

**DRUG TESTING IN THE AUSTRALIAN WORKPLACE:
IS IT GOOD HRM?**

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INTRODUCTION

The issue of the use of substance abuse, that is the consumption of legal and illegal drugs, which may impair a worker's performance remains controversial in Australian workplaces. To date the issue has largely been contested in the more traditional industrial contexts, typically in industries where worker error can have profound consequences for property and people. There is already evidence that the issue will be contested in an ever-increasing range of industries and occupations.

Largely, the issue of employer response to drug use in or impinging on the workplace has been couched in terms of obligations under occupational health and safety legislation. In reality, the implications are far wider. From an employee perspective there are issues, which include privacy, discrimination and apparent failure to consider the circumstances giving rise to the allegedly errant behaviour. From an employer perspective, health and safety is only the starting point with issues of productivity and managerial prerogative also coming into play.

In this paper we commence with a discussion of the issues surrounding legal and illegal drug use, which may impact on the workplace. In this process we reveal the weakness of the standard arguments in favour of mandatory drug testing and highlight the need for more sophisticated instruments for determining and employee's fitness for duty. In the second part, we use a series of three case studies to demonstrate the characters and causes of the disputes which have surrounded employer attempts to introduce mandatory drug testing. In the process we demonstrate that, as with many human resources issues, the resolution involves consideration of both substantive and procedural issues.

SUBSTANCE ABUSE AT WORK AND ITS MANAGEMENT

Dangers and Costs of Substance Abuse

Substance abuse and the potential dangers it poses in the workplace are well documented. For example, Wall (1992) identifies both illicit substance abuse and 'recreational' substance use (alcohol) as having negative impacts upon almost all industries in Australia, causing substantial costs in both human and economic terms. Whilst acknowledging the lack of accurate data concerning drug use in the workplace (Allsop, Phillips & Calogero, 2001; Allsop & Pidd, 2001), Wilke (1998) conservatively estimated that substance abuse in Australia:

- Imposes direct costs upon industry (predominantly in lost productivity) amounting to some \$3.7 billion annually;
- Imposes indirect costs to industry of \$10 billion annually, for example, employee turnover, poor decision making and employee stress; and
- Accounts for 10 per cent of workplace deaths and 25 per cent of workplace accidents.

The National Health and Medical Research Council (NH&MRC) found that 22 per cent of the working population drank alcohol at harmful levels and up to 27 per cent of the working population experienced alcohol related problems annually. Richmond, Heather, Holt and Hu (1992), note that illicit drug use is also responsible for harm (stemming from negligence) to other individuals within the workplace.

Occupational Health and Safety and Drug Testing

Under the Robens style occupational health and safety legislation enacted in each of the Australian states and territories, employers have a duty to provide a safe workplace for all employees, visitors and passers-by of sites which they control. Employers are subject to strict liability under this law and face significant fines if found to be in breach (Keenoy & Kelly, 1998). Significantly, the duty of employers is not confined to

avoiding injuries but mitigating the risk of injuries (Nolan & Nomchong, 2001). Thus employers are obligated to provide a safe system of work and logically this may extend to preventing injuries arising from drug use.

Research from the USA, where drug testing is common place, indicates that the use of drug testing programs in both employment and pre-employment testing has been a major factor in the reduction of absenteeism and accidents, and is the most popular method of removing the issue of substance abuse in the workplace (Osterloh & Becker, 1990; Greenberg, 1992; Hartwell, Steele, French & Rodman 1996; Flynn, 1999). These points seem to provide a compelling case for drug testing in the workplace to ensure that employees are meeting their contractual obligations to a satisfactory standard, and also to ensure that employers meet the requirements of duty of care under OHS legislation (DesJardine & McCall, 1990). Implicit in these points is that employers who do not have drug testing policies and programs are potentially maintaining an unsafe workplace (Redeker & Segal 1989). However, as Gip (1999: 16) notes, a report by the American Civil Liberties Union (ACLU) questions the cost- effectiveness and overall value of drug-testing:

The ACLU cites analysis by a committee of the National Academy of Sciences (NAS), which found that most workers who use illicit drugs never use them at work, and when they use drugs on their own time, they do so in a way that does not affect work performance.

The issue of performance is an important concept as DesJardine and McCall (1990:203) point out: To what level of performance are employers entitled? If an employee's productivity is satisfactory that person is fulfilling their major contractual obligations and it is not pertinent for the employer to have knowledge of drug use on the grounds of impaired productivity. This leaves the important issue of duty of care but not every job has the potential to do harm. DesJardine and McCall (1990: 204) argue:

To say that employers can use drug testing to prevent harm is not to say that every employer has the right to know about the drug use of every employee.

