Judgment Number: AC 22/04
File Number: ARC 42/03

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER	of applications for declarations and injunctions
AND IN THE MATTER	of proceedings removed from the Employment Relations Authority
BETWEEN	NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated
	First Plaintiff
	AND Flight Attendants & Related Services Association Inc
	Second Plaintiff
	AND Aviation & Marine Engineers Association Inc
	Third Plaintiff
	AND Service and Food Workers Union Inc
	Fourth Plaintiff
	AND Aviation Industry Officers' Union Inc
	Fifth Plaintiff
	AND Pegasus - NZ Airline Services Society Inc
	Sixth Plaintiff
AND	Air New Zealand Limited
	First Defendant
	Business New Zealand Inc
	Second Defendant

Court: Chief Judge TG Goddard
Judge B S Travis
Judge GL Colgan

Hearing: Auckland
6, 7, 8, 9 and 10 October, 24 November, 19 December 2003
16 and 17 February 2004

Appearances: John Haigh QC, Kathryn Beck and Helen White, Counsel for Plaintiffs
Robert Fardell QC and Kevin Thompson, Counsel for First Defendant
Penelope Swarbrick, Counsel for Second Defendant
Ross Wilson, Advocate for NZ Council of Trade Unions
Robert Stevens, Counsel for Privacy Commissioner

Judgment: 13 April 2004

JUDGMENT OF THE FULL COURT

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Introduction

[1] This is an application by six unions for a permanent injunction and declarations against Air New Zealand Limited, a public company carrying on the business of providing air passenger transport services within and from New Zealand. The remedies the unions seek, if granted, would restrain the first defendant from implementing aspects of its recently announced policy on alcohol and other drugs in its workplace and would strike down as unlawful those portions of the policy that provide for the testing of employees for the presence of such substances in their bodies. "Drugs" include medications, both prescribed and unprescribed that are nevertheless lawfully available, as well as illicit "recreational" drugs that are sometimes unduly focussed upon in discussion of this topic.

[2] By consent, pending the Court's decision, no drug testing is being carried out, with the exception of pre-employment testing which is not attacked, apparently because the plaintiffs consider that the Court has no jurisdiction in respect of such testing[1]. The first defendant does not carry out alcohol testing and has no present intention of doing so but wishes to reserve the right to begin as soon as the necessary technology becomes available to it.

[3] The plaintiff unions are the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc, the Flight Attendants and Related Services Association Inc, the Aviation and Marine Engineers Association Inc, the Service and Food Workers Union Inc, the Aviation Industry Officers' Union and Pegasus - NZ Airline Services Society Inc. They are registered unions representing many of the approximately 10,000 employees of the first defendant and its subsidiaries in various locations throughout New Zealand and overseas.

[4] The plaintiffs are authorised by their members to negotiate for them and otherwise to represent their collective interests in their employment relationship with the first defendant. Five of the six plaintiffs are parties to various collective agreements with the first defendant. Members of the fifth plaintiff are employed by the first defendant on individual employment agreements based on the collective agreement to which the first and fourth plaintiffs are parties. This collective agreement expires on 30 June 2004. All agreements are silent on the subject of testing employees for the purposes now contemplated by the first defendant. It seems to be common ground that it is an incident of the employment relationships to which

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[1] From the facts of other cases that have come before the Court, that concession may go too far as a general proposition because sometimes successful applicants are allowed to start work conditionally upon not failing the substance test.

the first defendant is a party with the plaintiffs and its members, that the parties to such relationships must deal with each other in good faith and in a fair and reasonable manner. It is also common ground that the first defendant has the right to manage its business as it sees fit, except to the extent that it has tied its hands by agreement or is prevented by law from doing so.

[5] In addition to the original parties, we granted Business New Zealand (BNZ) party status and the New Zealand Council of Trades Union (CTU) and the Privacy Commissioner leave to appear and be heard. Affidavit evidence tendered by BNZ was received without the deponents being required to appear for cross-examination. The Privacy Commissioner and the CTU gave no evidence but addressed submissions to the Court. Notice of these proceedings was given also to several other unions having members employed by the first defendant (including the two pilot unions) but none sought to be heard.

The employer's policy on alcohol and other drugs

[6] The case concerns the validity of the promulgation by the first defendant of a document called the Air New Zealand Policy on Alcohol and Other Drugs in the Workplace ("the policy"). The document in question is the version that the first defendant issued in November 2002, as modified by an altered version that was produced during the hearing as a result of the way the evidence developed. The following are the salient points of the policy.

[7] The document begins with a brief introduction which is in no way contentious and which states that the first defendant is committed to providing a safe and healthy workplace for all its employees and to ensuring the safety and security of the travelling public. It goes on to say that employees are required to maintain a zero blood alcohol level and a drug-free level at all times while on duty, and that they must not attend work under any circumstances under the influence of alcohol or any drugs.

[8] There follows a section under the heading of *"JUST CULTURE/REPORTING REQUIREMENTS"*. This states that the policy is part of an overall integrated approach to safety and security and that, to encourage the open reporting of all incidents and risk exposures, including those that relate to drugs or alcohol, the first defendant adopts a *"just culture"* approach. This is stated to mean that, provided the employee does not come within certain exceptions, he or she will not be at risk of disciplinary sanctions for reporting any incidents or risk exposures, including self-reporting, relating to the use or presence of drugs or alcohol or the influence of drugs or alcohol in the workplace. The document reminds

employees that it is mandatory that all incidents and risk exposures, large or small, that may pose a hazard or potential hazard to customers, staff, operations, or members of the public must be reported to the first defendant. There follows a statement that alcohol and other drugs are hazards or potential hazards, and so are employees who are in breach of the requirement to maintain zero blood alcohol levels and drug-free levels at all times while on duty, or who attend work under any circumstances under the influence of alcohol or drugs.

