IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 197
ARC 21/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ELECTRICAL UNION 2001 INCORPORATED First Plaintiff
AND	DEAN GREGORY COWELL Second Plaintiff
AND	MIGHTY RIVER POWER LIMITED Defendant

Hearing:	30 August 2013 (Heard at Rotorua)
Appearances:	Lou Yukich, advocate for plaintiffs David France, counsel for defendant
Judgment:	24 October 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This challenge by non-de novo hearing to a determination of the Employment Relations Authority[1] issued on 28 March 2013, addresses a dispute about Dean Cowell's refusal to undergo a random drug or alcohol test. Because the case is a dispute about the interpretation, application or operation of a collective agreement, both the Union party to the collective agreement and Mr Cowell, who is an employee and a member of the Union, are the plaintiff parties.

[1] [2013] NZERA Auckland 107.

Relevant facts

[2] Mighty River Power Limited (MRPL) put in place a drug and alcohol policy in 2009 which provided for a testing regime in a number of specified circumstances. Random testing (suspicionless or other than event-triggered) was not included among the circumstances in which this unilaterally imposed policy and procedure was to apply.

[3] The inaugural collective employment agreement between the first plaintiff and the defendant was entered into in mid-2011. Its term was from 1 July 2011 until 30 June 2013. Bargaining for a replacement collective agreement between these parties has been initiated by the first plaintiff but, as at the date of hearing, had not progressed beyond initiation. Pursuant to s 53 of the Employment Relations Act 2000 (the Act) the collective agreement (the Mighty River Power Limited & Electrical Union 2001 Inc. Collective Agreement 2011 – 2013) continues to be in force and, unless and until a replacement is settled, will continue to be operative until 30 June 2014.

[4] In December 2011 the defendant promulgated, again unilaterally although following consultation with employees and their unions, an amended drug and alcohol policy. As an earlier determination[2] of the Authority records, the December 2011 extension of the drug and alcohol policy to random testing was announced by the defendant in an email to employees on 22 August 2012.

[5] The significant feature of the defendant's December 2011 amendment of its drug and alcohol policy is its provisions for random testing that were absent from its predecessor. Its function is said to be: "[t]o define procedures to manage the risk associated with drug and alcohol misuse.". The explanatory notes attached to the policy include the following:

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[2] [2012] NZERA Auckland 375. The Authority had been asked to determine whether Mr Cowell's workplace was a "safety sensitive area" and whether his position was a "safety sensitive position". The Authority decided that both the work area and the employee's position were "safety sensitive". That determination of the Authority was not challenged, and so is not at issue in this case.

> At Mighty River Power we are committed to ensuring the safety of our employees and contractors while at work. Drugs and alcohol are potential hazards in the workplace and Mighty River Power has introduced a workplace testing programme to ensure the safety of our people.
>
> We will take all practicable steps to ensure those who carry out work for the Company are fit for work and free from the influence of drugs and alcohol. The following will be carried out to help safeguard our employees and contractors:
>
> Fitness for work where required will be determined by drug and alcohol testing.
> …
> Random testing will be conducted if and when required. It is the intention of the Company to control the risk of drug and alcohol misuse without resorting to random testing.

[6] On 31 August 2012 at the Kawerau geothermal power station where he works, MRPL instructed Mr Cowell to submit to "random drug testing". Mr Cowell was selected randomly in the sense that MRPL did not have grounds to suspect that he may have been affected adversely by alcohol or drugs and he had not been involved in any accident or incident. Upon advice, Mr Cowell refused to undergo the test directed by the employer although he then went to his own medical practitioner, underwent a drug test at his own expense, and subsequently provided MRPL with the negative results of that drug test.

[7] Mr Cowell, with the support of his Union, declined to comply with the employer's workplace drug and alcohol policy because he said it was contrary to the collective agreement under which he and others worked.

[8] All parties are to be complimented on their decision to resolve a genuine dispute about this question without MRPL taking any steps against Mr Cowell personally for refusing to comply with its direction. That is a course that this Court has long endorsed.[3] Where there is a genuine dispute about employment rights or obligations, there are statutory mechanisms that should be used, especially where, as here, the affected employment relationships can continue in the meantime.

[3] See, for example, *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917.

The collective agreement's relevant provisions

[9] The first provision of the collective agreement which the plaintiffs say conflicts with the employer's drug and alcohol policy and which permitted Mr Cowell to refuse lawfully and justifiably to undergo a random drug or alcohol test, is cl 32.1. It provides:

> **Evidence of Fitness for Work**
>
> In accordance with its responsibilities to effectively manage all hazards the employer is required to ensure employee 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, request in writing, that an employee provide 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.
>
> 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.

[10] Section 11 of the New Zealand Bill of Rights Act 1990 (NZBORA), which is incorporated into cl 32.1, provides: "Everyone has the right to refuse to undergo any medical treatment."

[11] Particularly relevant to the decision of this challenge is cl 37 of the collective agreement which states as follows:

> **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 [employee's] 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).

Drug testing in practice

[12] The company's drug testing procedure (invoked on any of the several grounds referred to in it) includes, sequentially:

- the completion of written consent forms;
- the provision by the employee of a specimen of his or her urine;
- the sending of that specimen to a laboratory for analysis of the presence of certain specified drugs at or above certain specified levels;
- the preparation and sending by a laboratory analyst to the employer, of a certificate of the results of that analysis of the employee's urine; and
- if the analysis is positive for the presence of one or more of the specified drugs, an investigative process by the employer which will include discussions with the employee and may include sanctions.