It follows that where there is less potential for harm, less intrusive alternatives such as impairment testing to ensure fitness for work are likely to be more effective and are less likely to raise the concerns of privacy and fairness (Soroohan, 1994; Maltby, 1999). These are important considerations that employees and their representatives (trade unions) are concerned with when the issue of drug testing is raised in the workplace.

From an employee perspective, the first consideration is the right to privacy. Using Mill's principle of liberty, Bowie and Duska (1990: 89) put the argument as follows "employees have the right to do whatever they wish as long as it does not harm the employer". In this context, if a person chooses to take illicit drugs outside of their work commitments, it is of no concern to the employer as long as it does not impinge on work performance (Bowie & Duska, 1990). In addition, drug testing suffers from accuracy problems (Maltby 1987). Typically drug tests cannot determine whether the effects of illicit drugs, which may remain in the system for days and even weeks, will substantially impair or affect performance. Webb and Festa (1994) also note that the link between drug usage and on-the-job injuries is at best tenuous. Drug testing may also uncover other medical conditions that may affect the employment status of workers. As Wasserstrom (1978) argues in this context, employees have a right to 'informational privacy'. This is supported DesJardine and McCall (1990: 202) who state:

an employee's right to privacy is violated whenever personal information is requested, collected, or used by an employer in a way or for a purpose that is irrelevant to or in violation of the contractual relationship that exists between employees and employers.

Thus the argument that the innocent have nothing to fear from drug testing is erroneous, as it may violate employee rights in a number of ways, for example, if testing has the potential to provide the employer with generic medical information which is not relevant to the contractual relationship (Cranford, 2001). In addition, mandatory testing may be open to improper or malicious use of procedures to intimidate or target employees who undertake activities that may be unpopular with management, such as union activism (Webb & Fester, 1994). Therefore, the use of drug testing within the workplace may create an atmosphere of insecurity, oppression and anxiety in employees and may actually result in lower performance and increased

labour turnover (Redeker & Segal, 1989). Indeed, Bohle and Quinlan (2000) have noted that this has been an important consideration of the Australian management of US-based organisations that have pursued the introduction of these measures. In addition, Zwerling Ryan & Oraw argue that, because of methodological problems, many arguments justifying pre-employment drug screening have been exaggerated (1990: 2643). Finally, Bahls (1998:82) notes that the Internet is filled with tips on how illicit drug users can evade drug tests and detection.

Of central importance is the role of work culture and social environment in the use of legal drugs such as alcohol and tobacco and also illicit drugs like marijuana. As Allsop and Pidd (2001: 5) note:

In a variety of cultures, formal and informal pressures still encourage weekly after work team building and relaxation based on alcohol consumption. Sanctioned drugs such as caffeine and tobacco, have been embraced in ritualised breaks in worktime.

A study of alcohol consumption in the Pilbara mining region of Western Australia, found that consumption of alcohol was 64 per cent above the State level (Daly & Philp (1995). Later research by Midford, Marsden, Phillips & Lake (1997), in a study of workforce alcohol consumption in mining-related worksites found that alcohol consumption was greater than the national average, that drinking in the top risk category was on a par with the national average and that binge drinking was more prevalent and related to shift work and isolation from family.

As indicated above, research on drug use is increasingly focusing on the nature of work. Issues of control, alienation and stress linked with the individual's perception of their powerlessness are important factors in drug use in the workplace (Tices & Sonnenstuhl, 1990; Seeman & Seeman, 1992; Greenburg & Greenburg, 1995; Ames & Grube, 1999). As Midford (2001: 46) argues:

In the workplace, holding the view that drug use is a problem for the individual worker is functional from the point of view of the employers, because it avoids any exploration of how the workplace may contribute to the problem. However, to gain an understanding of workplace drug problems, one must look at a full range of factors that influence patterns of drug use.

This is a theme that the union movement has focused on when addressing the issue of drugs in the workplace. The union movement through the Australian Council of Trade Unions (ACTU) generally does not support the introduction of any form of biological testing of workers for alcohol or other drugs in the workplace, except in very limited circumstances and subject to joint union and employer agreement (ACTU, 1991). They argue that the introduction of testing cannot be seen as a quick fix solution and is unacceptable and inappropriate in most circumstances. The ACTU does not consider that the introduction of a testing program is an effective strategy for the workplace. Testing for alcohol and other drugs is usually an inappropriate feature of any prevention program for a number of reasons:

- inaccuracy of test results, both positive and negative;
- drug testing measures exposure, not impairment, particularly with drugs other than alcohol;
- problems and errors with interpretation of test results;
- the impact of prescribed medication and over-the-counter drugs;
- the focus on the individual;
- the infringement of individual rights;
- the problems associated with the right to privacy; and
- the disruption to industrial relations (ACTU, 1991).

