

Fineprint

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Workplace Drug Testing

Employer health & safety obligations and right to manage *versus* employee rights

The Employment Court decision of New Zealand Amalgamated Engineering Printing v Air New Zealand Limited allows for workplace drug testing in limited circumstances, but what are they?

The claims

The case was brought by six unions, cited as New Zealand Amalgamated Engineering Printing (NZAEP), to prevent Air New Zealand from implementing parts of its proposed policy on drug and alcohol testing. Testing was proposed for certain situations including:

- After accidents;
- Where reasonable suspicion exists;
- Before employment; and
- Random testing.

Various breaches of statutory and common law rights were alleged by NZAEP.

The arguments and findings

Air New Zealand successfully argued existing employment contracts were silent about testing (therefore not breached). It also argued that as an employer, it had both a right to manage and an obligation to provide a safe workplace. Crucially, Air New Zealand's openness about its intentions and reasoning meant it did not mislead or deceive.

The Court held the Bill of Rights Act should be regarded when considering the *reasonableness* of the policy but Air New Zealand was not directly covered by the Act because it did not perform a public function. The Human Rights Act was not breached because the detriment (being tested) was not attributable to a prohibited ground of discrimination.

Air New Zealand further argued that employees had a choice to accept testing or refuse and potentially face disciplinary action.

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The Court (noting that informed consent is crucial for random testing) held that this was true consent because it involved a choice between two alternatives, an approach it must be said, that is relatively favourable to employers.

Conversely the Privacy Act argument has been left open – samples are not personal information, but results would be. Further, the Court refused to deal with the issue directly until a complaint had been made under the Act. There were, however, reservations about employer claims of complete confidentiality, because samples can be obtained by government agencies.

Safety sensitive

The court noted that people working in *safety sensitive* areas must expect less privacy and personal autonomy than those with less responsibility. Co-operation with the employer is required, and public safety necessitates a workplace free of the risk of impairment through the taking of drugs and alcohol. Unfortunately, but understandably, no definition of *safety sensitive* has been given.

Suggested approaches

The Court suggested that *employers* should consider the following:

- The benefits of testing;
- Reasonableness of the policy itself;
- Any opposition raised and whether some or all of the testing should be prohibited;

- Whether the outcome fits with other outside factors, including employment trends and expectations, and the position adopted overseas;
- A refusal to be tested must not presume a positive test;
- Employers can investigate those refusing, and possibly commence disciplinary proceedings;
- Independently conducted testing and compliance with accepted standards;
- Minimal intrusion, maximum sensitivity;
- Offering counselling and rehabilitation before termination; and
- Results open to medical review.

“...people working in *safety sensitive* areas must expect less privacy and personal autonomy...”

While not all addressed by the Court, *employees* should consider:

- That an employer, in certain circumstances, can require tests to meet its health and safety obligations;
- Whether or not consent is given is both a factual and legal issue;
- What constitutes a *safety sensitive* workplace could be widely interpreted in future cases but is likely to include workplaces involving passenger transport,

- heavy machinery, emergency rescue, working at height, on water or underground;
- Whether drug and alcohol testing is covered in an employment agreement;
- What, if anything, their employer has indicated about proposed policies for testing;
- Discussing the matter with us if you have been dismissed for failure to undertake a test or for any result of a test;
- Counselling and rehabilitation should be offered or suggested by your employer; and
- Discussing the matter with a union representative if you have any concerns.

Conclusion

Employers should heed the Court's indication that testing may only be justified following consultation with employees, where necessary to meet health and safety obligations, and in situations where there is either reasonable suspicion, or following an incident or accident.

The importance of this case is that random testing may also be appropriate in *safety sensitive* workplaces. Any employer considering a drug testing policy however also needs to weigh up benefits against costs, because what constitutes *safety sensitive* is unclear and random testing is likely to be very expensive and may consistently fail to pick up drug and alcohol abuse in the workplace.

Imminent changes to holidays legislation

Government backs off

The Government recently announced it was backing off some of the provisions in the holidays legislation that came into force on 1 April. It is expected the first changes will be in place before the next public holiday – Labour Day (Monday, 25 October). These are expected to include:

- Workers will not be able to claim penal rates if they call in sick on a public holiday.
- Removing an anomaly that allowed some workers to claim penal rates twice for working on a public holiday.

