SQUIRE PATTON BOGGS

WORKPLACE VIEW

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The Latest on Drug and Alcohol Testing

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The debate surrounding the implementation of substance abuse policies has gained momentum of late.

On the testing front, it remains to be the case that saliva testing cannot accurately determine the impairment of an employee under the influence. On the implementation front, recent decisions by the Fair Work Commission (**FWC**) acknowledge the invasiveness of certain tests over others. However, these decisions have been largely dependent on the circumstances of each case, signalling little hope for a uniform approach.

In the meantime, the threshold requirement remains that testing regimes must be "reasonable" in the context of each given workplace.

Saliva Testing v Urine Testing

Historically, the FWC has favoured urine testing on the understanding that it captures a more accurate assessment of illicit substances. However, that view was reversed in August 2012 when the Full Bench in *Endeavour Energy v CEPUA & Ors* [2012] FWAFB 4998 accepted that saliva testing detects more **recent** substance consumption. This was significant because it focused the purpose of testing on determining an employee's "impairment for working purposes" and not on exposing their personal choices on the weekend. On that basis, urine testing was considered to be unnecessarily invasive for drug testing purposes.

Privacy v Safety

The invasiveness of urine testing demonstrates the fundamental tension between privacy and safety. If the purpose of drug testing policies is to measure an employee's impairment and therefore their compromised ability to perform work-related tasks, then testing that reveals the presence of substances beyond that scope is irrelevant and should be protected for privacy reasons.

In the case of *Maritime Union of Australia and DP World* [2014] FCA 134, Deputy President Booth was required to resolve a long-running dispute over the terms of DP World's enterprise agreements, namely a clause which introduced a controversial drug and alcohol testing policy. The policy proposed a random drug and alcohol and swab testing regime which had the potential to reveal the full scope of employees' extra-curricular activities (if any).

The Maritime Union of Australia (**MUA**) argued the employer had failed to properly consult with employees and their representatives on the policy's introduction and sought changes to the testing regime. Booth adopted the FWC's view in Endeavour Energy, confirming that urine testing may reveal the personal choices of individuals that did not present a risk to safety in the workplace.

Booth's decision, however, was quashed on appeal to the Full Bench albeit on technical grounds relating to statutory interpretation. The employer successfully argued that Booth had erred in assessing the "merit" and "reasonableness" of the drug testing methodology when, in fact, the legal question to be determined was the interpretation of the clause in the enterprise agreement which introduced the drug and alcohol testing policy. Applying the principles of statutory interpretation, the Full Bench considered the context of the dispute (namely DP World's history of using urine testing methodologies in other states) and allowed the clause in the enterprise agreement to apply the controversial policy.

The Full Bench decision highlights an avenue via which courts and tribunals may find in favour of urine testing despite the safety vs privacy debate. Where employers have an established history with invasive drug testing methodologies, the courts and tribunals will consider their predecessors' views when assessing the introduction of new policies. The decision also demonstrates the extent to which a dispute's individual circumstances can drive the outcome.

Safety-Critical Occupations

Recent decisions of the FWC indicate support for zero tolerance drug policies in safety-critical occupations and industries where substance induced impairment can have serious ramifications.

The case of *Toms v Harbour City Ferries* [2015] FCAFC 35 arose from an incident involving a ferry master who crashed his ferry into a wharf while covering a shift. A drug test confirmed he had consumed cannabis within 16 hours of the shift and his employment was terminated in accordance with the employer's zero tolerance drug policy.

The employer argued it had acted appropriately given its commitment to safety, but the FWC thought otherwise and reinstatement was ordered. The FWC considered the termination to be harsh in light of the ferry master's 17 years of service with no history of substance abuse, the medicinal reasons for his drug use (to relieve shoulder pain), and the unexpected shift he had agreed to cover.

But the FWC decision was overturned by the Full Federal Court which focussed on the ferry master's wilful and knowing breach of a zero tolerance drug policy in accepting a shift while under the influence. The court considered that this amounted to serious misconduct which warranted termination despite the compelling evidence that there was no causal link between the effect of the drug and the incident.

This zero tolerance approach was followed in the recent case of *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033, which involved a Sydney Airport worker who experimented with cannabis over the weekend (this time for recreational purposes). The worker was subjected to a random drug test the following Monday and the positive results (**8** times above the policy's allowable limit) led to his dismissal. Relying on his record (7 years clean until now), he brought an unfair dismissal claim, but this was rejected by the FWC which held that his knowledge of the drug policy warranted his dismissal. His appeal to the Full Bench was dismissed on the basis that random drug testing in the safety-critical airline industry is justified.

These decisions demonstrate the weight the FWC places on wilful breaches of drug policies where the ramifications of breach can be significant. The decision should also place employees in safety sensitive industries on alert about compliance with such policies.