The ACTU position is that unions and employers must jointly develop any drug testing policy, particularly where alcohol or other drug misuse is identified as a workplace issue. Indeed, any policies dealing with workplace hazards and OH&S should be jointly developed and implemented. The ACTU (1991) policy framework focuses on safety at work, specifically:

- having full participation in and joint control by workers and their representatives;

- applicability to both workers and management;
- addressing the workplace causes of alcohol or other drug misuse;
- being consultative, educative and rehabilitative, not punitive; and
- maintaining confidentiality at all levels

This pluralist stance adopted by the ACTU is based upon the argument that it is only when drugs and alcohol are misused, to the extent that the user cannot properly and safely carry out regular duties that a need for control and prevention measures arises. In any consideration of an appropriate response in particular workplaces, there must first be involvement of union representatives, and second an examination of the broad environmental factors such as those listed above. The ACTU also argues that rehabilitation action should be undertaken during working hours or through schemes that include paid leave. A key issue the ACTU promotes is that the misuse of alcohol and other drugs may be symptomatic of other problems such as:

- hazardous work;
- poor work environment;
- unrealistic deadlines;
- lack of job satisfaction;
- lack of participation and control;
- inadequate training and supervision;
- work culture; and
- shift work (ACTU 1991).

This position finds support in the work of Hagen, Egan and Eltringham (1992) who found a link between higher alcohol consumption and work factors such as pressure, stress, lack of control and over-work. Summarising the work of Roman, Johnson and Blum (2000: 39) on the relationship between stress at work and increased alcohol consumption, Philips (2001) states:

Much of this increase [in stress] has been stimulated by changes in work organisation that have occurred in the second half of the twentieth century. Among the changes:

- jobs have become more complex
- responsibility has been devolved to less senior personnel
- employer organisations have become larger and more global
- manual labour has been mechanised
- machines have become more 'intelligent'
- continuous production schedules have disrupted daily life patterns and resulted in more people working for extended periods.

Indeed, the fatigue generated by these factors combined with increased deregulation of the labour market in Australia raises major issues regarding OHS in the workplace (ACIRRT, 1999). As Nolan (2000: 2) argues:

Employees and unions have questioned why random drug testing has assumed such priority in an industrial climate where increasing demands have been placed upon workers to work twelve-hour shifts. Evidence suggests that it is fatigue and not impairment through drugs and alcohol abuse that leads to the majority of accidents.

Holistic Approaches and Fitness for Duty

The ACTU argues that, if management is truly interested in these issues, then a more holistic approach should be adopted; for example including fatigue monitoring and management systems. This raises a second often more subtle and complex issue: control in the workplace. Trade unions often see the introduction of concepts such as drug testing as management exercising increased control under the guise of 'managerial prerogative', and a strategy to marginalise the countervailing power of unions, particularly where there is no consultation on the subject. As Webb and Festa (1994: 101) note:

On a broader scale, the notion of testing programs, especially if introduced unilaterally and without reference to or consultation with employees and their representative bodies, is philosophically at variance with labour relations in Australia.

This can potentially become a major issue of conflict between management and the trade unions. The need to strike a balance between the employer's legal obligation and the employees' rights is a complex and sensitive issue in the development of drug policies. Similarly, Nolan (2000: 63) points out: "Legal obligations that are too dogmatically defined can easily clash with industrial relations".

It is perhaps the impracticality of a dogmatic approach to drug testing that is leading to the development of a broader concept of fitness for duty. Although this concept is most prevalent in the mining industry where it is embodied in regulations made pursuant to occupational health and safety legislation, it is also appearing in industries such as road transport and public transport. Traditionally, the concept of fitness for duty meant little more than pre-employment screening of employees to determine their capacity to meet the requirements of the job. More controversially, as explained above, fitness for duty is often manifest in testing regimes designed to detect impaired capacity to perform the duties of a position. Such approaches have often proved controversial due to the process by which the regime has been introduced and because of deficiencies in the tests themselves.

The need for a more holistic and pragmatic approach then has led to advocacy of a non-discriminatory regime for testing for a wide range of physical and psychological factors, which may impair performance (Nolan & Nomchong 2001). While the search for appropriate tests remains problematic, the philosophical underpinning of this approach is that the causes of impairment are not confined to circumstances within the employee's control and may be impacted by workplace conditions within the control of the employer.