[13] MRPL's drug and alcohol policy deems a positive test result or an employee's refusal to undergo testing to be serious misconduct which may result in disciplinary action including dismissal.[4] A refusal may also lead to an employee's suspension for the purpose of investigating the circumstances of a refusal.[5]

[14] It is agreed that the analytical information provided by the laboratory to the employer is the subject employee's "personal information" as that term is defined by the Privacy Act 1993 in that it is information about the content of a bodily fluid of

[4] Clause 5.1.5.
[5] Clause 5.1.1.

the employee.[6] I conclude that this analytical information is also "personal information" about the employee pursuant to cl 37 of the collective agreement.

[15] A unilaterally imposed regime of random drug and alcohol testing is not lawful if it or its procedures are contrary to the terms of an applicable collective agreement: *New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd.*[7]

[16] The parties agree that the laboratory analysis of an employee's urine cannot identify the quantities of any of the specified substances disclosed to be present above certain levels, how those substances have been ingested, or when that occurred. It is also common ground that these tests are not necessarily tests of impairment of the employee to undertake work at the time of testing. It is also true that a negative test does not necessarily evidence fitness to work at the time of testing.

The Authority's determination

[17] With respect to the plaintiff's argument that cl 32.1 prevented the defendant from conducting random alcohol and drug testing on its employees, the Authority concluded that:[8]

> … 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.

[18] The Authority also found that the unilateral introduction of random drug and alcohol testing by the employer did not amount to an attempt to vary cl 32.1 without the Union's agreement.

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[6] Section 2.
[7] [2004] 1 ERNZ 614.
[8] At [18].

[19] Addressing whether cl 37 (Privacy) of the collective agreement affected MRPL's ability in law to require Union members to undergo random drug and alcohol testing, the Authority assumed that cl 37 incorporated the "principles" of the Privacy Act 1993 into the collective agreement so that those principles were terms of the collective agreement. The Authority examined the Privacy Act's Privacy Principles 1 and 4. Privacy 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. Privacy Principle 4 provides that personal information may not be collected by unlawful means, or means that are unfair or unreasonably intrusive.

[20] The Authority then considered what was meant by the phrase "personal information". It applied the analysis of the Employment Court in *Air New Zealand* where the Court concluded that although neither breath nor urine samples constituted "personal information", the results of tests taken from these samples to determine the metabolite content of them, were personal information about the individual from whom the sample was taken. So, too, was information associated with requiring, conducting, recording and following up drug and alcohol tests.

[21] The plaintiffs submitted that the defendant had breached Privacy Principle 1 in that it was not necessary to collect the information to demonstrate fitness for work. This contention, however, was rejected by the Authority which concluded that this "was not the purpose of the collection" and that no "fetter of the kind contended arose through the application of principle (sic) 1."[9]

[22] As to a breach of Privacy Principle 4, the information was said to have been sought under duress because Mr Cowell was told that if he refused to supply a specimen of his urine, he would be subject to disciplinary action. The Authority again had recourse to the *Air New Zealand* judgment where the Court accepted submissions by the Privacy Commissioner that lawfulness was unlikely to be an issue where the testing took place with informed consent, and the presence of informed consent underpinned the fairness of the policy's operation. The Court

[9] At [36].

concluded that a level of intrusiveness may be justified for random testing in safety sensitive occupations, noting that:[10]

> … 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 because it involves a choice 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. …

[23] Next, addressing Mr Yukich's submission that the policy breached s 21 of the NZBORA protecting citizens against unreasonable search and seizure, the Authority again reverted to the *Air New Zealand* judgment and also the case which endorsed it subsequently in the Supreme Court (albeit not an employment case), *Cropp v Judicial Committee.*[11] The Courts in both cases concluded that a requirement to provide a bodily sample for the purpose of testing is a "search" of the person. Engaging in a balancing exercise, however, both Courts also found that in the context of a person being tested for drugs and alcohol, the importance of protecting safety in sensitive areas justified a testing regime intended to deter drug-taking. In these circumstances the Authority concluded that Privacy Principle 4 did not fetter MRPL's ability to promulgate a drug and alcohol policy providing for random testing.

[24] For reasons which are still not entirely clear, the plaintiffs elected to challenge only parts of the Authority's determination (a non-de novo hearing) which did not include, strictly, its interpretation of cl 32.1 of the collective agreement and application to Mr Cowell's circumstances. The focus of the plaintiffs' challenge is on the Authority's interpretation and application of cl 37. It is, nevertheless, difficult to address properly and sufficiently the cl 37 issues without revisiting and analysing cl 32.1. That is because the interpretation and application of individual clauses in a collective agreement, especially where these are closely related as cls 32.1 and 37 are, cannot be undertaken in isolation of the context of the whole agreement. In these circumstances, the Court will, therefore, express views and make observations

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[10] *New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd*, above n 7, at [238].

[11] [2008] NZSC 46, [2008] 3 NZLR 774.

about both cl 32.1 and the Authority's determination about it as part of addressing the challenge and for the wider employment relations purpose of giving the parties guidance about important features of their employment relationships.

Interpretation of collective agreements

[25] The correct approach to interpreting collective agreements has been addressed most authoritatively and recently by the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meatworkers and Related Trade Unions Inc.*[12] The Court followed the judgments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[13] and what it described as a series of important decisions of the House of Lords (now the Supreme Court) of the United Kingdom and of the New Zealand Court of Appeal over a lengthy period.[14] The Court accepted (and it was not argued otherwise before it) that it was proper to consider prior instruments between the parties to a collective agreement or their predecessors, and found helpful the summary of McGrath J in *Vector Gas* of Lord Hoffman's five principles of interpretation in his judgment on behalf of the majority in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[15]

> … interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[26] The Court of Appeal in *Silver Fern Farms* also approved of the analysis of Tipping J in *Vector Gas* as follows:[16]

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[12] [2010] ERNZ 317 (CA).
[13] [2010] NZSC 5, [2010] NZLR 444.
[14] These judgments were set out at footnote 20 of the Court of Appeal's judgment in *Silver Fern Farms Ltd*.
[15] [1998] 1 WLR 896 (HL) at [61].
[16] *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 13, at [33].

> … generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification. But a clear drafting or linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear. A special meaning exists when the words used, even after the contractual context is brought to account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evident from the objective context that the parties, by custom, usage or agreement, meant their words to bear a meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage.

[27] What is the context in, or the background against, which the relevant provisions of the collective agreement were entered into? The parties produced little, if any, evidence of this. What is known is that the defendant had a drug and alcohol policy from 2009 although this made no provision for the random testing of employees. The original 2009 version of the policy had been the subject of consultation but was not contractually based or approved, at least until the first collective agreement came into force in 2011. No history of collective agreements between the first plaintiff and the defendant or other collective agreements with MRPL, either past or present, were referred to in evidence.

[28] In these circumstances, and also in the absence of any real ambiguity in the relevant words and phrases used, I must assume an intention by the parties to mean what is ordinarily taken from those words in the context of the collective agreement as a whole and having regard to the nature of the work performed by the employees subject to it.

The collective agreement interpreted

[29] Although it is correct that there is no express reference in the collective agreement to drug and alcohol testing in general, or to random testing in particular, there is, nevertheless, express reference to compliance with company policies by which means MRPL elected to address the issue of drug and alcohol testing. Clause 36 provides:

> Company Policies do not form part of this Collective Agreement however the employee is required to become familiar with and observe the current policies, practices and procedures where these are fair and reasonable.

[30] The collective agreement therefore acknowledges the non-contractual role of policies, requires employees to become familiar with and observe those policies, practices and procedures which are described as "current", and also qualifies adherence to them by requiring that they be "fair and reasonable".

[31] I accept that cl 32.1 of the collective agreement did not constrain the application of the 2009 drug and alcohol policy. It was a "current" policy when the collective agreement was entered into. The parties then had an opportunity to address the policy in their collective agreement negotiations but did not do so. It is not argued that the 2009 policy was unfair or unreasonable.

[32] I interpret the phrase "the current policies, practices and procedures" as meaning those instruments that were current at the time the collective agreement was entered into. Any broader meaning, including any such instrument subsequently entered into, although "current" at the time an issue arises under it, would be untenable and could not be what the parties to the collective agreement meant. So it is policies, practices and procedures, which were in place and operative when the collective agreement came into force, with which employees were required to become familiar and which they had to observe.

[33] The defendant's submission, with which the Authority agreed, that cl 32.1 of the collective agreement does not constrain the manner in which the company's drug and alcohol policy (and random testing for drugs or alcohol in particular) is to be applied is therefore difficult to accept. Clause 32.1 was agreed to when the drug and alcohol policy in its unrevised version was in effect and had been so for almost two years.

[34] The real issue between the parties in this regard is the effect, if any, of cls 32.1 and 37 upon the amended and augmented drug and alcohol policy issued in 2011 and, in particular, to its extension to random testing.

Clauses 32.1 and 37 in context

[35] As Mr France pointed out, cl 7.1 of the collective agreement ("Objectives") provides:

> Through this agreement the parties, and those to whom it applies, commit to a safe and healthy work environment and a productive sustainable employment relationship recognising the valuable contribution of all stakeholders in the business and the mutual obligation to behave in a manner consistent with the spirit and intent of the statutory code of good faith.

[36] Clause 7.8 ("Health and Safety") provides the following additional objectives:

> We have a strong culture of promoting the health, safety and security of our employees, consumers, contractors and others who may be affected by our activities.
>
> We have a health and safety management system aimed at eliminating work-related injuries and occupational health impairment among employees and contractors on our sites.

[37] The defendant argues that cls 32.1 and 37 of the collective agreement must be interpreted so as to recognise the safety-sensitive nature of the defendant's work sites and roles covered by the collective agreement, and to ensure consistency with its obligations under the Health and Safety in Employment Act 1992. In particular, the defendant submits the collective agreement should be interpreted to promote, rather than to prohibit or restrict, the health and safety rights and obligations arising at law, unless expressly contradicted.

[38] Clauses 7.1 and 7.8 identified by Mr France are general provisions which assist in interpreting other relevant provisions of the collective agreement. They cannot, however, override, contradict or cause a different meaning to be given to another provision or provisions if those particular clauses are unambiguous.

[39] Further, whilst I accept that for sound reasons the collective agreement promotes health, safety and security, clauses such as 32.1 and 37 were included to provide limitations and to ensure that these objectives were not pursued at all costs to the exclusion of the rights and liberties of individual employees. Seen in this way, the agreement as a whole seeks to establish a balance between these competing

considerations. The achievement of that balance is evidenced by the collective agreement allowing for the pre-December 2011 drug and alcohol policy which did not contradict cls 32.1 or 37. Those clauses were included to guard against the unilateral imposition by the employer of extensions to the 2009 drug and alcohol policy such as random testing, at least in the form it is currently and, of course, without the agreement of the affected employees through their union.

Decision of challenge

[40] The Authority erred in its determination of the question as to whether cl 37 of the collective agreement constrained MRPL from implementing its drug and alcohol testing policy. It focused on the sentence set out at the start of cl 37: "The principles of the Privacy Act 1993 (The Privacy Act) will apply …".

[41] The collective agreement referred, however, to the "principles" of the Privacy Act, not simply the "Privacy Principles" contained within it. I conclude that the reference to the principles of the Privacy Act was intended to apply the broad philosophies underpinning that Act to privacy questions that might arise between the employer and employees and not simply some or even all of the legislation's Privacy Principles.

