



Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
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Minimum Wage to Increase



On 24 February 2014 Labour Minister Simon Bridges announced that the adult minimum wage is to rise to \$14.25 an hour (currently \$13.75). The Starting Out and training minimum wages will increase from \$11.00 an hour to \$11.40 an hour, which is 80 per cent of the adult minimum wage. The new minimum wage rates will come into effect on 1 April 2014.

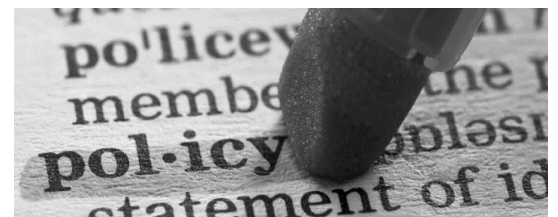
Testing Drug & Alcohol Policies

The introduction of drug and alcohol policies in workplaces has increased significantly in recent years to the extent that these are now relatively commonplace. Consequently there have been a number of determinations arising from challenges to an employer's ability to rely upon such policies.

A recent determination - ***Electrical Union 2001 Incorporated v. Mighty River Power Limited*** [2013] NZEmpC 197 was concerned with Mighty River Power's ability to carry out random drug testing in accordance with the express provisions of the Drug and Alcohol Policy.

The background facts are as follows:

1. In 2009 Mighty River Power introduced a Drug and Alcohol Policy; this policy did not provide for random testing.
2. In 2011 Mighty River Power introduced an amended drug and alcohol policy, following consultation with employees and their unions, which included provision for random testing.
3. Mr Cowell, an employee of MRP, was selected to undertake a random drug test pursuant to MRP Drug and Alcohol Policy.
4. With the support of his union, he refused to undergo a random drug test on the basis that this request was contrary to the provisions of the collective agreement.
5. On advice from his union, Mr Cowell had a drug test carried out by his own medical practitioner, at his own cost, which was negative which he provided to Mighty River Power.



The Mighty River Power policy deemed that a positive test result or an employee's refusal to undergo testing amount to serious misconduct which may result in disciplinary action including dismissal. The policy also provided that a refusal may also lead to an employee's suspension for the purpose of investigating the circumstances of a refusal.

However Mighty River Power did not take any steps to discipline and/or suspend Mr Cowell until the dispute over their ability to require random drug testing was resolved. In this regard the Employment Court complimented the parties for taking this approach:

"[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. 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."

It was the union's position that the Drug and Alcohol Policy was inconsistent with the following provisions of the collective agreement:

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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"Clause 32.1: 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.

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

And

"Clause 37: 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)."

Note that in respect to clause 37 it was agreed for the purpose of the hearing that the analytical information provided by the laboratory to the employer as the result of a drug test was the 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 the employee. The Court also determined that this analytical information is also "personal information" about the employee pursuant to clause 37 of the Collective Agreement.

Might River Power relied upon the following clause in support of their ability to require compliance with the Drug and Alcohol Policy:



"Clause 36:

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."

The Employment Court referred to what is commonly understood to be the leading determination on the validity of Drug and Alcohol Policies – **New Zealand Amalgamated Printing & Manufacturing Union Inc v. Air New Zealand Ltd** [2004] 1 ERNZ 614 and referred to the general principle set down in that determination as follows:

"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."

Further, the Court determined:

1. The provisions of the Collective Agreement, in particular clause 32.1 and clause 37, did not impact upon the 2009 Drug and Alcohol Policy which was in force prior to the first Collective Agreement being entered into in 2011.
2. The provision for random drug testing was inconsistent with clause 37 of the Collective Agreement which provided that personal information could only be obtained "with the employee's consent" and if it is "reasonably necessary." Consequently if the employer wished 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 obtaining the sample analysis (personal information). There is no restriction upon an employee's ability to refuse consent.
3. Had it been an issue before the Court they would have found that cl 32.1 of the Collective Agreement was also breached by Might River Power seeking to compel Mr Cowell to undergo random drug testing under the policy. The basis of this finding was that 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.

Clearly this determination does not prevent employers in general from implementing a Drug and Alcohol Policy which includes provision for random drug testing however it will be applicable where such a policy is inconsistent with the provisions of an applicable collective or individual employment agreement.

We would in any event urge that advice is sought on both the proposed content of any Drug and Alcohol Policy, the appropriate means by which this is introduced into your workplace and the application of any existent policy.