Paul Swain, Minister of Labour, has said that these points were “unintended consequences” in the drafting of the legislation.

Further proposed changes are:

- A clearer definition of the concept of “good faith”, clarifying the situation with non-union members free-loading on union-negotiated employment agreements.
- An amendment to a provision allowing the Minister of Health to limit health sector strike action in the interests of health and safety.

- A change that employers may request a medical certificate before three days if there is suspicion an employee is pulling a sickie.
- An extension of the deadline from April 2005 to April 2007 to resolve issues relating to composite pay rates (where penal rates are an integral part of wages/salaries).

If you need help to interpret any part of the Holidays Act 2003, and to deal with these proposed changes, do call us.

Dealing with the Inland Revenue

British-style

Readers may be surprised at our publishing the letter below. It is not *Fineprint's* usual style to publish jokes, riddles nor poke fun at the Establishment. However, at the end of this long, cold and simply frightful winter, we thought it was time we lightened up for spring. No doubt many of our readers have thought of writing to New Zealand's IRD in a similar vein – but a Brit beat you to it, and we publish the Department's reply.

This letter from the British Inland Revenue Department was reprinted in *The Guardian* on 27 September 2003.

Dear Mr Addison

I am writing to you to express our thanks for your more than prompt reply to our latest communication, and also to answer some of the points you raise. I will address them, as ever, in order.

Firstly, I must take issue with your description of our last communication as a "begging letter". It might perhaps more properly be referred to as a "tax demand". This is how we at the Inland Revenue have always, for reasons of accuracy, traditionally referred to such documents.

Secondly, your frustration at our adding to the "endless stream of crapulent whining and panhandling vomited daily through the letterbox onto the doormat" has been noted. However, whilst I have naturally not seen the other letters to which you refer, I would cautiously suggest that their being from "pauper councils, Lombardy pirate banking houses and puissant gas-mongers" might indicate

that your decision to "file them next to the toilet in case of emergencies" is at best a little ill-advised.

In common with my own organisation, it is unlikely that the senders of these letters do see you as a "lackwit bumpkin or, come to that a "sodding charity". More likely they see you as a citizen of Great Britain, with a responsibility to contribute to the upkeep of the nation as a whole. Which brings me to my next point.

Whilst there may be some spirit of truth in your assertion that the taxes you pay "go to shore up the canker-blighted, toppling folly that is the Public Services", a moment's rudimentary calculation ought to disabuse you of the notion that the government in any way expects you to "stump up for the whole damned party" yourself. The estimates you provide for the Chancellor's disbursement of the funds levied by taxation, whilst colourful are, in fairness, a little off the mark. Less than you seem to imagine is spent on "junkets for bunterish lickspittles" and "dancing whores" whilst far [more] than you have accounted for is allocated to,

for example, "that box-ticking façade of a university system."

A couple of technical points arising from direct queries:

- 1 The reason we don't simply write "Muggins" on the envelope has to do with the vagaries of the postal system;
- 2 You can rest assured that "sucking the very marrows of those with nothing else to give" has never been considered as a practice because, even if the personal allowance didn't render it irrelevant, the sheer medical logistics involved would make it financially unviable.

I trust this has helped. In the meantime, whilst I would not in any way wish to influence your decision one way or the other, I ought to point out that even if you did choose to "give the whole foul jamboree up and go and live in India" you would still owe us the money.

Please forward it by Friday.

Yours sincerely

H J Lee, Customer Relations

First published in New Zealand in *Council Brief*.

Stay invested and win!

A disturbing trend is appearing with some holders of managed funds. Now that their investment has returned to breakeven, they are withdrawing their money and investing into property or debenture type products. This is counter-productive behavior. Their managed funds are likely to keep increasing in value (although at a slower pace than in the past 18 months) and over the medium term should produce

a better risk adjusted return than some of the higher risk debentures that are attracting money at present.

If investors are concerned about their managed funds falling in value they should seek professional financial planning advice. We can refer clients to financial planners who belong to The Portfolio Group. These financial planners meet international 'Best

Practice' standards and have access to a range of absolute return funds that have the potential to minimise losses in the event of another economic downturn. It is time in the markets, not timing of the markets that wins over time.

