, Privacy Commissioner, *Media Release*, 22 November 1994

2 B. Slane, The Privacy Implications [1995], *NZ Law Review*, 89. Quoting an American worker who was subjected to drug testing by way of urine sample.

There is a lack of legal authority in New Zealand relating to this issue. Legal action was filed in the Employment Court over a proposal by Auckland-based Mercury Energy to introduce random employee drug testing, however the matter was adjourned and then withdrawn. Commentators have expressed varying views about this contentious issue (Edwards, 1995; Webb, 1995). It is perhaps overly simplistic to believe that a punitive approach based on dubious technology will solve a problem as complex as substance abuse. But in the attempt, damage may be done to the fragile employer-employee relationship. This paper will suggest some less controversial approaches which may be used to address the issue.

The need for testing

In justifying any testing procedure, it is first necessary to be convinced that work performance will be effected by the use of the substance detected by the test. Controlled research has demonstrated that basic psychomotor and cognitive skills relevant to job performance are impaired by most drugs (Nicholson and Ward, 1984). This has been found to include over the counter and prescription drugs (Klein, 1972). As it is likely that the use of such "legal" products is far greater than the use of illicit substances, this leads to the suggestion that testing should be targeted in this area. The emphasis on testing for illicit drugs suggests that the motivation is not simply the improvement of work performance.

There is little research available as to the level of drug use in the workplace in New Zealand, although there have been studies to establish the levels of substance abuse in the wider community (Black and Casswell, 1992). A 1990 household survey of over 5,000 people aged 15-45 years, showed that over 70 percent of drug users were employed, 10 percent of full-time employees had used drugs more than five times in the previous year and three percent had used drugs more than five times in the previous month. Eighty-nine percent of cannabis users said that they had never smoked at work. The highest rates of drug usage are among unemployed young males.

Webb (1995: 20) states that: "it can be fairly safely assumed that the extent of alcohol and drug problems in the workplace are likely to reflect those in the general population." In accepting this opinion, it is necessary to decide whether concerns relate to drug usage at work, impairment from drug usage out of work time, or just drug use generally. Research is needed, to discover whether social and recreational users who confine usage to out-of-work time and yet may still test positive for drugs are impaired in their work performance. Overseas research has suggested large productivity losses attributable to alcohol and drug abuse (Collins and Lapsley, 1991; Crouch, 1989).

Nolan (1994) cites a confidential 1994 report showing ESAT programmes leading to an 81 percent reduction in drug related incidents and a 75 percent reduction in dismissals. This is attributed to the introduction of urinalysis and education programmes. However, statistics from the United States show that only 0.5 percent to one percent of employees randomly tested will give positive results (Macdonald, 1993). Nolan (1994) and Webb (1995) are convinced of economic gains to be made through drug testing. Webb (1995: 26) states:

While the lack of a systematic base of empirical data cautions against overstating the findings of existing studies, and while ESAT may be seen to present problems from a political and ethical perspective, there appears to be evidence enough that it makes hard-nosed economic sense to test workers for substance use.

This is disputed by the Privacy Commissioner who states: "A report on cost and efficiency of drug testing programmes in use by US federal agencies three years ago showed that of almost 29,000 employees tested, only 153 tested positive. Agencies had spent $US11.7 million, so the cost of identifying an employee who had used illegal drugs was $US 77,000" (Slane, 1994).