In the following section of this paper we examine three key cases which have shaped the development of the concept of fitness for duty in Australia and which demonstrate the futility of unilateral approaches by employers.

CASE STUDY ONE: THE SOUTH BLACKWATER MINE

Background

South Blackwater Coal Ltd (SBCL) employs 400 workers and is located approximately 900 km north-west of Brisbane in the heart of the Bowen Basin coal mining region of Queensland. As part of a policy development process designed to ensure a safer working environment, management and trade unions were in the process of negotiating policies and procedures for drug-testing at the mine (in line with that of other mines in the region). Previously, testing only took place if staff were involved in an accident. During this process, management found a used syringe on-site and took this as prima facie evidence of illicit drug use in the workplace. Management immediately moved to install drug-testing procedures at the mine. Trade unions advised their members to refuse this blanket testing for drugs, at which point they were stood-down by the company. After one week and three visits to the Australian Industrial Commission (AIRC) the case was formally resolved. The analysis below illustrates the problems and issues associated with the implementation of these procedures.

ISSUES PRECEDING THE DISPUTE

SBCL management had been in negotiation with the Construction, Forestry, Mining and Energy Union (CFMEU) and the Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union (CEEPU) for approximately 10 months, in an attempt to implement a company Drugs and Alcohol policy at the SBC Mine. From management's perspective, the rationale for the introduction of such a drug policy was to:

- identify any drug problems that might exist in the workforce and incorporate the results into the education process;
- ensure that the drug testing scheme operates effectively, and consider any changes that may be required in future anti-drug efforts; and
- ensure that the company provides a 'safe workplace' (for both employees and visitors) and that 'safe systems of work' are not jeopardised by individuals under the deleterious influence of illicit substances (AIRC, 2000:1).

In August 2000, a used syringe located in a toilet on-site caused a needle stick injury. General Manager Jim Randall noted that:

After we had our experts look at it, it was obvious it had been used for some kind of drug injection on-site (ABC Radio Interview, 9 August 2000).

Management took this as prima facie evidence of drug abuse in the workplace. Due to its responsibility to maintain a safe work environment and its frustration with regard to the negotiation process to date, SBCL management informed the unions in July 2000 that it was going ahead with the implementation of its Drugs and Alcohol policy in August of that year. The first stage was the introduction of 'blind' drug tests for all employees as a precursor to random drug testing. The 'blind' tests required each employee, contractor and even visitors to the site to provide a urine sample for testing, but no specific records (identifying individuals) were to be kept. Management justified this decision to the unions by citing a requirement under law to provide both a safe workplace and safe systems of work as allowed for in the certified agreement, which stated:

This clause does not remove the right of SBCL to unilaterally develop and implement safety policies or procedures, subject to any dispute being dealt with in accordance with clause 2:15 (SBCL, 1998).

The mine's management stated that the introduction of such a testing program was consistent with industry standards, and SBCL's competitors had undertaken similar substance tests for some time (Randall, 2000). Management argued that the 'blind' testing was merely a way to provide the company with useful statistical data, upon which management could act, should the need arise (Randall, 2000).

Senior SBCL management indicated that the company believed it had the right, if not the obligation, to test for illicit drugs and alcohol abuse, citing the concern for employee safety and the vicarious liability of the company for employee actions. Management attempted to alleviate employee/union concern by stressing that the policy was the result of a safety issue, and not one specifically designed to reduce workforce numbers. As Jim Randall stated:

we are very concerned about drugs in the workplace and safety issues... Management wanted to alleviate any employee fears about drug testing and stressed the policy was a safety issue (cited in Vale, 2000).

Dispute over the Introduction of Drug and Alcohol Policy

Negotiations continued through the period leading up to the implementation of the blind test, however, no agreement was reached and the union refused to condone the company policy as it was presented. SBCL management enforced the implementation of the 'blind' testing regime, employing evidence of the used

syringe found on-site as prima facie evidence of illicit drug use. As Jim Randall reiterated on the day of the implementation of the drug testing policy:

We've asked all the workers, not only all the workers but all the visitors, all the contractors, anybody on this site, we've asked them to participate in what we're referring to as a blind test, and a blind drug test is where we're simply testing anybody on site here as a precursor to random testing. But the blind test will not take anyone's name; it's simply for information so that we can gather information about the incidence of drug taking on our site (ABC Radio Interview, 9 August 2000).