Call us for a referral to a qualified financial planner.

Source: TPG

Protecting Rural Amenity

Looking at rural subdivisions

Rural subdivisions are a current hot topic, and hot property, in many districts of New Zealand at present. This article discusses a recent High Court decision that may give some comfort to those who seek greater protection from fragmentation and development for rural areas. Conversely, it may set alarm bells ringing for those who are involved in subdivision of rural land in sensitive areas such as the Tasman and Queenstown districts.

Dealing with the effects of rural subdivision is a significant issue for many councils, given the pressure for rural development in many parts of New Zealand and the associated community concerns related to aspects of this.

Councils generally make provision within their district plans for the protection of natural features and landscapes which reflect those concerns and the relationships that people in their communities have with rural landscapes. However, those self-same district plans often contain objectives and policies which recognise and provide for the demand for rural subdivision. There is an obvious tension between these objectives and policies. That anxiety is reflected in the controversy that often surrounds council and Environment Court decisions in relation to grants of consent for rural subdivisions.

Queenstown, in particular, has made headlines recently with members of the council and local residents publicly expressing their disappointment with an Environment Court decision which granted consent for a subdivision with considerably more new lots in a proposed rural subdivision than the eight lots that had been originally approved. This is just one example of heightened community concerns about the adverse effect of development on some rural landscapes.

Tasman case

However, the findings in the recent High Court decision (*Jennings v Tasman District Council*) may give heart to opponents of rural subdivision and development. While the case was decided on its own particular facts it shows a judicial willingness (at the High Court level) to favour the objectives and policies which advocated the protection of the character and amenity value of the rural areas over those objectives and policies which enabled rural-residential development.

The appeal arose from the Environment Court's refusal to allow the Jennings to subdivide a 5.3065 hectare block of rural land on the western hills above the Waimea Plains in Tasman District. The Environment Court had concluded that taking into account the existing rural-residential dwellings in the area of the proposed subdivision the extra dwellings would have an adverse cumulative effect which was more than minor.

The Environment Court also concluded that consent to the proposed subdivision would have an adverse precedent effect, accepting expert witness opinion that in the circumstances of the case it was probable that if the appeal succeeded and the development was allowed other applications for rural-residential subdivision would be made in reliance on the decision. The effect on the environment of other ad hoc consents for rural-residential subdivision on hill slopes around the Waimea Plain would be result in further fragmentation, loss of rural character and amenity, and would have high impact on the environment.

On appeal, the High Court held that the Environment Court had not erred in that assessment.

The Environment Court also identified two main themes running through the district plan objectives and policies. In considering those two themes the Environment Court said:

It is the apparent tension between those themes that underlies the difference between the planners in this case. However we take it that in developing the plan, the Council intended that both themes are part of a coherent instrument. So the provisions are to be understood as being consistent with each other.

By making subdivision of land in the Rural 1 zone to create lots less than 12 hectares a discretionary activity, the Council must have intended that each such proposal

deserved individual consideration by reference to the items in section 104(1) (including the objectives and policies of the plan, the subdivision assessment criteria) and the purpose of the Act. Consent might be granted or refixed.

That seems to us to indicate that the second theme, of enabling rural-residential development, is subservient to the first theme, identifying values to be protected.

The Jennings argued before the High Court that it was wrong in law for the Environment Court to conclude one objective or policy was subservient to another. They argued that district plans typically have competing objectives and policies, and it is for the Court to *balance* those policies and objectives. Therefore the Environment Court should not have concluded the proposed subdivision development was contrary to the plan's policies and objectives.

However, the High Court concluded that there was nothing in the plan or the Resource Management Act which required all objectives and policies identified in a plan to be of equal importance. In this case, the Environment Court (for logical, interpretative reasons) concluded that the theme of enabling rural-residential development was subservient to the protection of the character and amenity values of rural areas. Contrary to the Jennings' arguments, it was open to the Environment Court to reach this conclusion.

Queenstown's turn?

It is interesting to note that the Environment Court's decision in the Queenstown case mentioned above, *Hawthorne v Queenstown Lakes District Council*, has also been appealed to the High Court. It will be even more interesting to see if the decision in the *Jennings* case has any impact on the outcome of that case, and whether the Court applies the same logic. If so, it will be heartening indeed for would-be defenders of our existing rural landscapes.