The testing procedure

The most frequently used procedure is the collection of a urine sample. A procedure must be used which ensures that the sample is not diluted, or a blank sample smuggled in as a substitute. In the sporting area, this security is achieved by having the collection of the sample witnessed. If unwitnessed, procedures such as adding colouring agent to the toilet cistern and taping faucets (Nolan, 1995) must be adopted. In Australia and New Zealand, the drugs tested for are:

- Cannabinoids
- Opiates
- Cocaine
- Amphetamines
- Benzodiazepines
- Alcohol

The analysis at the laboratory has a two-tiered approach. Initially, those samples below the predetermined levels are excluded. A positive response does not prove the presence of the drug, because there are a number of legitimate substances which can interfere with the screening tests and result in positive responses. The positive samples are referred to a qualified scientist for confirmation and quantisation. Evidence is then available of the presence of the substance in the sample. As stated by Nolan (1995: 14): "It is the scientist's role to ensure that the most accurate and precise results are delivered to the sporting body or workplace and to make sure that procedures have been enforced to protect the integrity of the sample. The responsibility then lies in the hands of trained medical personnel to determine the meaning of these results when related back to the individual." Thus, a Medical Review Officer must interview the donor, to determine whether there is any legitimate reason for the drug to be present, before the result is reported back to the employer. There is a loss of privacy in being forced to reveal personal medical details and it is unclear whether the Medical Review Officer can be required not to pass these on to the employer.

The Privacy Commissioner (Slane, 1995: 91) has stated:

> It is well just to remember exactly what you are learning when you are drug testing by urinalysis. At best it shows that the person who tests positive may have been impaired at some past time. A test cannot confirm that the person has been impaired. Nor can it confirm that the person was impaired when the test was taken. It cannot determine precisely when the drug was used. Nor can it identify the quantity of the drug ingested.

There is potential for problems to arise, because a person who tests positive may claim that they inhaled a substance by way of passive smoking, because they were present either deliberately or not, when this activity was being carried on.

Reasons for testing

Testing programmes might be instituted for a variety of reasons, ranging from a desire by employers to improve productivity, increase profits and minimise the risk of accidents, through to the detection of employees with a propensity for illegal behaviour, or the reduction of drug abuse in the community at large. The identification of people whose drug use indicates potential poor job performance, in order to avoid employing such people or terminating their employment, has the potential for considerable discrimination. In some cases, the testing regime may be a device to reinforce the power of the employer and have little to do with actual employment outcomes. In assessing the purpose, an indication may be given by the manner of testing, be it random testing or with cause, such as following an accident or near miss. Further, testing of employees in safety sensitive occupations might be more easily justified than global testing of all staff, although this could be seen to be discriminatory. If there is a genuine wish to deal with a perceived problem, then programmes which involve education and counselling, in which employees are encouraged to take responsibility for their actions, and in which those who seek assistance for a problem escape censure, may have a greater chance of success than a purely punitive plan.

In the United States the clear intention is to reduce drug use in the community at large:

> . . . mandatory drug testing programmes have a lot more to do with defending anti-drug cultural norms by espousing homilies than with serious analysis of employee productivity . . . (Wisotsky, 1987: 767)

In March 1986, the President's Commission on Organised Crime recommended that, in order to reduce the demand for drugs, employers should randomly test employees for the use of illegal substances (Commission on Organised Crime, 1986). The issue, on 15 September 1986, of Executive Order No. 12564 required all Federal agencies to test employees in "sensitive positions".

The legal background to testing in New Zealand

Several New Zealand statutes impinge on the issue of drug testing. The purposes of the various statutes differ and so they present a conflicting picture. The emphasis in the Health and Safety in Employment Act 1992 is the prevention of injury to the workers or the general public, while the New Zealand Bill of Rights Act 1990 and the Health and Disability Commissioner Act 1994 are concerned with the protection of the rights of the individual. The various statutes and the effect which they might have on the implementation of any testing programme will now be considered.

Health and Safety in Employment Act 1992

Section 6 of the Act requires employers to take all practical steps to ensure the safety of employees while at work. Section 15 requires the employer to take all practical steps to ensure that no action or inaction of any employee while at work harms any person. Employers must be pro-active in ensuring the safety of employees in the workplace (see *Department of Labour v Regina Ltd* (unreported D.C. Dunedin CRN 3045004405 4 March 1994, per Judge Everitt). "Hazard" is widely defined in section 2 to include any circumstance that is an actual or potential source of harm.