Implications for Employers

- In practice, drug testing policies are assessed on the basis of reasonableness and enforceability.
- Recent decisions confirm the FWC's endorsement of the summary dismissal of employees who wilfully breach zero-tolerance testing policies. This is particularly relevant for employers in safety-sensitive industries.
- Employers must consult with employees and their stakeholders about the terms of drug testing policies, especially where such policies impose a zero-tolerance approach.
- Employers should ensure they have privacy policies which address drug testing issues and inform employees about use of personal information for such purposes.

Employer Reminder

Earlier this month, the FWC in *Joby Cherunkunnel v Alfred Health* [2015] FWC 1127 provided a timely reminder that an employer cannot claim to have fairly investigated an employee's alleged misconduct if they fail to interview them.

Commissioner Cribb emphasised that even if an employer's disciplinary procedures do not **explicitly state** whether an employee subject to allegations would be interviewed as part of the investigation, it is "clearly implied in the procedural factors which guide the investigation".

It will not be sufficient that an employer **technically rather than genuinely** meets the requirements of its disciplinary process.

In addition, the Commissioner confirmed that this implied duty to interview applies to both internal and external investigations.

In light of this, employers are reminded that even if internal disciplinary procedures do not require them to conduct an interview, the FWC has implied the requirement into all workplaces to ensure a fair investigation occurs.

Client Quiz

When can an employer lawfully terminate an employee because of illness or injury under the *Fair Work Act* 2009 (Cth)?

a) When the employee has been off work for exactly three months on paid personal leave?

b) When the employee has been off work for three months with two months of the absence being on paid personal leave?

c) When the employee has exhausted their annual leave entitlement and has a further three months off work, one month of which was paid personal leave?

d) When the employee has exhausted their paid personal leave entitlement and has a further three months off work?

The first correct answer emailed to isla.rollason@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Did You Know?

The federal government has published its response to the recommendations made in the recent independent review of the 457 visa programme, supporting an overwhelming majority of the panel's recommendations.

The key reforms the government intends to progress in 2015 include:

- strengthening the 457 monitoring regime through tighter and more sophisticated targeting of sponsors;
- increasing information sharing between government agencies to ensure the protection of workers e.g. with the ATO to ensure 457 workers are not being underpaid and undercutting Australian workers;
- introducing a new Ministerial Advisory council on Skilled Migration to review and advise upon the list of occupations (the CSOL) available for sponsorship;
- replacing the current training benchmark requirements with an annual training fund contribution which will target areas in which there are skills shortages within the Australian workforce. This proposal is subject to further consultation;
- making the English language requirement more flexible by requiring an average score of five across all components of the International English Language Test rather than a score of five in each component and providing for concessions for certain businesses and industries;
- increasing the term of a standard business sponsorship from 3-5 years for established businesses and from 12-18 months for start-ups;
- streamlining the application process for certain sponsors depending on risk factors such as business size, occupation, salary and sponsor behaviour;
- reducing the salary threshold below which a 457 holder must be paid a market rate salary from AU$250,000 to AU$180,000;
- freezing the Temporary Skilled Migration Income Threshold (TSMIT) at AU$53,900 for at least two years with potential for regional concessions; and
- making it an offence and introducing penalties for sponsors to receive payment in return for sponsoring a 457 holder.

Finally, while the government noted the panel criticisms of the current labour market testing requirements which were described as 'not fully reliable' and 'ineffective', there are no proposals to abolish or amend the requirements.

Further details of the proposals can be found on the Immigration website.

Legislation Update

Legislative Instrument	Status	Proposed Changes
Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) Bill 2015 (**Bill**)	Introduced in the House of Representatives on 26 February 2015	The Bill amends the *Safety, Rehabilitation and Compensation Act 1988* (**Act**). Currently, the Act establishes the Comcare Scheme to provide compensation and rehabilitation support to injured Australian Government and Australian Capital Territory employees, as well as employees of private corporations that hold a license under the Act. The Bill proposes to amend the Act so that Commonwealth authorities can exit the Comcare Scheme through financial and other arrangements. Examples include: • empowering Comcare to determine and collect 'exit contributions' from exiting Commonwealth authorities. This will ensure an exiting employer does not leave the Comcare Scheme without contributing an amount to cover any current or prospective liabilities that are not funded by premiums the employer has paid before exit; • empowering Comcare to collect ongoing contributions from exited employers or successor bodies; and • ensuring that employees injured before the employer's exit continue to be supported by an appropriate rehabilitation authority.

Events Update

L&E Breakfast Seminar 15 April 2015

"How to Avoid Discrimination Claims" presented by Jillian Howard and Emily Tan

To register an interest in this event please rsvp to isla.rollason@squirepb.com

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