The CFMEU and CEEPU advised their members to refuse to undertake the tests. Although the action of refusing to undertake a blind test for illicit substance abuse was not considered to constitute 'industrial action' by the AIRC, SBCL management stood down all employees that refused to provide the required urine sample (250 in total) without pay, resulting in the initiation of industrial conflict.

CFMEU and CEEPU representatives cited two important issues behind their decision not to 'allow' their members to provide the samples required by management. Firstly, the unions rejected managerial arguments concerning the need for a 'safer workplace'. They argued that the employer's concern was not so much safety, but rather an attempt to increase their ability to rid themselves of 'troublesome employees' (Vickers, 2000 cited in Vale, 2000). Union representatives were concerned that management seemed interested only with whether employees were using illicit substances, not why they were using them. Indeed, as the state secretary of the CFMEU, Andrew Vickers (cited in Olsson & Vale 2000: 6) stated:

the miners were not against drug testing but did not want a half-baked scheme put up as part of a feel good exercise by management. Peeing in a cup and submitting that for drug testing will not tell you if you're stressed or fatigued. We want proper procedures and protocols used and genuine safety measures, not just more arrows in the company's quiver of punitive measures.

The second issue identified was that of the inability of substance testing to accurately gauge the level of employee impairment whilst on-duty. It was the contention of the unions that substance testing may be inherently flawed in efforts to ensure a safer workplace for all individuals. In addition, union representatives also noted that, if the issue is OH&S, then measures of impairment and chemical ingestion related to the work itself should also be included in these safety procedures. As Steve Pierce of the CFMEU stated:

The union wanted pupil dilation tests and psych-motor tests (which measure average reaction times), and protocols including anonymity, protection from legal action and proven validity attached to urine testing. It also wanted increasing use of 12-hour shifts examined in tandem with fatigue and stress tests. Finding out down the line that you've got dangerous practices is too late...I believe tests for impairment are probably more accurate than just a test for presence of substance...We're not condoning the use of illegal substances, but a person could be measured to have it in his system when in fact there is no impairment.

Representatives of the CFMEU maintained this argument, agreeing that whilst drug testing procedures were consistent with the company's Fitness for Duty policy, it needed to form part of a 'proper set of comprehensive procedures' aimed at the detection of fatigue and stress levels, as well as illicit substance abuse and subsequent employee rehabilitation. The CFMEU counter position regarding the implementation of the policy focused on four points:

- The union will refuse to allow members to submit for drug testing if the employees are collectively unhappy with the intrusion into their personal lives;
- The testing of urine samples does not reveal the extent of impairment with some drugs staying in the human body long after any significant effects have 'worn off';
- The drug testing policy discounts any analysis of why the employee is taking illicit substances, focusing only on the question as to whether they are taking drugs. Such a lack of analysis fails to indicate whether working conditions may be partly responsible for employee dependence upon illicit substances (e.g. 12-hour shifts, work stress levels, poor job satisfaction; unrealistic deadlines etc);

- The drug testing policy fails to test for chemicals that may enter the bloodstream of an employee via their work duties that may be harmful and adversely affect their performance (e.g. carbon dioxide levels; excessive dust particles etc.) (Olsson & Vale, 2000; Vale, 2000; AIRC, 2000).

Resolution of the Dispute

Despite the intervention of the AIRC, drug testing remained an issue and a sub-text to ongoing management and trade union conflict, which was not resolved until mid-2001. The case illustrates the problems, issues and the complexity surrounding the development of drug testing policies in the workplace, and in particular, the importance of due process and consultation where drug testing is not part of a wider OH&S process.

CASE STUDY TWO: BHP PILBARA MINES

Background

The Pilbara region in Western Australia (WA) is located 1600 kilometres north of Perth. BHP produces approximately 65 million tonnes of iron ore per annum from its mines in the region. BHP iron ore has more than 1563 employees and 1300 contractors. The largest open cut mine is at Newman. This is linked to major ore processing, stockpiling and shipping facilities at Nelson Point and Finucane Island, on opposite sides of the Port Headland harbour.

On the recommendations of the coroner following a fatal drug related accident in 1994 and several other incidents, BHP sought to introduce drug and alcohol testing. Following the introduction of voluntary programs, BHP sought implementation of a mandatory drug and alcohol-testing program at each of its sites in the Pilbara. The introduction of a mandatory program stemmed from a philosophy that BHP had a responsibility to ensure the safety of all its employees. As Judith Thompson, Manager of Public Affairs for BHP iron ore in WA reiterated:

There's a duty of care that spreads among the workforce and from supervisory people to the workforce. Based on that duty of care, we have developed a policy in relation to drugs and alcohol on site, which is also consistent with WA mining legislation¹ (ABC Radio National 1996).