[42] More significantly, however, the Authority's determination on the effect of cl 37 of the collective agreement, which was set out at [33]-[43] of its determination, did not examine the balance of cl 37. This provided that "on a case by case basis" the consent of an employee is required to be obtained by the employer to "collect and retain personal information, concerning the employee's employment", whether such personal information is obtained by the employer directly from the employee or from any other person where that is "practical". Clause 37 further constrains the acquisition of such information by specifying that it will only be obtained "as is reasonably necessary" although it does not specify for what purpose. Finally, cl 37 says that employees have "rights and obligations" although the only one mentioned expressly is the employee's right of access to, and to request correction of, personal information held by the employer about the employee. That is subject to one exception being for "evaluative material [insofar] as it relates to any exception

provided by the Privacy Act". There is no suggestion that these rights or obligations are at issue in this case.

[43] What is important is the collective agreement's constraint on the employer in collecting and retaining personal information about an employee concerning the employee's employment, whether such collection by the employer is directly from the employee or any third party. The requirement that consent be obtained on a "case by case basis" means that on any occasion where the employer wishes to collect personal information concerning the employee's employment, the employer must seek the employee's consent to this collection of information and the employee must give such consent before such personal information can be collected and retained. The employee cannot give general consent for the future, for the collection and retention of personal information.

[44] So, applying cl 37 to the case of drug and alcohol testing, if the employer wishes to apply its policy and procedure to an employee on any particular occasion, it must first seek and obtain that employee's informed consent to the obtaining of sample analysis information (personal information).

[45] There is no restriction upon an employee's ability to refuse consent, such as a qualification that consent shall not be unreasonably withheld. Further, for reasons set out subsequently in this judgment, such consent cannot be obtained under threat of disadvantage in, or dismissal from, employment if the consent is not given.

[46] Mr Cowell acted on advice from his union that MRPL could not compel him to participate in the random drug testing exercise. That was because it was in breach of the cl 37 of the collective agreement. He was entitled to refuse to consent to MRPL's collection and retention of his personal information by the obtaining of it from urine analysis from random testing.

Clause 32.1

[47] As already noted, because the plaintiff's grounds of challenge do not include a challenge to the Authority's determination that cl 32.1 did not constrain MRPL from lawfully requiring Mr Cowell to undergo a random drug test,[17] the following statements about cl 32.1 are comments or observations. I offer these for the benefit of the parties in what will have to be their negotiations about how an appropriate and lawful drug and alcohol testing regime (going beyond the 2009 version) can be implemented lawfully.

Section 11 of the New Zealand Bill of Rights Act

[48] Because s 11 of the NZBORA has been incorporated expressly into cl 32.1 of the collective agreement, it is necessary to examine what are its "principles" which may constrain MRPL from requesting an employee to provide a specimen of that employee's urine even if the employer has what is described as "reasonable just cause" for doing so.

[49] As already set out, s 11 provides quite simply that everyone has the right to refuse to undergo any medical treatment. Section 11, as with other sections defining rights of citizens generally, is subject to s 5 ("Justified limitations") of the NZBORA which states as follows: "Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[50] In this case, even if the employer's drug and alcohol policy may in practice include a requirement to "undergo any medical treatment", no s 5 limitation on the absoluteness of s 11 can apply because the policy and its procedures are not "prescribed by law". Rather, they are managerial directives in an employment relationship.

[51] Although s 11 of the NZBORA is adopted expressly in the collective agreement, the defendant's submission is that this legislation is not otherwise

[17] At [19].

applicable to the circumstances of this case. That is because, as s 3(b) of the NZBORA provides, it is only applicable to acts done "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".

[52] MRPL generates and sells electricity. From 1999 to 2013 it was a State-owned enterprise and was included in sch 1 of the State-Owned Enterprises Act 1986. It ceased to have that State-owned enterprise status from 4 March 2013 following the coming into law of the State-Owned Enterprises Amendment Act 2012 (Mighty River Power Limited) Commencement Order 2013. The defendant's drug and alcohol policy was, however, introduced before the Commencement Order and the events concerning Mr Cowell also preceded the cessation of the applicability of the State-Owned Enterprises Act to the defendant.

[53] There is, nevertheless, authority supporting the proposition that the NZBORA does not apply to public bodies in respect of their non-public activities, including employment relationships.[18] So even as a State-owned enterprise, the defendant says that its drug and alcohol policy was not involved in the performance of a public function. That is because it applied only to its employees and contractors and its purpose was to ensure their safety on safety-sensitive sites.

[54] In this regard the defendant also relies on one of the leading texts in the field:[19]

> The intent of s 3(b) is to apply the Bill of Rights to acts done in performance of the public function, rather than to all acts done by a body that happens to perform a public function. Actions ancillary to the performance of a function, such as the procuring of premises and supplies, and the employment and dismissal of staff, are more properly governed by the principles of general private law.

[55] This statement of the law has since been adopted by the High Court in an employment-related case.[20]

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[18] See *Poole v Horticulture and Food Institute of New Zealand Ltd* [2002] 2 ERNZ 869 at [208].
[19] Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Victoria, 2004) at 96.
[20] *Butler v McCutcheon* HC Auckland CIV-2011-404-923, 18 August 2011 at [58].

[56] I agree with the defendant that the NZBORA has no general application to this case except to the extent that one of its provisions (s 11) has been adopted expressly in the parties' collective agreement.

[57] The defendant further submits that the reference to s 11 of the NZBORA in cl 32.1 supports the proposition that drug testing is not associated with fitness for work. As already noted, s 11 provides for the right to refuse to undergo medical treatment. The defendant submits that drug testing by urinalysis is not a medical treatment and is not associated with medical treatment so that, seen in this light, cl 32.1 does not apply to drug testing generally or random drug testing in particular.

[58] What constitutes "medical treatment" for the purposes of s 11? There are now divergent judicial and academic viewpoints on the meaning of this phrase. Summarised briefly, what might be called the narrow view holds that "treatment" is to be construed literally in the context of the curing of ailments. That is to be contrasted with a broader view that defines "treatment" as applying not only to the curing of ailments but also to situations in which individuals may be examined medically, including for solely evidential purposes.