[9] The following exceptions to the just culture approach are then set out:

> *Pre-meditated or intentional harm to people or equipment/property*
> *Actions or decisions involving a reckless disregard toward the safety or security of our customers, guests or fellow employees*
> *Failure to report safety, security and environmental incidents or risk exposures as required by standard operating procedures or the Company's mandatory reporting policy.*

[10] There follows a statement that –

> *Staff members who act in one of these ways remain exposed to the possibility of disciplinary action. A staff member's compliance with reporting requirements will be a factor to be weighed in our decision making in such circumstances.*

[11] The document then outlines awareness and education programmes as well as procedures for drug and alcohol testing in certain situations. The intention is expressed to provide an education and awareness programme for all employees, to develop employee awareness of issues related to alcohol and drug use by employees, and to explain the availability of support and rehabilitation for employees who seek assistance. There follows an offer to employees to join the company drug and alcohol rehabilitation programme which is part of the first defendant's employee assistance programme (EAP). Another statement contained in this introductory section relates to pre-employment testing. The first defendant says it will make new appointments in safety sensitive areas contingent on applicants returning a negative drug and alcohol test. It says further that employees may be tested for the presence of drugs or alcohol when an accident, incident, or near miss occurs, and that they may also be made to undergo reasonable cause testing (described as testing for the presence of drugs or alcohol) where actions, appearance, behaviour, or conduct suggests drug or alcohol may be impacting on their work. Next, it is stated that employees may be required to undergo drug and alcohol testing at random intervals on randomly selected persons.

[12] The drugs tested for will be cannabis metabolites, opiates (including morphine, heroin, codeine, and homebake), cocaine metabolites, sympathomimetic amines (includes ecstasy, speed, "P", and pseudoephedrine) and benzodiazepines. The document states that, where individuals are subject to testing, appropriate confidentiality protocols will be followed and a medical review procedure will apply to all drug test results before information about the test is passed to management and will also apply following a positive alcohol test result. Except for the provision of alcohol on company premises in approved situations, employees observed handling alcohol or other drugs at work may be disciplined under the first defendant's serious misconduct procedures.

[13] For the purposes of the document, certain terms are defined, of which the following are examples:

> ***Safety sensitive areas*** *in these procedures mean areas where employees may, if affected by alcohol or other drugs, expose themselves, other employees or other persons to the risk of injury, and include but are not necessarily limited to, those areas in which employees are working around, with, or on aircraft in the airport environment, Network Logistics, or on engineering and maintenance bases. Managers making safety critical decisions will also be deemed to be working in safety sensitive areas.*
> *…*
> ***Zero-blood alcohol*** *in these procedures is defined as 0.02 % blood alcohol content or equivalent breath – alcohol level to take into consideration medication that may contain some alcohol or other "contaminant" effects.*
>
> ***Incident***
> *An unplanned, undesirable event which* ***could*** *have caused (in slightly different circumstances) loss in the form of injury, illness, environmental or property damage, or business interruption.*
>
> ***Accident***
> *An unplanned, undesirable event which* ***did*** *cause loss in the form of injury, illness, environmental or property damage, or business interruption.*

[14] The next section of the document is headed *"What Employees Must Do"*. It is made clear that employees are required to control the consumption of alcohol and other drugs in their own time to ensure they comply with the company policy when commencing duty or while working. There is a statement that employees taking prescription medicines must discuss side effects of the medication with a medical practitioner and ask whether such medicines are likely to affect their performance or safety standards in the workplace. If employees are required to take medications likely to cause impairment (examples given are drowsiness, fatigue, altered perception, mood swings, and loss of co-ordination), and affect the employees' ability to work in a safe manner, they must inform the chief medical officer, an occupational safety and health adviser, or their manager, who will contact a health professional to discuss what accommodations, if any, need to be made. There is more

detailed discussion of the drug and alcohol awareness programme and of drug and alcohol rehabilitation.

[15] A long section of the document details the medical review procedures applicable to all testing. From this can be extracted the following statements:

- Medical personnel will be acting for the company and not as the employee's doctor.
- Medical review personnel will not be involved in the specimen collection process.
- Medical personnel will become involved on receipt of any drug test results or of a positive alcohol result.
- The primary role of the medical review is the interpretation of positive results and, in the case of a positive urine drug test result, it will occur before any advice about it is referred to a manager.
- Following the review, the company doctor will prepare a report to the employee's manager with an opinion as to whether there is any medical or other reason to account for or explain the positive result, but any medical information obtained not related to alcohol use or the test result will be treated as confidential and will not be disclosed without the employee's consent. (This appears to apply to alcohol tests only.)
- On receipt of a positive drug test, the medical officer will inform the employee and conduct a medical interview with the employee to review his or her medical history or other relevant bio-medical factors, and ultimately forward results of verified positive tests to the manager with an explanation of the positive result including any medical information related to the drug use detected by the test, but non-related information will be treated as confidential.

[16] We accept and rely on the first defendant's assurance that the testing procedures are intended by it to be carried out in accordance with the Australian/New Zealand Standard Procedures for the collection, detection and quantitation of drugs of abuse in urine: AS/NZS 4308:2001. We will also rely on the first defendant's assurance that positive test results would, if it succeeds in resisting the present challenge, be reviewed in the first instance by a company medical officer with the donor, to determine whether there is any medical

explanation for the positive result and that this would occur before a result is considered in the context of any other company investigation.

[17] Most of the remaining pages deal with the various kinds of testing. Under the heading of *"Internal Transfer Testing"* it is said that a current employee offered a new position in a safety sensitive area must return a negative drug and alcohol test before any new position is confirmed. This is said to apply only where the offer constitutes an entirely new role for the employee and the employee does not currently work in a safety sensitive area. The procedure laid down is that employees will be told that their consideration for the offer of appointment is subject to a negative test; they will give consent to such test; the first defendant will arrange for the collection and analysis of urine samples for the purpose of determining whether there are levels of drugs or alcohol exceeding the accepted Australian Standards for Drugs or the company cut-off levels for alcohol. If any applicant refuses the test, he or she will no longer be considered for the appointment but will be retained in his or her existing role.