Where do I go for my holidays?

Separated parents need to work out children's holiday access.

With the summer break fast approaching, everyone will be starting to make plans for their holidays. Separated parents, in particular, should now be making arrangements for their children to enjoy Christmas and the summer with each of them.

Children of separated parents often become anxious about the arrangements made for them over Christmas and the summer holidays. Good planning, early on, will make the entire process easier and more manageable for everyone.

It is up to both parents to work out an arrangement that best suits the needs of the children, and also fits in with their own plans for the holiday break. In particular, the parent with whom the children are not living (the non-custodial parent) needs to ensure there are access plans over the Christmas break.

For those of you who would like some guidance on organising access for the children at Christmas and New Year, the following may help.

- Parents usually decide on alternate arrangements, for example,
 - One parent (Dad) has Christmas Day and New Year's Day 2005 with the children. In the following year (2005-2006) the children stay with their mother; or
 - Christmas Day 2004 with Mum, and New Year's Day 2005 with Dad; or

- Share both days equally – Christmas morning with Mum and the afternoon with Dad, then the same arrangement for New Year's Day.

If there is no agreement on holiday time, do contact us early. Sorting out access during the holidays in good time can save worry, time and money. It may prevent a small problem getting bigger and more expensive to fix if left to the last minute.

It should be noted that a non-custodial parent (who does not have the day-to-day care) can have access rights enforced, but *cannot* be forced to exercise their access rights.

If an access order exists and one parent prevents and/or hinders access without good reason, section 20A of the Guardianship Act 1968 provides for the imposition of a fine and/or imprisonment. Section 19 enables the Family Court to issue a warrant for enforce access.

Managing the relationship

Many parents develop a closer and better relationship with their children after separating. The most valuable thing parents can give children is time.

For access to work well, the move from one home to the other must go smoothly and calmly. If one parent finds meeting the other difficult, it may be best to arrange for a friend or relative to act as go-between, collecting and returning the children. Another alternative is for the children to be collected after school and dropped back at school the following day.

The summer holidays should be a magical time for children. Separated parents should sort out access times early on to avoid disappointment to New Zealand's greatest assets.

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NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills and information whilst maintaining client confidentiality.

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Postscript

Don't know your post code?

For efficient mail delivery, NZ Post encourages people to use a postcode. Discounts are offered to businesses using accurate post coding for bulk mailings. But what happens when you don't know the postcode for a private address or a business? Look on www.nzpost.co.nz, click on 'Post Code Finder' and follow the easy instructions.

School zones mapped on web

School zones are now easy to find with a website recently established by the Ministry of Education. Set up in response to an increasing number of calls from real estate agents and parents the website can find zones for state primary, composite and secondary schools.

Searching by school name, street name or location will give a map of the state schools in the area. The maps can be zoomed or panned for very specific searching.

If you want to know the schools for which your house is zoned, or are looking at buying a new house and need to check out the zoning – simply look at www.schoolzones.co.nz

Help with the RMA

The Ministry for the Environment has recently produced a practical guide for the RMA. Entitled "An Overview to the Resource Management Act", this is one of the 'Everyday Guide' series published by the Ministry. It can be downloaded from the Ministry's website: www.mfe.govt.nz/publications/rma

Index of *Fineprint* Articles

If you would like to look at past articles published in *Fineprint*, please contact our editor, Adrienne Olsen. She will e-mail or post you an index which goes all the way back to the first issue in April 1997. E-mail: adrienne.olsen@paradise.net.nz or call 04-972 4735.

Fineprint Readership Survey

Every three years we have asked a random selection of readers to fill out a readership survey. We have been hugely grateful for the feedback over the years.

It is now time for another readership survey – this time with a difference – it's electronic. The survey can be found on the:

- Website address listed in the column on the right ; or
- NZ LAW website – www.nzlaw.co.nz under 'Newsletter'; or
- E-mail the editor – adrienne.olsen@paradise.net.nz. Please put 'Fineprint survey' in the subject line.

If you do not have internet access or would prefer hard copy – please call us and we will post you a copy of the survey.

We very much rely on feedback from our readers to continue to publish material that readers find interesting and/or useful.