Webb (1995: 133) concludes: ". . . the employer duties to identify, eliminate such hazards . . . would likely include substance abuse." If so, it follows that sections 10(2)(c)-(e) impose a duty on employers to monitor their employees' exposure to drugs and alcohol and, with their informed consent, to monitor their health in relation to such exposure.

These provisions should be interpreted in light of section 6 of the New Zealand Bill of Rights Act 1990 which requires that, wherever an enactment can be given a meaning consistent with the rights and freedoms in the Bill of Rights, that meaning shall be preferred to any other meaning. The Courts have emphasised that limitations on the rights in the Bill of Rights are to be restrictively interpreted (see *R v Goodwin* [1993] 2 NZLR 153). To interpret the Health and Safety in Employment Act 1992 to give powers to randomly drug test would give powers to employers which are not given to police officers or prison authorities. This is a result which is unlikely to have been intended by Parliament. If the testing is for cause, such as following an accident or near miss, then the position is less clear.

New Zealand Bill of Rights Act 1990

The major hurdles in using the Bill of Rights to resist testing are the need to establish whether a particular employer is covered by the Act and then whether such testing is contrary to the rights protected.

Section 3 of the New Zealand Bill of Rights Act states that it applies to acts done by one of the branches of Government. This would include public sector employers. The protections also apply to situations where ESAT is authorised by legislation, or where the employer is acting in the performance of "any public function, power or duty", by or pursuant to law. Mail handling by New Zealand Post has been held to be a "public function" (see *Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd* [1990-92] 3 NZBORR 339 and also *Television New Zealand Ltd v Newsmonitor Services Ltd* 2 NZLR 91 1994 where TVNZ, a State Owned Enterprise, was held to not have a "public function" because profit is its primary objective). The principle test is whether the activities of the employer are such, that those who would be affected by the activities should have the protection of the law.

Private sector employers may fall within the Bill of Rights if the employer is exercising a statutory or regulatory power or performing activities of a public nature. If the ESAT is being carried out to ensure the safety of the public, as required by section 15 of the Health

and Safety in Employment Act 1992, then arguably this is a public function. Shaw (1995: 61) suggests that, even should the Bill of Rights be "held not to apply in a particular case of [employee drug testing], Bill of Rights norms and values might, nevertheless, still be applied via the common law" and " . . . Indeed, in some circumstances, the common law may provide wider protection than the Bill of Rights against invasion of privacy and bodily integrity."

Assuming that the Bill of Rights applies to a particular employer, the relevant sections are:

Section 11 - Right to refuse medical treatment; and
Section 21 - Unreasonable search and seizure.

The first hurdle with respect to section 11 is to establish whether ESAT is "medical treatment". Case law has considered blood samples (*Cairns v James and Fox* [1990-92] 1 NZBORR 3223, 1992), sterilisation (*Re H* (1993) NZFLR 225), and non-therapeutic vaginal examination (but see Collins, 1992: 117 where treatment is stated to be confined to "therapeutic and curative medical procedures". In *Re H* "treatment" was taken to mean the application of medical and social services; however in *R v B* (1994) 1 HRNZ 1, the fundamental human right to privacy and bodily integrity was emphasised.

It is problematic whether urinalysis would fall within medical treatment. Shaw (1995: 64) states that treatment, "extends beyond the therapeutic and curative to include diagnostic, protective and preventative practices as well". He believes that section 11 would apply to the provision of a urine sample.

Urinalysis is not diagnostic, protective or preventative in the medical sense from the point of view of the employee. It is a punitive measure to allow the employer to discover something of which the employee is likely to be well aware, and is not for the benefit of the employee unless it prevents their being injured at work, or results in education, or rehabilitation.