[18] A similar process is to be followed for the purpose of post-accident and post-incident testing except that, if the employee refuses to provide consent or to undergo the test, this will be recorded and the employee's action can be investigated under employment investigation procedures. Following the collection of a sample or breath test, the employee will be removed from the site on pay until such time as he or she is deemed fit to resume work. Where a negative test results, the employee's employment will continue without loss of earnings, but a positive result will lead to the employee's actions being subject to an investigation under the first defendant's accident and incident procedures and employment investigation procedures.

[19] Reasonable cause testing applies when any person working on a company site suspects that drugs or alcohol may be impacting on an employee's work. It is stated that reasonable grounds can be established if the employee's behaviour warrants warning and is indicative of impairment or abnormal behaviour. A refusal to provide consent or to undergo the test when required will lead to an employment investigation. A positive test, if taken, will have similar consequences.

[20] Under the heading of *"Random Testing"* the first defendant states that it may conduct periodic unannounced random testing to prevent abuse and to identify abusers. The procedure to be followed contemplates that a random sample will be selected by electronic means by an independent agency covering a cross-section of employees in a particular area,

who will be notified that they have been selected to participate in a drug and alcohol test. The employees selected will be supervised from the time of notification until the breath test has been completed and the urine test has been collected. The employees will be asked to provide written consent, but an employee refusing to do so or to undergo the test will face the same consequences as in other like situations, and employees testing positive will be referred to the rehabilitation programme and to a health professional expert for assessment and recommendation of appropriate treatment.

[21] A further section deals in detail with testing protocols and the document concludes with an authority and declaration form which, on the back, has a certain amount of information for employees. A copy of this document is annexed to this judgment. It is in the form of a Microsoft Word document showing "tracked" changes made by the first defendant in the course of the hearing. The alterations were made by the first defendant.

The case as pleaded

[22] In their pleading the plaintiffs stress that the policy purports to vest certain powers and rights in the first defendant including the following:

> *7.1 To require employees to be subjected to testing in the form of collection of breath and/or urine samples from employees.*
>
> *7.2 Having the employee accompanied by a manager or supervisor at all times until the collection of any urine sample, including accompanying the employee to the hospital or doctor if immediate medical attention is required.*
>
> *7.3 To analyse samples so collected for the purpose of detecting the prior consumption or ingestion by the employee of a variety of drugs or alcohol.*
>
> *7.4 To impose a requirement for employees to provide samples of breath or urine in any or all of the following circumstances:*
>
> *(a) When an accident, incident or near miss incident occurs;*
>
> *(b) Where actions, appearance, behaviour or conduct suggests to the Defendant that drugs or alcohol may be impacting on the employee's work;*
>
> *(c) At randomly selected intervals, in relation to randomly selected employees;*
>
> *(d) When employees are selected for a new appointment in a "safety sensitive" area.*

[23] The first defendant however, asserts that the policy in addition provides for:

> *7.1 an awareness programme and voluntary rehabilitation;*
>
> *7.2 circumstances in which the Defendant may consider use of the testing procedures referred to the Policy namely internal transfer testing when an employee is*

transferring to a "safety sensitive area", post accident / incident testing, reasonable cause testing and random testing;

7.3 a requirement that any testing of employees only be undertaken upon the provision of informed consent by the employee;

7.4 any informed consent testing to be undertaken in accordance with the procedures prescribed in the Policy.

[24] The plaintiffs say the collective and individual agreements do not permit or empower the first defendant to carry out the actions specified in the policy. The first defendant denies this, while admitting that the agreements in question are silent on the subject. The plaintiffs allege that the policy is unlawful or unreasonable in a number of particulars which the first defendant denies. In particular, the plaintiffs allege:

10. The operation of the policy by the Defendant may subject the affected employees to disadvantage or detriment in their employment.

Particulars

(a) Where the employee is requested to consent to the provision of a sample of breath or urine by:

i. Subjecting the employee to a situation of unnecessary stress and undue influence.

(b) Where the employee refuses to consent to the provision of a sample of breath or urine when requested to do so by:

i. Rendering conditional an offer of a new position to which the employee would otherwise be appointed;

ii. Subjecting the employee to an employment investigation procedure, a possible outcome of which is the taking of disciplinary action up to and including dismissal from employment.

(c) Where an employee has provided a sample of breath or blood and the level is above 0.02% by:

i. Unreasonably concluding that such level amounts to an impairment;

ii. On the basis of such unreasonable assumption subjecting the employee to an investigation under the Defendant's Accident and Incident Procedures and the Employment Investigation Procedure, an outcome of which may be the taking of disciplinary action up to and including dismissal from the employment;

iii. Requiring the employee to be referred to a rehabilitation program;

iv. Requiring the employee to submit to examination by a health professional.

(d) Where an employee has provided a urine sample and such sample is found to contain levels of drug metabolites of the type and in the proportion specified by AS/NZS 4308:2001 Australian New Zealand Standard Procedures for the Collection, Detection and Quantification of Drugs of Abuse in Urine by:

i. Unreasonably concluding that such levels equate to impairment;

ii. On the basis of such unreasonable assumption subjecting the employee to an investigation under the Defendant's Accident and Incident Procedures and the Employment Investigation Procedure, an outcome of which may be the taking of disciplinary action up to and including dismissal from the employment;

iii. Requiring the employee to be referred to a rehabilitation program;

iv. Requiring the employee to submit to examination by a health professional;

v. Requiring the employee to undergo a humiliating, stressful and unreasonably invasive procedure.

