The Employers' Perspective

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Introduction

There are a number of situations where an employer may consider it desirable or necessary to test whether current and prospective employees are using or have used drugs. Such situations include:

- tests in order to screen job applicants for drug use
- to protect the safety of employees and others
- to assist in accident prevention
- to assist in accident investigation
- to ensure appropriate levels of performance and production are being maintained
- to ascertain whether there has been compliance with an employer's code of conduct or employment contract relating to drug use.

Testing may need to be of a particular individual as the result of a specific event, or of a class of employees or potential employees.

Whether such tests are lawfully able to be administered is yet to be judicially determined. The issues raised are undoubtedly important and will become increasingly so as employers become more pro-active in safety matters.

Employers will need to take great care with this issue as a response will be required to a positive drug test by an employee, whether this be a warning, a suspension, a dismissal or counselling. Based on overseas experience, the most likely situations which will give rise to judicial pronouncements on drug testing in the workplace will be:

- a challenge by employees to the introduction of a drug testing policy by the employer
- an alleged unjustified dismissal of a person who has been dismissed after testing positive for drugs
- an alleged unjustified dismissal of a person who has refused to undergo a drug test
- a claim by an employee that a provision in his or her employment contract relating to drug testing is harsh and oppressive (s 57 ECA).

A finding adverse to the employer in any of these circumstances will attract significant financial consequences.

Each scenario will raise a multitude of issues on its own. Some of these issues are raised in this paper. From an employer's perspective, it would be fair to say that however

necessary or desirable drug testing may seem to be, the issue should be approached with extreme care.

Technical data on drug testing in the workplace

1 *Drugs*

The term "drug" or "drugs", as used in this paper includes alcohol, therapeutic drugs (prescription and over-the-counter drugs) and illicit drugs.

2 *Effects of drugs*

It is well established and recognized that drugs can create at least three different categories of problems: perceptual, cognitive and judgment problems; deficiencies in motor co-ordination; and neuromuscular and psychomotor dysfunctions.

3 *Effects of drug abuse in the workplace*

Employees who work under the influence of drugs cannot function as efficiently and safely as their sober colleagues. This is shown by many studies. Effects of drug use include an increased risk to the health and safety of the work-force and of the public, decreased performance, lower productivity, lower quality of product or of service, higher incidence of absenteeism and tardiness, and higher use of medical benefits. The most serious effect of all of drug abuse is the higher rate of job-related accidents.

4 *Drug testing*

Drug testing involves not only the testing of body fluids (for example urine) for the presence of drugs or their metabolites, but also (and as importantly) the accurate interpretation and use of results. It is the responsibility of employers to ensure that the procedures and methods used for drug testing are accurate, reliable and legitimate.

Legal aspects of drug testing in the workplace

For the purpose of this paper there is a need to consider the application of the Health and Safety in Employment Act 1992, the Human Rights Act 1993, the Privacy Act 1993, the Employment Contracts Act 1991 and the Bill of Rights Act 1990.

1 *Health and safety in employment*

The Health and Safety in Employment Act 1992 (HSEA) is of primary importance in this issue. It places an onus on employers to ensure the health and safety of their employees and others. Section 6 provides that: "Every employer shall take all practicable steps to ensure the safety of employees while at work....". By virtue of s 15, "Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person".

In addition, employers have specific duties regarding hazards management (ss 7 to 10), information (s 11), training and supervision (s 13). Employers have a duty to ensure that employees have an opportunity to be involved in the development of procedures regarding hazards management (s 14).

A corresponding duty is placed on employees to take all practicable steps to ensure their

safety while at work and that none of their action or inaction will cause harm to any other persons (s 19).

There is no clear direction in the HSEA with respect to drug use and safety. What is clear is that there is a legal burden on employers to be pro-active in assessing safety concerns and diligent in minimizing all potential safety risks. This has been emphasized by courts. Employers are obliged to take every reasonable precaution for the protection of employees and others. This has been strongly emphasized by the courts on many occasions.

We regard the employers' statutory obligations mentioned above as including a duty to ensure that workers who are known or believed to be drug users will not harm co-workers and others.

The duties related to the management of hazards are particularly relevant to drug testing. The HSEA requires employers to identify and eliminate, isolate or minimize hazards. Hazard is defined in s 2 of the HSEA.

Whether drug use amounts to a hazard has not yet been considered by New Zealand courts. However, it is most likely that at least in some cases, drug use would come within the definition of hazard. For instance, it is arguable that a drug impaired worker working in a safety sensitive position[1] would create a hazard for the worker and others.

Consequently, it is arguable that employers can have recourse to drug testing as a measure to prevent injuries to their employees and to the public. This is regarded as being implicit to the employers' statutory obligations set out in the HSEA.