[59] I would add that there may be another scenario illustrated by this case and workplace drug and alcohol testing regimes in general. Even under a narrow interpretation, providing specimens of breath or urine may arguably amount to "medical treatment". That is where the requirement of an individual to provide those specimens might be for evidential purposes, but may also lead to the imposition of a treatment programme to assist an individual employee to desist from the consumption of alcohol or drugs, and may well also include further evidential testing (random or otherwise) to ascertain the effectiveness of that treatment. It is unnecessary to explore this interesting question further in the context of this case however.

[60] The divergence of academic viewpoints on the interpretation of "medical treatment" is illustrated by a comparison of the leading New Zealand texts on the

Bill of Rights Act. Rishworth, Huscroft, Optican & Mahoney are proponents of what I have described as the broader view of "medical treatment", observing that:[21]

> When bodily integrity is interfered with for forensic reasons, as in the taking of blood samples for paternity or alcohol testing, the question arises whether there is 'medical treatment' or 'experimentation' involved. It has already been suggested that it is not experimentation. Is it 'medical treatment'? On the one hand, the blood is not taken for the purpose of treatment. On the other hand, whatever the purpose, a physical examination or the insertion of a needle may be said to constitute a medical procedure that 'treats' the person; it will be a medical treatment whose object is the obtaining of a sample or information. The actual process of obtaining blood is governed by certain protocols to reduce the risk of infection and so on, even if the blood is then used for non-treatment purposes. But to say that the taking of blood samples and the like is medical treatment does not mean that compelling the giving of samples for forensic purposes is impossible; only that it is necessary to determine whether compulsion can be justified as a reasonable limit on the right in s 11. This will depend upon the context.

[61] The contrasting academic position is taken by Andrew Butler and Petra Butler.[22] The authors take particular issue with the broader approach to s 11 advanced above, stating:[23]

> Our view that the ambit of s 10 of BORA does not encompass taking blood for evidentiary purposes holds also for s 11. The determinative factor should be the intention of the treatment. In neither the blood alcohol nor the paternity testing cases, is the *intention* of taking the blood sample to diagnose suffering or to cure an ailment. In other words, the aim is not to treat a patient, but to collect evidence. That this must be done by a medical practitioner according to certain protocols is not decisive. The authors therefore disagree with Rishworth's analysis, which seems to regard medical treatment as including the taking of blood samples for forensic purposes on the basis that the taking of such samples has to be done by a medical practitioner according to certain protocols.
>
> In our view, taking blood samples is more satisfactorily dealt with under s 21 of the BORA (unreasonable search and seizure). This allows an analysis in the context of other evidential searches and guarantees consistency of the approach to search and seizure issues under s 21 of BORA.

[62] The textbook authors concentrate on blood samples as examples of bodily fluids taken for evidentiary purposes. There is, however, a difference between blood and urine specimens. Whilst blood is extracted by an invasion of the subject's body, providing a specimen of urine is the taking of part of the product of a natural bodily

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[21] Rishworth and others, above n 19 at 257.
[22] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005).
[23] At [11.8.5]-[11.8.6].

function, that is the periodic and necessary expulsion of urine. There are also less rigorous medical protocols surrounding the collection of urine samples (and breath samples) as opposed to blood.

[63] The courts, including the Employment Court, have also examined the meaning of s 11 on a number of occasions, not only in relation to drug testing, but also in the context of whether medical examinations of employees can be required either by the employer or by the Court in proceedings in which the results of such examinations may be relevant. In all cases, the Employment Court has endorsed what might be described as the 'broader' approach to s 11 although, as acknowledged, none of the cases is as recent as those in other jurisdictions which tend now to favour a narrower approach.[24]

[64] Support for both the broader and narrower interpretations of s 11 can also be found in judgments of the High Court and the Court of Appeal. While the higher courts have traditionally adopted a broader interpretation of s 11,[25] over more recent years the narrower approach has been favoured.[26]

[65] I consider that the definition of "medical treatment" in s 11 needs to be considered in the context of the NZBORA as a whole. I agree with those Judges who have said that the lawfulness of the taking of bodily samples for evidential or identification or similar purposes, is best dealt with as a matter of search or seizure under s 21 of the NZBORA. In this sense, "medical treatment" is to be interpreted narrowly, in accordance with the common meaning of the phrase, and would not, therefore, include the provision of specimens of breath or urine of an individual employee for forensic or workplace evidential purposes.

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[24] See *Harrison v Tucker Wool Processors Ltd* [1998] 3 ERNZ 418 at 470, *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2002] 1 ERNZ 744 at [19], *Teague v Wallace Corporation Ltd* [2002] ERNZ 830, *Radio New Zealand Ltd v Snowdon* [2003] 1 ERNZ 12 at [63]-[64].

[25] See *Cairns v James* (1991) 5 PRNZ 476 (HC) at 479, *R v B* [1995] 2 NZLR 172 (CA) at 177, *Down v Van de Wetering* [1999] 2 NZLR 631 (HC) at 637.

[26] See *Pio v Police* HC Rotorua AP43/94, 13 February 1995 at 5, *Police v Onekawa* HC Auckland T293/97, 7 July 1998 at 4, *R v Griffin* [2000] DCR 281, *A v Council of the Auckland District Law Society* [2005] 3 NZLR 552 (HC), *Taylor v Attorney-General* HC Auckland CIV-2010-485-2226, 19 July 2011 at [32].