[25] The first defendant says:

> *10. The Defendant denies the allegations in paragraph 10 of the Amended Statement of Claim and says further:*
>
> *10.1 in the event that an employee applicant applies for a new position requiring a transfer into a "safety sensitive area", and that applicant declines to undertake a urine sample and/or breath test upon request ("internal transfer testing"), then the applicant will no longer be considered for an offer of that appointment in a "safety sensitive area" but will retain his/her existing role;*
>
> *10.2 in the event that as a result of any test undertaken under the Policy, an employee is found to have a blood alcohol content of above 0.02% (or equivalent breath / alcohol level) while on duty, that employee will be regarded as above the defined zero-blood alcohol limit and as a result, in breach of the Defendant's requirement for all employees to maintain a zero blood alcohol level at all times while on duty;*
>
> *10.3 in the event that an accident or incident occurs in which an employee is involved and the Defendant determines that there is sufficient cause to test for drugs or alcohol and/or reasonable cause exists to suspect that drugs or alcohol may be impacting on an employee's work, the Defendant may request the employee to consent to undergo a test and, in the event that the outcome of any test is a "positive" result then that result may form part of the Defendant's investigation arising from the accident / incident and/or reasonable cause;*
>
> *10.4 in the event that an employee is randomly selected and asked to consent to undergo a test, and any test produces a "positive" result then the employee will be referred to the rehabilitation programme and to a health professional expert for assessment and recommendation of appropriate treatment.*

[26] The plaintiffs say the provisions of the policy they had referred to are unlawful and in breach of the statutory and contractual rights of the plaintiffs and the employees. The first defendant disagrees.

[27] The plaintiffs say that, to the extent that the first defendant's policy purports to empower it to do all the required actions described in the amended statement of claim, such

policy constitutes a unilateral variation of the employment agreements between the plaintiffs and the first defendant, and adversely impacts on the employees, and that such unilateral variation is unjustified. The first defendant denies it has imposed any unilateral variation.

[28] That is the first of three causes of action.

[29] The second cause of action alleges that the first defendant's policy deceives, misleads or is likely to mislead employees by implying or inferring:

- that the information collected by means of the testing of employees' breath or urine may prove a correlation between the presence of a substance and impairment or incapacity to work safely;
- that the first defendant has a duty under the Health and Safety in Employment Act 1992 to require employees to provide the first defendant with samples of breath or urine;
- that an employee has a duty under the same Act to provide samples of breath or urine;
- that the first defendant will maintain or be able to maintain strict confidentiality in respect of the samples collected by the first defendant in furtherance of its policy.

[30] The plaintiffs allege that the first defendant is in breach of the statutory prohibition against directly or indirectly misleading or deceiving employees contained in s4(1)(b) of the Employment Relations Act 2000. The first defendant denies all these allegations.

[31] The third and final cause of action begins with an allegation that the requirement to provide bodily samples to the first defendant is unreasonable or unlawful. Particulars given allege that the requirement, in terms of the policy, to provide samples of bodily substances is in breach of ss9, 11 and 21 of the New Zealand Bill of Rights Act 1990 and is an interference with employees' privacy in breach of privacy principles 1 and 4 of the Privacy Act 1993.

[32] It is also alleged that no genuine consent is possible because a refusal to consent will unjustifiably disadvantage the employee refusing it and the imbalance of power between the first defendant and individual employees further undermines the employee's ability to give properly informed and genuine consent. Also under this heading there is alleged a breach of the Human Rights Act on the footing that the requirement to provide a urine sample for collection and testing as a pre-condition to being offered an appointment to a new position is discriminatory of employees who may wish to refuse to provide such a sample owing to

religious or ethical beliefs, race or ethnic origins or disability. Further, the requirement on employees to provide information to the first defendant in relation to medication taken by a particular employee is discriminatory and may give rise to a breach of the Human Rights Act 1993. Further allegations are that the first defendant's policy is in breach of the contractual duty imposed on it to ensure that any requirement it seeks to impose on employees is both lawful and reasonable.

[33] The first defendant denies all these allegations and in addition asserts that the New Zealand Bill of Rights Act does not apply to any of its employment relationships or, if it does, there will be no breach of the Act. Further, the first defendant says there is no justiciable issue under the Privacy Act 1993 but, in any event, the collection or manner of collection of personal information about employees under the policy will not breach any of the privacy principles in that Act. The first defendant says there is no right to privacy that could give rise to a breach actionable by the plaintiffs or any of their members, and in any event, the policy accords employees fair and reasonable treatment. The first defendant says the testing will only be undertaken in the event that the employee provide informed consent to undergo a test and says there is no breach of the Human Rights Act. The first defendant says the policy and the application of any part of the policy is both lawful and reasonable.

[34] The remedies the plaintiffs seek, under the first cause of action, include a permanent injunction restraining the first defendant or its agents from implementing the following aspects of the policy:

> *(a) requesting the provision of a urine sample;*
>
> *(b) requesting the provision of a breath test;*
>
> *(c) conducting breath testing or urine testing of the employees;*
>
> *(d) taking disciplinary action against any employee who refuses to consent to provide samples of breath or urine …;*
>
> *(e) requiring any employee to undergo "rehabilitation";*
>
> *(f) requiring any employee to undergo medical examination,*

[35] In respect of the second cause of action the plaintiffs seek a declaration that the policy is deceiving or misleading or likely to be so, and a permanent injunction requiring the first defendant to refrain from acquiring or otherwise soliciting samples of employees' breath or urine. In relation to the third cause of action, the plaintiffs seek a declaration that a request to provide samples of breath or urine is unlawful or unreasonable, a further

declaration that the requirement to provide samples of breath or urine is unlawful or unreasonable, and a permanent injunction requiring the first defendant to refrain from requesting employees to provide samples of breath or urine or requiring such samples to be provided.

The issues for decision

[36] The issues raised by the pleadings are:

- whether the policy amounts to a unilateral variation of contract or a direction to employees;
- whether the policy deceives or misleads employees, or is likely to do so;
- whether the policy, as a command to undergo drug tests, is lawful and reasonable having regard to -
  - the New Zealand Bill of Rights Act 1990;
  - the Privacy Act 1993 or the common law relating to privacy;
  - the Human Rights Act 1993;
  - any other considerations.