If section 11 does not apply to urinalysis, then section 21 may provide protection. In *R v Jefferies* [1994] 1 NZLR 290, Richardson J stated that section 21 applies to a search of the person. In *R v A* [1994] 1 NZLR 429 he stated that a search is an examination of a person or property and a seizure is the taking of what is discovered. In Canada, the essential element seems to be the taking of a body fluid from a person without consent (*R v Dyment* (1988) 45 CCC (3d) 244, 253-260. If an employer uses coercion, then there is no genuine consent. If the search is unlawful, through lack of consent, then there is a prima facie presumption that it is unreasonable.

Thus the lawful authority to conduct ESAT would need to be found in statute, the employment contract, collective bargaining agreement, or the consent of the employee. Any statute containing a discretionary power must be read consistently with section 21, which requires the search and seizure to be reasonable in all the circumstances, which include the decision to test at all and the procedures used. Random testing without justifiable cause is likely to breach section 21, in that it would then be likely to be unreasonable. In *R v A,* Richardson J stated that, in deciding whether a search and seizure is unreasonable, the expectation of privacy must be weighed against legitimate state interests.

Shaw (1995: 75) states that, "Only where the employer's interests demonstrably outweigh the need to protect the individual's countervailing reasonable expectations of privacy, will the [employee drug testing] programme be upheld." An employer might attempt to justify testing under section 5 of the Bill of Rights by claiming that the necessity to test can be "demonstrably justified" in the interests of the protection of public safety. The least intrusive system would have to be shown to have been adopted, along with a proven connection between the testing and the legitimate purpose.

Consent

In most cases the employer will rely on the employee's consent to testing, either to the specific testing, or by way of the employment contract or collective bargaining agreement. The Privacy Commissioner (Slane, 1995: 89) has expressed concern about such consent in stating:

> "In the employment and sports spheres the power balance will generally be so unequal that the test can, for all intents and purposes, be described as mandatory because of the negative consequences that may flow from a refusal to submit to testing."

The consent given must be genuine and will only be genuine where the employee believes there is a choice (see *R v Wojcik* (unreported High Court Wellington T111/93 24 February 1994, Gallen J), and *Police v Kohler* [1993] 3 NZLR 129 (CA). If valid consent has not been given, then the employer will be left to justify the testing under section 5 of the Bill of Rights.

The laboratory providing the testing will be concerned with the issue of consent. This is so because the Health and Disability Commissioner Act 1994 provides, in section 20(a), that the Code shall contain provisions that, except where any enactment or any provision of the Code otherwise provides, no health care procedure shall be carried out without informed consent. A health care procedure includes a health examination and health services carried out on any person by a health provider (section 2). Health care providers include any registered health professional, which means, inter alia, a person registered as a medical laboratory technologist under the Medical Auxiliaries Act 1966.

Relevant rights in the Code are:

- Right 1, the right to respect, dignity and privacy. The privacy relates to unnecessary physical intrusion and is breached by being required to urinate in front of a witness unless this can be justified as being "necessary".

- Right 7, the right to make informed choice and give informed consent. The emphasis is on consent freely given, after receiving all appropriate information.

Employers have suggested that it is permissible to state that in certain circumstances testing will be required and, should the employee refuse consent, employment in a safety sensitive area will be discontinued until a clear test is provided, although the employee will retain all

usual benefits. Even in this situation the consent is not freely given, as the employee is agreeing in order to avoid a change of job, with resultant loss of job satisfaction and loss of personal status.

Human Rights Act 1993

It is a breach of the Act to discriminate in matters of employment on the ground of disability. Disability is defined, inter alia, as "Physical disability or impairment, physical illness, psychiatric illness and intellectual or psychological disability or impairment". It is unclear whether social or casual drug users fall within the definition of disability, in that it is difficult to assess the point at which drug or alcohol use becomes an illness or disability. Testing might be justified under section 29, if the employee's duties entail a risk of harm to themselves or others and it is not reasonable to take the risk, unless the employer could take reasonable measures to reduce the risk to a normal level. If it can be shown that drug users are a greater risk of harm than others, and there is no reasonable way to reduce the risk, then discrimination by refusing to hire, or taking other measures contrary to section 22, may not breach the Human Rights Act.