[66] It is noteworthy, also, that the report of the Attorney-General under s 7 of the NZBORA presented to the House of Representatives in respect of the Criminal Investigations (Bodily Samples) Amendment Bill in 2009 treated the proposed DNA sample collection process by buccal (inner-cheek) swabs or finger prick blood samples as a s 21 NZBORA issue, that is relating to the right against unreasonable search and seizure. There is no suggestion in the Attorney-General's report that such practices amount to "medical treatment" under s 11 of the NZBORA.

[67] As against that, the context in which it is used in cl 32.1 of the collective agreement favours a broader meaning. In effect, cl 32.1 permits the employer, if it has "reasonable just cause", to request in writing that an employee provide evidence of his or her fitness for work. It is that permission that is made subject to "the principles of s 11". It is difficult to imagine how "medical treatment" in the narrow sense of the word would affect the provision of evidence of fitness for work. A broader interpretation of "medical treatment", including the results of medical testing, fits more naturally with the rest of the clause.

[68] On balance, I consider that the reference in cl 32.1 to s 11 of the NZBORA does not affect the provision of specimens of breath or urine pursuant to the defendant's drug and alcohol policy because "medical treatment" is not involved in their provision.

Fitness for work

[69] Because the parties disagree on this issue, it is necessary to interpret what is meant by the phrase "fitness for work" in cl 32.1 of the collective agreement. In essence, the defendant argues that the purpose of a random drug or alcohol test is not to determine an employee's "fitness for work" but is, rather, to act as a deterrent to all employees being affected adversely at work by their previous consumption of drugs or alcohol. As I understand the defendant's argument, it distinguishes random (deterrent) testing from drug and alcohol testing triggered by other specified events (incident or accident, reasonable cause to suspect etc).

[70] In making this submission, Mr France relied on passages in the *Air New Zealand* and *Cropp* judgments about random testing. In particular, in *Air New Zealand*, the Court noted:[27]

> … There is no evidence that Air New Zealand has employees whose work is adversely affected by drugs or alcohol. Rather, population studies (including in New Zealand) suggest that if its employees are typical of the population in general (although there is no evidence that they are), then some are likely to be adversely affected by drugs and/or alcohol. So, rather than addressing an identified particular problem, the company's strategy is based on deterrence and anticipation of a problem, actual or prospective. …

[71] The Court later went on to observe:[28]

> … The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.

And in *Cropp* the Supreme Court noted:[29]

> … The purpose of the random drug-testing rules is deterrent. Without a deterrent, drug consumption which is not immediately obvious to an observer, but which may still adversely affect a rider's judgment and behaviour in the heat of a race, may be undetected and therefore unprevented. And, as was said in argument, for a jockey who contemplates using drugs, the degree of randomness affects the degree of the risk of being detected, and therefore the effectiveness of the deterrent.

[72] The plaintiffs' argument is that "fitness for work" should be interpreted broadly including by assuming (as the employer does in effect) that an employee with more than an allowable specified level of drugs or alcohol in his or her urine is to be regarded as unfit for work.

[73] At cl 3.1 of the drug and alcohol policy under the heading "Responsibilities" is the following: "It is the responsibility of all employees to be "fit for work" whilst undertaking company work or driving a company vehicle."

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[27] *New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd*, above n 7, at [256].
[28] At [251].
[29] *Cropp v Judicial Committee*, above n 11, at [31].

[74] At cl 5.9 ("Definitions") the policy defines "Fit for Work" as "[i]n a physical and mental condition free of impairment due to the influence of drugs or alcohol."

[75] I accept that random testing has a general rationale of deterrence. However, when one asks the next logical question, that being why MRPL wishes to deter its workforce from having more than these maximum levels of alcohol or drugs in their bodies, the irresistible answer is to attempt to ensure that they are all fit for work and that their workplaces are thereby safe.

[76] "Fitness for work" includes important elements of safety, not only of individual employees who may be unfit, but also for the purpose of ensuring the safety of others including other employees, contractors, visitors, and even, in some circumstances, members of the general public.

[77] So analysed, in a "fitness for work" context, random drug and alcohol testing is essentially no different from the same exercise triggered by the other factors which, although they are not devoid of any deterrent elements, probably have less of a general deterrent intent and consequence than random testing.

[78] The application of commonsense also leads to the conclusion that employees who are affected adversely by drugs or alcohol at work are not "fit" for work in the broad health and safety sense of that word. The defendant's case for random testing for indicia of consumption and, thereby, the potential effects of drugs and/or alcohol on employees at work, focuses on the trigger for the testing (random as opposed to being for reasonable cause). However, the rationale for the testing remains the same, irrespective of the particular trigger that implements it. Although it is correct that random testing has a general deterrent effect, so too, for example, does post-accident or incident testing. Employees will be deterred from being affected by drugs or alcohol if they know that they will be tested, even where the cause of the accident or incident may be other than drug or alcohol impairment.

[79] In dealing with the relationship between the policy and cl 32.1, the Authority acknowledged the express reference in the December 2011 version of the policy that "Fitness for work will be determined by drug and alcohol testing" and that drug test

results were "… not a test of impairment". However, the Authority continued: "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."[30] The Authority went on to observe:

> [17] As has been acknowledged in the case law, random testing as it relates to drug and alcohol use has an important deterrent role. [Here the Authority referred to the *Air New Zealand* case at [251] and *Cropp* at [31]-[32].] 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.
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> [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.

[80] I respectfully disagree with the Authority's reasoning. Whilst random testing may have an important deterrent role, the fundamental rationale for drug and alcohol testing is to attempt to ensure an individual's fitness for work, irrespective of the immediate trigger factors (random or for cause). Simply because Mr Cowell was required to undergo a random test (as opposed to an otherwise-triggered test) did not mean that this was not for reasons of ensuring his (and others') fitness for work. It does not follow therefore, as the Authority concluded, that the random testing trigger meant that cl 32.1 did not apply.

"Reasonable just cause"?