The course of the hearing

[37] A full Court having been convened, evidence was heard on 6, 7, 8, 9 and 10 October 2003 and the case was then adjourned to a later date for the purpose of submissions. At that point, the Court directed the parties to mediation but that initiative was not fruitful. During the adjournment the first defendant issued its amended policy in part by way of reaction to observations made by members of the Court at the conclusion of the hearing of evidence. These observations pointed out that the policy as drafted differed in significant respects from the evidence given about the way in which it was intended to operate.

[38] The amendment of the policy prompted the plaintiffs to seek leave to recall one of their expert witnesses. This application was opposed but we agreed to it for reasons that we said we would give later. It is sufficient to say that the amended policy was in material respects different from the original to which evidence had up until then been directed, at any rate by the plaintiffs, and it was in the interests of justice to allow them to call further evidence directed to the amendments to the policy. This necessitated a further adjournment until after the long vacation. The Court reconvened on 16 February 2004 and heard the remaining evidence that day followed by submissions which occupied the rest of that day and most of the following day.

[39] The case was dominated by expert witnesses. The plaintiffs called three of them, Dr I R Gardner, Dr D R Black, and Dr J B Koea. The first defendant called two experts, Dr L J Kadehjian, and Dr S L Nolan. Dr Gardner is a specialist in occupational medicine. So is Dr Black who for eight years was employed by the first defendant, at first as Regional Medical Officer Northern and finally as Chief Medical Officer. Dr Koea is an expert in hepatobiliary and oncology who has had the experience of developing hospital policy and procedures appropriate in taking tissue and bodily fluids for research purposes, involving cultural considerations and ethical problems to do with consent issues and specimen use, storage, and disposal.

[40] Dr Kadehjian is a forensic toxicologist from California primarily lecturing and writing on the clinical, scientific, regulatory, and legal issues in drugs of abuse testing, including alcohol. Among the many important positions held by him, he is on the faculty of the US National Judicial College where he lectures to judges on the neurobiology of addiction, as well as the tools of drug testing covering clinical, scientific, regulatory, and legal issues. He provides consulting oversight for the US Federal Courts' Drug Testing Programmes and has done so for 10 years. He has also served as a biomedical consultant to a wide variety of public and private sector drug testing programmes internationally, including oil companies and car manufacturers.

[41] Dr Nolan, who heads the Environmental Science and Research Ltd (ESR) team administering the tests, is an acknowledged expert internationally on the topic generally of illicit drug identification and is a widely published author on the subject. She is an independent observer for the World Antidoping Agency (WADA) and a member of its subcommittee for Sports Drug Testing Laboratory Accreditation and Proficiency Testing. She is also a member of the joint Australian/New Zealand Standards Technical Committee CH-036 which was responsible for preparing the joint standard AS/NZS 4308:2001 already referred to. In addition we received the unchallenged affidavit evidence of Dr Allan Gainsford, an expert on breath testing for alcohol. We viewed a promotional and informational video prepared for ESR. We also received, as evidence and as part of counsel's submissions, a quantity of literature from New Zealand and overseas.

[42] Dr Gardner told us that there is little evidence derived from measurements of low blood or breath alcohol levels or low drug in urine or blood levels correlating the measured level of drugs or alcohol with performance detriment. If a drug or alcohol-using person is involved in an accident or incident it does not necessarily follow that the drug or alcohol effects were the main or proximate causes of the accident. Reliance on drug and alcohol

testing could cause a “blame the victim” mentality rather than implementing a proper accident investigation programme focussing on the causes rather than just one possible cause. The interaction between drugs, alcohol, sleep deprivation, effects of shift work, inter-personal stress, pre-existing medical conditions, and prescribed or over-the-counter medication, could not easily be measured or predicted. Dr Gardner thought that if what is really being measured is the form of detriment, then objective and repeatable measures, including good supervision and management, need to be developed that can be applied reliably to each employee who is in a safety sensitive position. This would not need the implementation of a mandatory drug or alcohol programme. He suggested that pre-employment and pre-placement testing really excluded only the young heavy user unable to stay off drugs for a two or three week period necessary to guarantee a “clean” test. He thought the introduction of drug or alcohol testing might lead to the development of a culture where drug-free urine would become available and employees with real problems will try to subvert the system by self-catheterisation with drug-free urine or by other ingenious and devious schemes to avoid returning positive tests.

[43] Dr Black dealt with occupational health issues arising from employee impairment in the workplace and discussed ethical and medical considerations arising from the first defendant’s drug and alcohol policy. Essentially he was critical of the testing protocol in certain respects. One of these criticisms, that ESR would report the results to line management and human resource management, has to some extent, although not to his entire satisfaction, been met by the first defendant’s amended policy. His other criticism, more fully developed when he was recalled, was that involvement of medical practitioners only at the late stage at which results were being considered was unsatisfactory and that appropriate medical practitioners should be involved from the stage at which testing is being required and carried out.

[44] Counsel for the first defendant told us that the issues on which its expert witnesses would enlighten the Court included the cognitive and psychomotor effects of drugs including alcohol; the probative value of drug and alcohol testing; the reliability and integrity of the drug and alcohol procedures proposed by the first defendant; the incidence of drug and alcohol use generally and also in the context of the workplace; the consequences of drug and alcohol presence in the workplace; and specific challenges to drug and alcohol testing. We summarise the effect of their evidence in the next section of this judgment.

[45] Other witnesses called by the parties included Mr A J Little, the National Secretary of the first plaintiff; Mr C J Sinclair, Senior Vice President Operations and Technical of the first

defendant; and for Business New Zealand, Ms A K Knowles of that organisation, and Messrs P W Smith and D B Flynn, managers in different industries in which drug testing now takes place. The affidavit evidence of these last three witnesses was not subjected to cross-examination.