The mandatory program proposed by BHP required that an employee, as a condition of employment, submit to random drug testing. If a test proved positive, on the first occasion the employee was liable to be sent home on paid special leave. On the second occasion within a period of two years, the employee was liable to be sent home on unpaid special leave. On the third occasion within the same time period, the employee's continuing employment would be the subject of discussions with the company (BHP Iron Ore Pty Ltd v Construction, Mining Energy Timberyards, Sawmills and Woodworkers Union WA Branch WAIRC 130 19 June (1998)) [Hereafter WAIRC 130 19 June 1998]. Education was a central part of the program, and there was also provision for assistance to those employees with a suspected alcohol or drug dependency. As Judith Thompson noted:

The policy includes education about the effects of drug and alcohol abuse and also offers counselling to people should they have trouble controlling their use of these substances (ABC Radio National 1996).

¹ It is a requirement under the Western Australian *Mines Safety and Inspection Act* 1994, and associated regulations, that no drugs or alcohol are permitted on mine sites. Specifically, Regulation 4.7 prohibits anyone from being in or on a mine while the person is affected by drugs or alcohol and entitles the mine manager/supervisor to direct any employee reporting for duty who in their opinion is adversely affected by alcohol or drugs to leave the mine.

Issues Preceding the Dispute

BHP held discussions with employees and the four unions regarding the introduction and implementation of the program in 1997. The respective unions held separate meetings of members. A valid majority of employees approved the implementation of the program, with the exception of one union: the WA branch of the Construction Mining Timberyards Sawmills and Woodworkers Union. A majority of its members at the Newman and Finucane Island sites voted overwhelmingly to reject the program. Following lengthy negotiations with employees and the four unions, BHP did not implement the program. It was held to be impracticable if it did not apply to all employees alike. In addition, the three unions that supported the program did so on the proviso that it applied equally to all employees (WAIRC 130 19 June (1998)).

The main objection of the dissenting union was to drug testing. The union was initially opposed to both alcohol and drug testing, but by the time the case reached the WA Industrial Relations Commission (WAIRC), the union no longer objected to alcohol testing. The union argued that drug testing constituted an unreasonable intrusion of an individual's privacy. The union also objected to the requirement that employees using prescribed or over the counter drugs that might impair them in their work, report this to the company, which would be required to maintain records of the employee's drug use for a minimum of two years (WAIRC 130 19 June (1998)).

Dispute over the Introduction Drug and Alcohol Testing

The dispute over the introduction and implementation of drug testing at three BHP sites was referred to the WAIRC by BHP after two years of consultation with the workforce. The WAIRC was asked to consider the program as a whole; specifically whether it was fair and reasonable.

Union Position

The dissenting union put forward three key arguments in opposing the introduction of the program. Firstly, the union questioned the prevalence of drug use in the workplace and argued that there was no evidence to justify the introduction of such a program. For example, the union highlighted that while voluntary drug testing was in place at BHP sites during 1997-1998, there were no reported incidents. Secondly, the union questioned urine testing as a reliable indicator of impairment resulting from drug abuse. Thirdly, the union argued that BHP should not impose the program on its members simply because they had obtained the consent of the members of other unions (WAIRC 130 19 June (1998)).

Management Position

BHP argued that the implementation of the program was necessary in order to enable it to satisfy its common law duty to provide a safe workplace and satisfy WA mining legislation. In response to the issue of privacy, BHP argued that the program protected the privacy of employees as far as possible, by providing strict security measures. Such measures were designed to avoid publication of any test result and any other information given as part of the program. Responding to the union's second argument, BHP acknowledged the criticisms surrounding drug tests as an indicator of impairment. In fact, the company admitted that such tests were not a test of impairment. BHP maintained that the cut off levels of drugs allowed under the program before a positive result was returned were at such high levels, that a positive result was a reliable indicator of safety issues. Finally, BHP argued that it should be free to implement the policy in accordance with the wishes of a significant majority of the workforce, after having extensive consultation with the employees and unions, regarding the implementation and implications of the program (WAIRC 130 19 June (1998)).

Both parties used expert witnesses to debate the extent to which drugs adversely affect safety in the workplace. This was a contentious and noteworthy issue throughout the dispute. The union argued that very little was known about the impact of drugs on workplace safety, and that in fact, some drugs could have positive effects. BHP, whilst accepting that little was known about the effect of drugs, argued that the effects of drugs on cognitive functions, psychomotor performance and other skilled tasks strongly predicted serious adverse effects on workplace safety (WAIRC 130 19 June (1998)).