Privacy Act 1993

This Act applies to employers as well as other agencies. Privacy Principle 1 permits the collection of information necessary for a lawful purpose connected with a function or activity of the agency. Drug testing which is intended to preserve safety, or maintain employee performance, would be a lawful purpose. Whether the collection of information from an employee's urine is necessary to maintain safety is doubtful. A particular workplace may need to prove an actual drug problem, or a reason to believe an individual employee is influenced detrimentally by drugs, to avoid a breach of Principle 1. Possibly, testing following an accident or near miss may be more readily justified, particularly if there is reason to believe drugs were implicated.

Impairment in the workplace is the problem, and urinalysis cannot detect this. As stated by Edwards (1995: 45), ". . . drug testing, rather than improving workplace safety, encourages alternative drug use, which might exacerbate safety concerns." It has been suggested that, as testing for alcohol use of drivers is increased, there is a move to using cannabis instead of alcohol.

Privacy Principle 4 states that the method of collection of information should not intrude to an unreasonable extent on the privacy of the individual. The practical arrangements for securing the sample and the mandatory removal of a sample may breach this principal. Privacy Principle 10 prohibits the use of information for purposes other than that for which it was obtained. If the sample was obtained for research or safety reasons, then to use the results for discipline may breach this principal.

Suggested statutory provisions

The Privacy Commissioner of New South Wales (1992) has recommended that testing should only take place:

1. When impairment would impose a demonstrable and substantial safety risk to that person or other people; and
2. There is reasonable cause to believe that the person to be tested is impaired by drugs; and
3. The form of testing must be capable of identifying the presence of a drug at concentrations capable of causing impairment.
4. Drug testing should be prohibited unless 1-3 above can be established.

The Privacy Commissioner of New Zealand prefers testing for alcohol impairment by use of breath testing devices, because of the proven link between use and impairment and because this is less privacy invasive than testing urine (Slane, 1994). In the case of ESAT, the lack of proven links between test results and impairment mean that programmes are likely to attract costly litigation and may not provide economic benefits.

In the United States, many states have adopted drug testing statutes and, in general, these prohibit random drug testing of employees to a significant degree and limit the circumstances in which drug testing may be conducted (Morgan, Lewis and Bockius, 1991; Abcarian and Donaldson, 1991).

Conclusion

The reduction of accidents and improvements in productivity are reasonable objectives for employers, but in light of the difficulties outlined in this paper, if a policy decision is made to introduce drug testing in the workplace, it should be done by way of legislation which preserves, as far as possible, the rights of workers and minimises the intrusion on privacy. Before drug testing is widely introduced in New Zealand, more research is needed to ascertain whether drugs are a major problem in the workplace and also whether drug testing alone would be sufficient to resolve any problem. Until more sophisticated tests are developed, which link levels of impairment with test results, drug testing is not a solution. The effort and expenditure would be better directed towards education programmes for workers about drug and alcohol use and the provision of support services, in a non-punitive manner, for workers who acknowledge a problem. Punitive measures generally invoke resentment and attempts to evade the system. However, if all workers feel they "own" the solution, it is more likely to be successful. Proponents of ESAT need to carefully consider the motives behind its proposed implementation. If these relate to the reinforcement of the power structure in the employment relationship, rather than a genuine desire to increase productivity or improve safety, then such testing is inappropriate.

References

Abcarian and Donaldson (1991), The Battle Against Substance Abuse in the Workplace: A Survey of Current Regulatory Issues, Mississippi College Law Review, **11**: 201-223.

Black, S. and Casswell, S. (1992), *Drugs in New Zealand - A Survey 1990,* Alcohol and Public Health Research Unit, University of Auckland.

Canadian Human Rights Commission Annual Report, 1993, Ottawa.