Findings of fact

[46] Rather than rehearse the evidence given we will state our findings based upon it. There was, of course, no issue of factual credibility although the expert opinion evidence was not uniformly helpful, especially where some witnesses strayed into advocacy. We wish to emphasise that our decision of the case is based on evidence about, and not popular conceptions of, situations including drug use, the effects of drugs and alcohol on work performance, and individual responses to programmes such as the policy provides for. That is especially important in this case which involves consideration of safety during air travel about which most people hold strong views concerning their own safety and risks to it. It is also important to decide the case on evidence about drugs, especially illicit recreational drugs on which topic many people hold similarly robust and sometimes contrary views.

[47] We accept from Mr Little's evidence that the plaintiffs and some of their members have objections to substance testing which he described as fundamental. The employees' objections are probably strong, although no individual employee gave evidence to say so. Somewhat colourfully, he said that employees fear the employer's interest in maintaining the health and safety of their work colleagues and the public. To put the matter in balance, it is fair to record that Mr Little also acknowledged that employers have statutory and common law duties to provide safe systems of work and are obliged to manage the risks presented by an impaired employee, by which term he said he meant an employee whose cognitive functions (perception, concentration, co-ordination, understanding, awareness and judgement) are impaired, and who is unable to properly carry out his or her tasks. He also accepted that not all workplaces present the same degree of risk and that the aviation industry is one where there is a greater safety sensitivity. He also accepted that managing the risk of impairment is difficult. As a result, much of the policy is supported by the plaintiffs.

[48] The objections as articulated by Mr Little are that testing is intrusive and, on the advice available to the plaintiffs, drug testing by urine sample cannot measure or give the employer any indication of whether the employee was impaired at the time the test was taken or at any time up to the taking of the sample. On that assumption the plaintiffs see the

implementation of testing as an exploitative attack on the employees' privacy, dignity and autonomy.

[49] We accept that the testing for the presence of drugs is by its nature intrusive. There is a degree of humiliation in providing a urine sample on demand and, as Mr Little pointed out, the specimen provided by the donor has to be inspected by the collector to establish the correct temperature, colour, and volume. We agree with him that there may be less than full or adequate comprehension of the discomfort, if not indignity, that the process might cause. Both the collector and the donor must keep the specimen in view at all times prior to its being sealed and labelled and the specimen must remain in the sight of the donor until he or she has signed off on the sealing and labelling of the specimen.

[50] We accept that some employees may resist drug testing on the basis of personal pride but may not be seen by the employer as acting conscientiously in doing so.

[51] Mr Little conceded, we think properly, that there is a reasonable correlation between the level of alcohol in the body and impairment of the employee tested, and also that the method of testing the person's breath is far less intrusive than urine testing. For these reasons Mr Little said the unions do not object to those aspects of the policy relating to breath testing for alcohol where it is likely to constitute an effective step of minimising the risk of harm. However, the unions do not accept that this degree of invasion of privacy is warranted to the extent of random testing or internal transfer testing although there may be arguments that breath testing is of some assistance where there are already other indications consistent with impairment by alcohol.

[52] Mr Little expressed concern that the first defendant might be unable to honour its assurance of confidentiality of the information it proposes to gather. He said that other agencies would have access to the information under their statutory powers. That is no doubt so and we accept the general validity of these reservations. The answer to them must be legislative and we address this in our conclusions.

[53] He also referred to the part of the policy that compels employees to disclose personal and private matters about their health. He characterised this as an invasion of their privacy. Employees may be reluctant to disclose the fact that they are on medications at all. He thought that the attempt to provide treatment for alcohol and drug users needs scrutiny because it compels employees to attend treatment and referral for treatment is based on the employer's judgement. Mr Little expressed doubt whether a direction from an employer that

an employee is to spend his or her private time attending employee assistance programmes is appropriate, helpful or legal.

[54] We accept Dr Gardner's evidence, in which other experts concurred, that drug use is not associated in the professional literature to any statistically significant degree with higher labour turnover, accidents, injuries, absenteeism and discipline problems. By contrast, there is good national and international acceptance of the significance of alcohol use and abuse as an independent risk factor in a number of adverse employment outcomes including accidents and incidents. There is also widespread community acceptance, especially in relation to road safety, of the need for blood alcohol or random breath testing. We agree that the implied and stated correlation between *"presence of a drug"* and *"impairment"* as a justification for testing is not fully supported by the evidence. We do not accept Dr Gardner's assertion that the procedures for collection of samples, chain of custody, medical review, and re-testing, are poorly defined in this case. We accept Dr Nolan's evidence to the contrary and specifically that scientifically rigorous protocols deal satisfactorily with these topics. Other criticisms offered by Dr Gardner have been responded to in the amended policy.

[55] In relation to drug abuse, Dr Gardner thought what is needed is a better understanding of the real prevalence rate of drug use in the employed population in New Zealand including among the first defendant's employees and properly designed studies that would help elucidate the link, if any, between consumption of illicit drugs and their impact on safety and productivity in the aviation environment. He also thought that such study should also attempt to quantify the impact on employees of the working environment workplace stressors, shift work rosters, fatigue, and non-occupational factors such as mental ill-health, prescription drug abuse, chronic medical conditions such as hypertension, diabetes and obesity. He thought there was also a need for a properly validated study of the workplace based devices which claim to measure the performance decrement of alcohol and other drugs. No doubt there is much merit in these ideas but we cannot act upon them in this case as our concern is with the validity of the policy which is concerned only with control over alcohol and drugs in a particular workplace.

[56] We agree with Dr Black that testing is a medical process or procedure but we do not accept that it necessarily involves at all stages a confidential doctor/patient relationship where, as under the policy, the position is made clear that the company doctor is not the employee's doctor. He pointed out that a number of drugs likely to be detected are used legitimately in prescribed medication and therefore a medical judgement is necessary. We

agree. He reiterated these concerns in the second brief notwithstanding the alterations to the policy which substantially met his objections.

[57] However, we also accept Dr Kadehjian's evidence that drug testing of employees is not without its uses. In particular, it is scientifically clear that a wide variety of both legal and illegal drugs can cause significant impairment of cognitive and psychomotor functions, with potential direct implications for workplace safety. In addition, some drugs can have long lasting changes on brain structure and function. The role of alcohol in performance impairment has been well demonstrated, especially in the context of road traffic accidents. It has also been shown to have played a role in aviation industry accidents.