2 *Human rights*

There may be a number of issues which arise out of the Human Rights legislation in connection with drug testing. The main question relating to the Human Rights Act 1993 (hereinafter referred to as "HRA"), is whether the performance of drug testing and the use of test results by employers could lead to prohibited discrimination based on disability. This issue has not yet been dealt with by the relevant authorities in New Zealand.

(a) The concept of disability

The first issue to be considered is whether a drug user or abuser will be considered as having a disability under the HRA. The Act defines disability as being, amongst other things, physical disability or impairment, physical illness, psychiatric illness, and intellectual or psychological disability or impairment (s 21(1)(h) HRA). In view of this definition, it is obvious that where the use of alcohol or drugs constitutes an illness, drug use will come within the legal definition of disability.

Consequent issues which arise are:

- do social or casual users of drugs fall within the definition as well as addicted or dependent users?

1 "Safety sensitive position" means any position in which a health impaired condition, including being under the influence of a drug, would constitute a direct threat to the health and safety of the employee himself or herself, of fellow employees and of the public.

- is a casual user of drugs who tests positive suffering from temporary impairment and thus protected by the HRA?
- does the HRA protect only people dependent on legal drugs or is protection extended to those dependent on illicit drugs?

These are issues that will probably require judicial consideration in the future.

(b) Discrimination under the HRA

Basically s 22 makes it unlawful for an employer to disadvantageously affect employment by reason of any of the prohibited grounds of discrimination, such as disability.

In addition, employers cannot make any enquiry about an applicant for employment which indicates or could reasonably indicate an intention to discriminate against the applicant (s 23 HRA).

Unlawful discrimination in the present context may thus occur at any stage of the employment process from recruitment to termination where the employer uses the disability (drug use) of the employee as the reason for making an employment-related decision about that employee. In other words, where there is an unlawful assumption by the employer that the employee cannot or should not do the job on account of his/her disability, unlawful discrimination will exist.

Employers cannot therefore test for drug use for the purpose of making an employment related decision unless one of the exceptions provided for in the HRA applies.

Exceptions

For the purpose of this paper the most important exceptions in relation to disability are those set out in s 29 HRA. The provision allows different treatment based on disability where:

(1) the duties of the position could be performed satisfactorily by the disabled employee only with the aid of special services and facilities and it is not reasonable to expect the employer to provide them; or

(2) the duties could be performed by the disabled employee only with a *risk of harm* to the employee or to others and it is not reasonable to take that risk, except if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

(c) Risk of harm

The latter exception pertaining to risk of harm is particularly relevant to this paper. It suggests that an employer may treat prospective or current employees affected by a disability such as drug dependency differently if the performance of their duties entailed a risk of harm to themselves or others and it was not reasonable to take the risk, unless the employer could take reasonable measures to reduce the risk to a normal level.

To meet the requirements set by s 29 and qualify for the exception therein, an employer would have to establish that employees who are drug users pose a greater risk to

themselves and normal individuals who are not users, and that the employer cannot reduce the risk to a normal level other than by refusing to hire drug users or taking other measures that may be contrary to s 22 of the HRA.

3 *Privacy rights*

The Privacy Act 1993 aims to promote individual privacy by establishing certain principles with respect to the collection, use and disclosure, by public and private sector agencies, of information relating to individuals, as well as access to information. Employers fall under the definition of agencies.

Where drug testing is to be used in employment, employers will need to ensure that information relating to employees' drug use is obtained, retained and used in accordance with the 12 privacy principles.

Drug testing is not prohibited by the Act so long as the collection of the information about employees' drug use is necessary for a lawful purpose connected with a function or activity of the agency (Privacy Principle 1). Safety of workers and others is a legitimate purpose connected with a function or activity of all employers, particularly in light of their obligations under the HSEA to ensure the safety of employees at work and to ensure that no action or inaction of any employee while at work harms any other person.

As well, drug testing requirements in cases of serious performance problems coupled with admissions of drug use or reasonable suspicion of drug use would probably fall within the meaning of "lawful purpose". Proper performance of work may also be regarded as being connected with a function of all employers.

While the Privacy Act does not prevent drug testing per se, the manner in which drug testing is carried out and the information derived from the process will be governed by the various Privacy Principles.

4 *Employment contracts*

(a) Power to negotiate on drug testing

Section 18 of the Employment Contracts Act 1991 ("ECA") provides that negotiation for an employment contract may include negotiation on any matter. Hence, anything that is not contrary to public policy and to law can become a working condition. There is no doubt that workplace rules relating to drug testing are subject to negotiation and can become part of an employment contract.