Resolution of the Dispute

On 19 June 1998 the WAIRC endorsed a requirement that BHP employees working on three sites, Newman, Finucane Island and Nelson Point, submit to random drug testing (Moodie1998). On this basis, the WAIRC considered it reasonable for BHP to implement a scheme designed to detect, so far as possible, the level of consumption of drugs by employees, and, to implement procedures designed to deter the use of drugs in the workplace. The WAIRC decided the program was not unreasonable, harsh or unfair in BHP's attempt to satisfy its responsibility to provide a safe workplace for all employees (WAIRC 130 19 June (1998)).

Weighing up intrusion and privacy concerns against the legal obligation to provide a safe workplace, the WAIRC concluded that whilst the program intruded on the privacy of individual employees, workplace health and safety requirements and community expectations were such that there would necessarily be some constraint on the civil liberties of employees. In addition, the program included elements that aimed to minimise intrusion of privacy. For example, urine samples were to be given in private and were not witnessed by the tester (WAIRC 130 19 June (1998)).

In reaching its decision, the WAIRC upheld several elements of the program as important; these included the provision for formal education, counselling and rehabilitation. The fact that the penal elements of the program were subordinated to education and rehabilitation were also important in the WA IRC's assessment. For example, the program provided that after the expiration of two years, any positive reading was expunged from an employee's record. Also important in the decision to endorse the program were the cut off levels set for a positive test. These cut off levels were held to be relatively high and, unlike many other programs, they were significantly higher than the Australian standard. In a limited sense then, the tests were regarded as rigorous, with experts identifying the probability for error in either test as less than one per cent (WAIRC 130 19 June (1998)).

In summary, the WA IRC found insufficient merit for the union's objection to the program, and, endorsed BHP's extensive consultation with the workforce on the dynamics of the program. In endorsing the program the WAIRC also noted the importance of a formal review mechanism, as new, more efficient and effective drug and alcohol testing methods become available (WAIRC 130 19 June (1998)).

CASE STUDY THREE: TRANSADELAIDE

Background

TransAdelaide is a provider of train and tram services to the Adelaide (South Australia) metropolitan area. TransAdelaide operates 94 railcars and 21 tramcars, on a network that covers 120 kilometres. Since 1992 TransAdelaide has had policies prohibiting the use of drugs, and being under the influence of drugs in the workplace. In 1998, after many revisions, the policy was finalised with a zero tolerance of both legal and illicit drugs; that is, a positive test was deemed to constitute impairment.

Issues Preceding the Dispute

On 2 October 1998 a TransAdelaide train was involved in a fatal accident at a level crossing. The train struck a 54-year-old woman hanging an electoral poster at the crossing at Oakland Park. It appears that the woman stepped back into the path of the oncoming train. Despite the fact that the accident was not the fault of the train driver, he was drug tested as part of the company's standard policy and procedure after any accident. The driver was subsequently found to have traces of marijuana in his urine. This contravened the company's Drug Free Workplace Policy and consequently the driver was dismissed. After a rejected internal appeal, the train driver, Mr Debono lodged an application with the AIRC in which he alleged that he had been unfairly dismissed.

Dispute over the Drug and Alcohol Testing Policy

The position taken by Mr Debono throughout the course of the dispute was that he was unaware of the Drug Free Workplace Policy. In addition, he denied taking marijuana, arguing that he had probably ingested it at a post Grand Final celebration one week prior to the accident. Despite this, TransAdelaide maintained that he was in breach of the policy and the company reaffirmed its right to dismiss Mr Debono.

Management Position

TransAdelaide management argued in their defence that since developing and updating its ongoing policies on a drug free workplace it had consulted actively and extensively with the appropriate OH&S committees and disseminated the information widely by using company notice boards and training sessions. In relation to illicit drugs, a document was tabled: TransAdelaide Policy News Volume 1 Issue 1, which included a series of question and answers, one of which stated:

- Q. The fact that someone tests positive to drugs does not mean that they are impaired. Why is TransAdelaide intruding on an employee's rights to enjoy social activities?*
- A. A person may not be impaired but still be positive. If the positive test is to an illegal substance such as cannabis or heroin, then the person is deemed to be impaired. In a criminal or common law case, the mere presence of an illegal substance, would increase the severity of the amount of damages awarded. TransAdelaide considers that it's duty of care to ensure everyone's safety overrides intrusion into privacy issues. This is a view which is upheld by a Full Bench decision on exactly the same issue in Western Australia. (August, 1998)*

The revised Drug Free Workplace Policy issued by TransAdelaide on 2 September 1998 clearly stated that a positive drug test was deemed to constitute impairment (AIRC, 50251 7 September (1998)).