[58] The role of drugs other than alcohol in performance deficits has also been recognised in legislation and judicially. Dr Kadehjian referred to studies in a small number of industries tending to show that persons testing positive for drugs had an increased risk of accidents and injuries and that the implementation of a testing programme resulted in the rate of positive drug test results dropping significantly, with a commensurate drop in personal injuries and human error accidents. Dr Kadehjian said that these studies had convinced employers that drug testing serves a valuable function in deterring drug and alcohol use, and in identifying those who use drugs or alcohol in temporal proximity with their work. We accept his evidence that drug testing regimes have a noticeable deterrent effect.

[59] He referred to a household survey in the United States in 2002 showing that 75 percent of current illicit drug users are employed, with the rate of admitted current illicit drug usage in employed persons being 8 to 10 percent. Of full-time employees 62 percent admitted to current alcohol use, 29 percent to recent binge use, and 7.4 percent to current heavy use. In the case of illicit drugs, 8.2 percent of full-time employees are current users. According to surveys to which the witness had access, the New Zealand population is not different. We would, however, treat with caution any claim of cultural identity between North America and New Zealand. Dr Kadehjian described the New Zealand National Drug Policy 1998-2003 which has, as one of its priorities, the reduction of hazardous and excessive use of alcohol and associated injury including in the workplace. The National Drug Policy contemplates the workplace as a key setting to address drug use, and programmes may address the issue of drug testing, particularly in safety sensitive occupations. The policy notes that an employer's overlapping statutory and common law duties to provide a safe workplace can be seen to mandate such testing programmes. The same is said about alcohol testing.

[60] We accept Dr Kadehjan's evidence that drug testing, while unable to demonstrate impairment, can demonstrate a relative likelihood of impairment depending on the situation, in the same way that an alcohol test provides an indication of the likelihood of impairment depending on the level. We accept that urine tests for the presence of the specified drugs can do the same, albeit with less certainty in some instances. A positive result shows that the employee who tested positive for a drug of abuse is more likely than one returning a negative test to use such a drug in the future and, as a consequence, to be at risk of being impaired. According to studies carried out, there is an increased risk of performance decrement up to two days after recreational use of marijuana. Dr Kadehjian noted statements by the United States Federal Aviation Administration and the Equal Employment Advisory Committee that the purpose of drug testing is not to determine that an employee is impaired by drugs at the time of testing: rather, it is to enable an employer rationally to determine if an employee has used drugs and to conclude reasonably that there is the possibility of future impairment based on subsequent use. He pointed out that the United States Supreme Court had held that a lower court's conclusion was flawed that regulations were unreasonable because the tests in question cannot measure current impairment. The information that there had been recent use of controlled substances could provide the basis for a further investigation and might allow the employer to reach an informed judgement as to how the particular accident occurred. Dr Kadehjian also discussed challenges to drug testing programmes in the United States and legal issues over concerns about the accuracy of testing and suspicionless testing. These topics were also dealt with by counsel in submissions and are discussed elsewhere in this judgment.

[61] To the extent that the scientific methodology of the collection and analysis of samples was impugned by the plaintiffs, we hold that there is no merit in the criticisms offered. We accept the evidence given by Dr Kadehjian and Dr Nolan. We find specifically that the first stage immunoassay operates by using antibodies generated by the immune system to recognise the presence of drugs or their metabolites in a specimen. Antibodies recognise the foreign molecules by their molecular shapes and chemical properties. Antibodies can be specifically engineered to recognise the unique molecular shapes and structures of a variety of drug molecules or their metabolites. The detection of cannabis is performed by using an antibody that recognises the unique molecular shape of cannabinoids, and morphine use can be identified with an antibody specifically designed to detect the shape of morphine. Some antibodies are able to detect several members of a class of very similar molecules. Immunoassays can be performed easily and rapidly with high accuracy, are chosen for performing initial testing on large numbers of specimens, and do so to a very high degree of accuracy, in 99 percent of cases. The cut-offs for immunoassays have been designed to

reflect recent use and are at levels that the laboratory can measure accurately and reliably. They have been standardised and incorporated in several laboratory procedure standards, including AS/NZS 4308. Once a specimen has tested positive by this means, it can be subjected to further testing to confirm the initial result by more sophisticated and scientific techniques. The results of the combination of immunoassay followed by GC/MS (gas chromatography/mass spectrometry) confirmation has been accepted, as Dr Kadehjian told the Court, by the United States Supreme Court as quite highly accurate, *"assuming proper storage, handling, and measurement techniques"*.

[62] Dr Nolan's evidence convinces us that the required standards are routinely met by ESR or the results are discarded. The first defendant presently intends to use the services of ESR.

[63] ESR has established commercial relationships with 160 urine specimen collectors nation-wide to service the needs of its clients. These agents are a mix of qualified occupational health nurses and medical centres who have been trained by ESR and have signed an agreement to conduct the collection according to the AS/NZS 4308 protocols. These include safeguards to ensure -

- correct identification of the donor;
- privacy (the process of urination itself is not observed);
- safeguards against the adulteration of urine specimens or their substitution or dilution;
- sealed specimen collection kits uniquely bar-coded;
- the provision of a temperature strip on specimen collection vessels to ensure that the specimen provided is at body temperature;
- the splitting of the initial specimen into two separate specimens in front of the donor (one of which is used for testing, and the other is stored in a secure freezer at ESR allowing the donor the option for a re-test within a limited time period);
- advice to the donor to watch the specimen division and sealing process;
- the sealing of both specimens with signed and dated tamper-evident seals and their placing in a tamper-evident bag;
- preparation and signature by both donor and specimen collecting agent of five copies of the chain of custody documentation, one of which is provided to the donor and one to the employer.