(b) Implied term

There may also be situations where the requirement that an employee undergo a drug test could constitute an implied term of the employment contract.

The requirement that an employee undergo a drug test was found to be implicit in the contract of employment in a Canadian decision in which it was found that where the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a

drug test. It was found that given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, in the absence of any express provision to the contrary.

In New Zealand, specific requirements have to be met for a term to be implied in a contract. The term must: be reasonable and equitable; be necessary to give business efficacy to the contract; be so obvious that it goes without saying; be capable of clear expression; not contradict the express terms of the contract.

These criteria were found to be applicable to employment contracts in *Attorney-General v NZ Post Primary Teachers Assoc* [1992] 1 ERNZ 1163 (CA).

There are certainly circumstances in which these criteria could be met. However, because of the uncertainty surrounding the question of whether the requirement to submit to a drug test constitutes an implied term of an employment contract in New Zealand, the most prudent approach for employers is to expressly incorporate the drug testing policy into the employment contracts.

(c) Management prerogative

It is also relevant in this paper to address the question of whether employers are entitled under the current law to exercise their management prerogative to introduce a drug testing policy.

"Management prerogative" and "the right to manage" which are used alternatively have for a long time been recognized by New Zealand courts. However, their scope and content have never been established in specific terms. Nevertheless, courts have consistently recognized that employers have the right to manage their business. This right has always been confined to matters that are not covered by employment contracts, or matters that are not inconsistent with the prevailing employment contracts. For instance, in *New Zealand Electrical Workers v NZ Steel Ltd* [1982] ACJ 179, 181, the Arbitration Court of New Zealand found that:

> The employer always has the right to manage unless the collective agreement clearly specifies otherwise in any particular field or fields.

In *Hale & Son Ltd v Caretakers IUW* [1991] 1 NZLR 151, the Court of Appeal maintained that employers had the right to make management decisions and that the Labour Court could not substitute its own opinion as to the wisdom or expediency of the employer's decision.

Up to 1994, the right to manage applied to most matters not dealt with in employment contracts. However, it could now be argued that the law has been modified by two recent decisions of the Employment Court involving the unilateral introduction of retirement policies by employers. Although the specific facts of each case related to a unilateral decision by the employer to terminate employment on the reaching of a particular age by employees, some general statements as to the law were made by the respective Judges in finding that in both cases the policies unilaterally introduced were not contractually binding upon the applicant employees.

In view of the recent findings of the Employment Court, a cautious approach dictates that the introduction of a drug testing policy should follow a process of consultation and agreement with employees and unions concerned. The best way to ensure that a drug testing policy will be binding upon the employees is to incorporate it into employment contracts with the consent of all employees and unions. The policy would then become a new contractual term enforceable by both parties.

5 *Bill of Rights Act 1990*

A further consideration for employers will be whether drug testing of current and prospective employees is constrained in any way by the Bill of Rights Act 1990.

Section 3 of the Act provides:

> This Bill of Rights applies only to acts done–
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

That Act appears by virtue of s 3(b) to apply to entities in the performance of any public function, power or duty. To this extent, state employers and quasi state agencies which are set up by statute will be covered by the Act when performing a public function, power or duty. Such employers include SOE's, government departments, universities, schools and polytechnics. Whether the negotiation of employment contracts and the introduction of policies applying to employees should be regarded as the performance of a public duty or function has not yet been considered by New Zealand courts. It is likely that each case will turn upon its own facts. However, it is our view that generally the Bill of Rights Act does not apply to employment contracts entered into by two or more private parties.[2]

It is doubtful that the application of the Bill of Rights to an employer would significantly alter the conclusions already reached. An employer to which the Bill of Rights Act applies will have to ensure that its drug testing policy or agreement conforms with ss 5, 8, 11 and 19(1) of the Act.

Conclusion

In view of the provisions of the Privacy and Human Rights Acts, and the law relating to employment contracts, it is doubtful that even in the absence of the application of the Bill of Rights Act, an employer could unilaterally force an employee to undergo a drug test. Matters relating to drug testing in the workplace are essentially governed by the applicable employment contract which itself is subject to any legislative constraints.

Drug testing will represent an acceptable intrusion upon workers' statutory privacy rights and human rights if it is undertaken for safety reasons, or for performance reasons in some particular cases. If drug testing is based on other grounds, the invasion of workers' rights may not be justifiable. Each case will turn on its own facts.

2 Some years ago the Supreme Court of Canada held that the Canadian Charter of Rights and Freedoms, which contains a provision similar to s 3 of the Bill of Rights Act, does not apply to a collective agreement between two private parties when no exercise or reliance upon governmental action is involved.