[81] Had it been an issue on the challenge, I would have found that cl 32.1 of the collective agreement was also breached by the defendant in seeking to compel Mr Cowell to undergo random drug testing under the policy. Clause 32.1 requires the employer to have what is described there as "reasonable just cause" to request in writing that an employee provide evidence of the employee's fitness for work.

[82] The defendant's drug and alcohol policy refers to what it calls "Just cause testing" at, for example, chapter 5.3.2. This states:

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[30] At [16].

> 5.3.2 Just Cause Testing
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> Just cause testing will be carried out where reasonable grounds for testing are present. Grounds for testing may include (but are not limited to) –
>
> - The person has been observed using drugs or alcohol while at work, during work hours or on a work site;
> - The person is displaying possible symptoms of being under the influence of drugs or alcohol, for example unusual or out of character on-site behaviour or performance; smell of alcohol; suffers from dizziness, has slurred speech, bloodshot eyes and/or hangover etc.
> - Drug and/or alcohol paraphernalia has been found at the work site.

[83] Circumstances other than such "[j]ust cause" for which the policy permits testing include "Post-Accident/Incident", pre-employment or role-transfer testing, and "Random Testing".

[84] It is common ground that the employer's requirement of Mr Cowell to undergo drug testing was a "random test" as that is defined in the policy. Clause 32.1 of the collective agreement, however, allows only "reasonable just cause" testing for the purpose of providing evidence of an employee's fitness for work.

[85] In addition, even if this had been a "reasonable just cause" request to undergo a drug test, cl 32.1 required the employer to make its request to Mr Cowell in writing, including giving detail of "the specific reason and circumstances for the request and the behaviours demonstrated by the employee" (the reasonable just cause) that the employer relied on in justifying the request.

[86] The evidence in this case, however, is that even if Mr Cowell's circumstances had given MRPL reasonable just cause to believe that he was unfit for work because of the effects of drugs and/or alcohol, the direction to provide evidence of his fitness for work (i.e. to provide a specimen of his urine for analysis) was not given in writing, which included the detail required by cl 32.1 supporting the employer's reasonable just cause for requiring Mr Cowell to undergo testing.

[87] The defendant did not specify in writing the reason and circumstances for its requirement of Mr Cowell to undergo drug testing because he had refused to do so. Further, there was no evidence of his unfitness for work on that day which may have

triggered the just cause provisions of the policy or of cl 32.1 permitting the defendant to require Mr Cowell to provide evidence of his fitness for work.

[88] As it has transpired, Mr Cowell was justified in refusing to undergo the test because he was entitled to do so. It is not insignificant that his refusal was made after he had taken the advice of his union which, also as it turns out, was correct advice. Without more support for a reasonable and fair conclusion by the defendant of "just cause" circumstances, Mr Cowell's principled refusal to undergo testing would not have justified the defendant's further insistence that he do so.

Free or coerced consent?

[89] An important part of the defendant's case, albeit as a fall-back defence, is that employees are entitled to refuse to submit to drug or alcohol testing if called upon by the defendant, although such a refusal may have consequences for the employee concerned. Those consequences are said to be set out at page 5 of the current policy although, it must be said, in a very elliptical way. Under a heading "Positive Results – Disciplinary Action" the following appears: "Disciplinary action up to and including termination of employment … may be taken where there is any breach of Drugs and Alcohol Procedures."

[90] Although the policy's flow chart diagram, set out as an overview of the procedure, indicates that if an employee does not consent to testing, "Disciplinary Action" will be taken and that this is referred to at page 5 of the policy, the only "Disciplinary Action" referred to on that page is at 5.4.2. However, it follows the description "Positive Results" which refers in 5.4.2 to "positive test result". Although not clear, I suppose it might be said that the following, at 5.4.2.4, is applicable in a case of a refusal:

> In any other situation where testing is required; this may be regarded as an employment offence and depending on seriousness, may result in the appropriate level of disciplinary action, up to and including dismissal.

[91] This would accord with cl 25 ("Termination of Employment") of the collective agreement which provides at cl 25.4:

> For breaches of serious misconduct termination will be without notice or a payment in lieu.
>
> Serious misconduct may include, but is not limited to, … failing to comply with a legitimate instruction, …

[92] Although Mr Yukich argued that consent given in these circumstances was not "informed consent", I think what the advocate meant was that consent in such circumstances could not be said to be consent given freely or would be consent given where the consequences of refusal might attract sanctions, including the ultimate sanction of summary dismissal.

[93] The validity of such consent was considered by the full Court in the *Air New Zealand* case. The arguments were the same in *Air New Zealand* as they are in this case. For the employer in *Air New Zealand*, as in this case, the submission was:[31]

> … that the issue of consent does not arise, arguing that an employee is free to refuse consent but in that event he or she will have disobeyed a lawful and reasonable instruction in the certain knowledge of facing an investigation on that account.

[94] The full Court went on to hold that:[32]

> … we conclude 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 because it involves a choice between alternatives about which adequate information is now given on the back of the consent form attached to the amended policy. Often in life a reluctant choice has to be made between unpalatable alternatives, but that want of enthusiasm for either alternative does not detract from the reality of the choice ultimately made. 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. For now, the Court has no alternative but to accept the first defendant's [the employer's] assurance that individual circumstances of a failure or refusal will determine the outcome.

[95] There is, however, a fundamental distinction between the *Air New Zealand* case and this one. Recording the argument, the full Court wrote:

> [178] [Counsel for the employer] submitted that the policy does not contravene or vary any term in the employment agreements and that more is

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[31] *New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd*, above n 7, at [236].

[32] At [238].