Issues

In considering the application the Commission identified three critical issues. Firstly, what was TransAdelaide's Drug Policy at the relevant time? Secondly, was the drug policy reasonable, and thirdly, was the applicant, Mr Debono, aware of the deeming policy? In relation to the first issue, the Commission reached no determined conclusion, but highlighted doubts surrounding the status of the September version of the drug policy. In relation to the second issue, the Commission considered evidence provided by Dr Jason White, on behalf of Mr Debono. Dr White stated that the concentration of cannabinoids in the urine is not a reliable indicator of their concentration in the blood, and that in the case of marijuana no accurate assessment of impairment had yet been developed (AIRC, 50251 7 September (1998)). Dr White also pointed to the unique features of marijuana; namely, that it metabolises differently from other drugs and is detectable in urine long after impairment has disappeared. On the basis of the evidence of Dr White, the Commissioner found TransAdelaide's drug policy to be neither oppressive nor unreasonable.

In relation to the third issue, the Commissioner accepted Mr Debono's evidence that he was unaware of the deeming policy. The deeming policy refers to the revised drug policy issued by TransAdelaide on 2 September 1998, that, in addition to prohibiting impairment by and possession of drugs whilst reporting for, or whilst at work, also deemed a positive test to be evidence of impairment. Commissioner Raffaelli noted that the drug policy had changed substantially over six years and should have been notified to all employees in a manner and medium that would ensure understanding and awareness of the changes by the entire workforce (AIRC, 50251 7 September (1998)).

Resolution of the Dispute

Whilst acknowledging TransAdelaide's statutory and public responsibility to provide a safe rail system, the Commission found that TransAdelaide did not have a valid reason to dismiss Mr Debono, since the policy was not known to him and it was unreasonable to accept that the policy should be known to him in view of the failure of the employer to properly disseminate the policy among its workforce. The Commission also

found that Mr Debono's termination was invalid to the extent that it was based on the premise that he brought TransAdelaide into disrepute as he was unaware of the drug policy and could not predict, nor be held responsible, for the public reaction that followed the accident. The termination therefore was found to be unreasonable. TransAdelaide were required to reinstate the driver and Mr Debono was awarded \$15 000 compensation in respect of remuneration lost.

DISCUSSION

High profile disputes over drug testing illustrate the contentious nature of the issue at the workplace. They also highlight the importance of developing an appropriate framework to deliver workable solutions. Arguably, this policy has to be developed in a participatory manner. The importance of a form of participation is that in providing substantive and procedural justice the policy the chances of effectively implementing the policy are maximised. Substantive justice entails meeting the reasonable requirements of management while recognising the various interests of employees at the workplace. A central issue with employee interests is the need to be treated with respect, which includes the need to minimise intrusions into the private lives of workers and ensuring that the drugs policy is related to the reasonable requirements of the job both in terms of occupational health and safety legislation and operational efficiency. In terms of procedural justice, the point is simply that acceptance of the policy is likely to require that it form part of a holistic OHS program which is jointly developed by employers and employees and unions as appropriate. A unilaterally developed drug testing policy that places an employee in a position, which could jeopardise their employment, is coercive and therefore unacceptable (Nolan, 2000). For sensitive issues like this to be handled successfully, employee acceptance is critical. Although not strictly an element of procedural fairness, there cannot be acceptance of the policy unless it is clearly articulated across the whole workforce.

While alcohol and illicit substance abuse in the workplace may need to be viewed in the context of an employer providing a safe and healthy workplace, the issues are not clear cut, and should be examined in the broader context of OHS in the workplace. The concept of fitness for duty highlights that the impact of drugs and alcohol are points along a spectrum of circumstances, which may impair employee capabilities. Significantly, the origins of these impairments fall variously within the control of employees, employer or may be shared by both groups. In these circumstances, an isolationist (single issue) approach tends to lend support to employee concerns that drugs policy (usually mandatory testing) is being used as a vehicle to achieve workforce reductions or a similar objective by indirect means.

Further support for a holistic approach derives from research, which indicates that high quality employee education, and assistance programs are important factors in preventing and reducing drug abuse (Desjardine & Duska, 1997; Oliver, 1994). Indeed, a drug testing policy that is not linked to a well established rehabilitation program is likely to result in the removal of the employee from the workplace, but not illicit drug use that may enter the workplace with a replacement employee.

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