Chetwynd, J. and Rayner, T. (1985), The Economic Costs to New Zealand of Lost Production due to Alcohol Abuse, *New Zealand Medical Journal*, **98**: 694-697.

Collins, D.B. (1992), *Medical Law in New Zealand,* Wellington, Brooker and Friend Ltd.

Collins, D.J. and Lapsley, H.M. (1991), *Estimating the Economic Costs of Drug Abuse in Australia,* Canberra, Australian Government Publishing Service.

Commission on Organised Crime (1986), *America's Habit - Drug Abuse, Drug Trafficking and Organised Crime,* Report to the President and the Attorney-General.

Crouch, D.J. et al, (1989), A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism Accidents and Costs. In S.W. Gust and J.M. Walsh (eds), *Drugs in the Workplace: Research and Evaluation Data*, Washington DC, National Institute on Drug Abuse.

Edwards, J. (1995), Workplace Drug Testing, *Human Rights Law and Practice*, **1**: 43-48.

Gaudin, J. (1994), *Employment Drug Testing and Employment Privacy*, Unpublished Paper presented to Privacy Issues Forum, University of Auckland, 12 May 1994.

Klein, K.E. (1972), Prediction of Flight Safety Hazards from Drug-induced Performance Decrements with Alcohol as Reference Substance, *Aeronautical Medicine*, **43(11)**: 1207-1214.

Macdonald, S. et al. (1993), The Limitations of Drug Screening in the Workplace, *International Labour Review*, **132(1)**: 95-113.

Morgan, Lewis and Bockius (1991), State-by-State Drug and Alcohol Testing Survey, *William and Mary Law Review*, **33**, 189-252.

Nicholson, A.N. and Ward, J. (1984), Psychotropic Drugs and Performance, *British Journal of Clinical Pharmacology*, **18(1)**: 1-139.

Nolan, S.L. (1994), *Drug Abuse in the Workplace: A Survey of the Evidence in New Zealand and Overseas*, Institute of Environmental Science and Research Limited, Wellington.

Nolan, S.L. (1995), The Scientific Reliability of the Process, *New Zealand Law Review*, April: 10-15.

Normand, J. (1990), An Evaluation of Pre-Employment Drug Testing, *Journal of Applied Psychology*, **75(6)**: 629-639.

O'Malley, P. and Mugford, S. (1992), Moral Technology: The Political Agenda of Random Drug Testing, *Social Justice*, **18(4)**: 122-146.

Oscapella, E. (1995), *A Response to Drug Abuse in the Workplace: A Survey of the Evidence in New Zealand and Overseas*, Unpublished Report prepared for the Office of the Privacy Commissioner, Auckland.

Privacy Commissioner of New South Wales (1992), *Drug Testing in the Workplace,* Sydney.

Shaw, A. (1995), Drug Testing in the Workplace and the Bill of Rights, *New Zealand Law Review*, April: 22-81.

Shipley, J. (1994), *Media Release: Minister Calls for Debate on Drug Testing in the Workplace*, Ministerial Press Statement, 22 November 1994.

Slane, B.H. (1995), The Privacy Implications, *New Zealand Law Review*, April: 89-92.

Slane, B.H., *Media Release: Workplace Drug Testing,* 22 November 1994.

Smith, V.H. (1988), To Test or not to Test: Is that the Question? Urinalysis Substance Screening of at Will Employees, *William Mitchell Law Review*, **14**: 393-442.

Webb, M. (1995), Employee Drug Testing: Implications for Policy, *Social Policy Journal of New Zealand*, **5**: 17-29.

Webb, M. (1995), "Workplace Drug Testing: Another Perspective", *Human Rights Law and Practice*, **1**: 131-140.

Wisotsky, A. (1987), The Ideology of Drug Testing, *Nova Law Review*, **11**: 763-778.

Zwerling, C. et al. (1990), The Efficacy of Pre-Employment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome, *Journal of the American Medical Association*, **264(20)**: 2639-2643.