> required than an assertion that, because an employment agreement does not provide for a policy, that policy must be unlawful. He pointed out that there is nothing in any of the employment agreements which specifically prohibits drug or alcohol testing. In particular, he submitted that there is nothing to prohibit an employer from instructing it's employees to be free from alcohol and/or drugs while on duty and not to attend work under the influence of alcohol or drugs. He submitted that there can be no doubting the reasonableness and lawfulness of the policy statement to that effect, and he argued that a lower standard of behaviour could not sensibly be sought by any party. …
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> …
>
> [179] The plaintiffs have not pointed to a contractual right with which the policy is inconsistent. [Counsel for the unions] was able to suggest only that by acting on suspicion of all employees, the [employer] was contravening the implied term of trust and confidence. We find this argument to be insufficiently convincing. Also, we do not accept the CTU's submission that it is contrary to the spirit of the Employment Relations Act. We prefer [counsel for the employer's] argument that there is nothing in the law or in any contract or collective agreement binding on the [the employer] to prevent it from imposing a comprehensive policy on drugs and alcohol in its workplace. Whether that policy can lawfully include provision for drug testing of employees is a separate question from whether the policy purports to impose new contractual obligations on the employees without their assent. There was insufficient evidence from which we could confidently hold that the employees' contractual burdens will be increased as a result of being asked to submit to drug testing in work time instead of performing their regular duties.
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> [180] The plaintiffs must fail on this issue because the [employer] has never sought or purported to vary any contract but has issued a policy outside the contracts in reliance on its right to manage and its duty to provide a safe workplace. The parties are accustomed to the first defendant's extensive use of non-contractual policies and manuals and this one is no different in principle. It is difficult to see how the making of a policy can be characterised as a unilateral variation of contract when the plaintiffs have been unable to point to any express or implied term of any collective agreement that is modified as a result of the policy. We did not understand the plaintiffs to suggest that the policy was, in some way, an unnegotiated addition to the collective agreements or to any employee's individual agreement or contract of service. …

[96] Put shortly, the important distinction between the cases is the presence of an express contradiction between the collective agreement and part of a policy and procedure in this case whereas, in the *Air New Zealand* case, there was no such inconsistency.

[97] As already noted, MRPL's last ditch argument says that even if the plaintiffs are correct that Mr Cowell is entitled under the collective agreement to refuse to participate in the practice of random drug testing, that does not prohibit the employer

from investigating the employee's reasons for refusal and imposing employment sanctions on him up to and including the ultimate sanction of dismissal.

[98] That is, with respect, such a remarkable proposition that it is understandably difficult to find not only any authority to support it but, indeed, any judicial analysis of, and comment on, it.

[99] The submission says, in effect, that an employee's exercise of an unconditional right to do or not to do something in the course of his or her employment, which right is contained in an applicable collective agreement, can nevertheless be penalised by the employer.

[100] When one takes another example of the same principle in practice, the fallacy of the submission is revealed even more clearly. Could the employer argue that where a collective agreement provides more sick leave than the statutory minimum, and an employee takes that entitlement (fulfilling all of the other qualifications of taking sick leave), that the employer could then demote the employee or dock his or her pay or even dismiss the employee for doing so? Even very cogent arguments that the employer needed all employees at work on the occasion of that illness would not justify such retaliatory action. The principle is the same in this case. The clear answer is that such a retaliatory response would not be upheld.

[101] If an employee were to be disadvantaged in employment or dismissed as a result of a refusal to consent to a random drug test, it is very difficult to argue that the Authority or the Court could find the statutory tests of justification under s 103A of the Act to be made out. That section provides the ultimate tests of justification for any disadvantageous sanctions that an employer might impose. It is difficult to see how the exercise by an employee of a right in an applicable collective agreement could justify a sanction. A fair and reasonable employer in all the circumstances at the time, and on an objective view, could not fairly and reasonably have imposed sanctions for exercising that right of refusal. Because the ability to refuse includes the ability to refuse a random test for drugs, it does not mean that there is an exception to the principle because of the safety objectives of the scheme.

[102] This is not a matter of "informed consent" (as the plaintiffs categorised it initially), the requirement for which is met by the policy and the forms employees are required to complete before random testing. Rather, this is a matter of consent free from threat of adverse consequences. The collective agreement does not provide for an arrangement such as the defendant submits it must be entitled to have in place. The consents of employees referred to in cls 32.1 and 37 are to be free consents without adverse consequences if they are not given.

[103] It will be clear that I do not accept this final argument for the defendant.

Conclusions

[104] For the reasons set out in this judgment, drug and alcohol testing under the defendant's policy is for the purpose of assessing and ensuring the fitness for work of employees.

[105] Mr Cowell was entitled to decline to undergo a random drug test and the defendant is not entitled to impose sanctions on him for that refusal.

[106] The defendant's drug and alcohol testing policy is enforceable in the form in which that policy was promulgated in 2009. MRPL must, nevertheless, comply with cls 32.1 and 37 in applying the lawful elements of the policy. The amendments to the defendant's policy in 2011, incorporating random testing, are not enforceable in respect of employees covered by the collective agreement who do not consent thereto. Employee consent is to be true consent and not coerced consent in the sense that the defendant cannot impose sanctions on individual employees for exercising their rights to refuse to undergo random testing.

[107] The foregoing constraints on the ability in law to require employees to comply with its requirements for random testing, arise out of the current operative collective agreement governing the work of members of the first plaintiff. So long as relevant provisions of the collective agreement remain in their current form, the defendant will have to bargain collectively with the first plaintiff either for the removal from any new collective agreement of the impediments to the process of

random testing without consent or, alternatively, for a mutually acceptable random testing regime.

[108] The Authority's determination is set aside and this judgment stands in its place.

[109] The plaintiffs are entitled to apply for costs both in the Authority and in this Court on the challenge. If costs cannot be settled informally between the parties, the plaintiffs may have the period of two calendar months from the date of this judgment to apply by written memorandum with the defendant having the following period of one calendar month to reply.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Thursday 24 October 2013