[64] The specimen is couriered the same day or overnight to the ESR workplace drug testing laboratory at Kenepuru Science Centre in Wellington, and arrives at approximately 7

o'clock the next morning, except for specimens collected on a Friday which are usually kept in the collecting agent's secure storage over the weekend. The laboratory is located within the forensic toxicology unit which has very tight security and strictly limited access as required for any forensic operation. All aspects of the testing process are controlled using forensic principles that require quality controls and peer checking at each step of the process. If the specimen collection process does not meet these criteria, the specimen is rejected on receipt at the laboratory.

[65] The first step of the analysis involves the screening of the A specimen for a range of drugs using an alternated immunoassay analyser with reagent kits used to manufacturers' specifications. The instrument is calibrated daily and blanks and controls are programmed regularly throughout the day. Each urine sample is screened for the classes of drug specified in the documentation to determine whether they are present at or above the cut-off levels for the five drug classes tested for. A test is also carried out for creatinine, to determine how dilute a specimen is. A specimen with a creatinine level below 200 mg per litre indicates an unusually or abnormally dilute specimen. This shows that the specimen may have been adulterated by the addition of water, or that the donor has digested a large quantity of fluid or a diuretic prior to the sample collection. In that situation, a repeat sample is recommended, and other adulteration tests can also be conducted at this testing stage.

[66] If the results of the initial tests are negative in the sense of not disclosing any drug class or presence below the cut-off levels, the testing is normally concluded at this stage. The report then states *"as defined by AS/NZS 4308:2001, the analyses all returned negative results"*. If an adulterant is detected, that is reported, and the specimen is taken through for additional testing. If the results of the initial test are equal to or greater than the cut-off levels for any of the drug classes, the specimen is subjected to confirmatory testing. The confirmatory test is performed before results are issued.

[67] The confirmatory test is carried out by the same laboratory. A second portion from specimen A is tested. ESR confirms all positive results from the initial test using either gas or liquid chromatography/mass spectrometry (GC/MS or LC/MS) which are the methodologies recommended by AS/NZS 4308. Confirmations are conducted by the comparison of retention time and fragmentation ions with an authenticated standard. They are conducted to the highest international standards by using deuterated internal standards and extracted drug standard calibration curves over appropriate concentration ranges. According to Dr Nolan, these methodologies provide absolute identification of a particular

drug and/or its metabolites, and accurately measure the amount of the drug. We accept that they are recognised by toxicologists generally as the gold standard for urine testing for drugs.

[68] If a drug or its metabolite is detected in this way, and is present at or above the confirmatory cut-off level, the report states that the presence of the substance was confirmed at a greater level than the cut-off level, and that, as defined by the standard, the result is positive. If no drug is detected, or the levels are below the cut-off level, the report states that the analyses returned negative results.

[69] There is provision for the results to be disputed by the employee. This is done by making a request for specimen B to be tested by ESR or another laboratory accredited for urinalysis. Owing to possible degradation of a specimen over time, re-testing need only detect the presence of the drug or metabolite at the limit of quantitation using mass spectrometry.

[70] In answer to questions from the Court, Dr Nolan confirmed that the lapse of time between the testing and the reporting of a positive result to the company is likely to be in the order of a week.

[71] The principal witness for the first defendant was Mr C J Sinclair, Senior Vice President, Operations and Technical. He has a significant background in the aviation industry, having been Chief Executive Officer of Airways Corporation Ltd for 13 years. He spoke about the first defendant's reasoning in introducing the policy and its intentions. This is very relevant evidence going to the reasonableness of the intended testing.

[72] We accept his evidence that while the first defendant is a public listed company, with its current majority shareholder being the New Zealand Government, it is not a state owned enterprise or any other form of Crown entity subject to specific Crown ownership related legislation or policy. We also accept that the first defendant's business has a number of diverse but related parts to it such as the operation of aircraft, the maintenance, repair and servicing of aircraft and aircraft engines, and ground related and other support services. The first defendant has two other primary operational arms, being sales and distribution (which includes cargo) and customer services (which includes cabin crew and airport services). Considerations affecting airline safety are seen by the first defendant to impact on almost every position, not just those within the operations or technical areas. That is said to be why the drug and alcohol policy has been made to apply across the whole company.

[73] Air New Zealand does not consider it has an endemic drug or alcohol issue in any of its workplaces. However, it has no reason to consider that its employee population is any different to the general population. Statistical information available over the general population indicates that a percentage of the workforce has a problem controlling the use of alcohol and drugs of abuse. There have been isolated instances where employees have presented with either a one-off or ongoing issue with a drug or alcohol and the first defendant has dealt with them. In cases that are exceptions to the "just culture" approach, the employees have been disciplined.

[74] The "just culture" works in this way. Air New Zealand insists on reporting all operational or safety issues in order that it may have the opportunity to address them rather than allow the issue to continue unreported and discover it only on the occurrence of an incident or accident. This insistence is included in training procedures and in the manual governing the General Incident Reporting Procedure (GIR) processes. This requires the reporting of occurrences and applies to all activities as opposed to the official civil aviation rules which are applicable only to accidents and incidents that affect aircraft operations. The required mandatory reporting is carried out in the context of what is described as a "just culture". Under that culture, it is considered preferable for the employer to be made fully aware of an issue and be given an opportunity to deal with it before any occurrence than for an employee to conceal an issue for fear of disciplinary consequences. However, a failure to self report is more likely to give rise to a possibility of disciplinary consequences.

[75] The "official" rules are contained mainly in Air New Zealand's Airline Management System Manual (the AMS Manual) which is the principal manual of the Air New Zealand Airline Air Operator's Certificate Exposition, issued by the Chief Executive under the Civil Aviation Authority (CAA) of New Zealand Rule Part 119. The exposition is a high level publication developed by Air New Zealand to demonstrate compliance with CAA requirements. It defines the management organisation and responsibilities and documents the policies of Air New Zealand for the safe and consistent delivery of quality products and services for Air New Zealand. Under the Civil Aviation Act 1990 and subordinate legislation Air New Zealand is required to maintain an exposition approved by the CAA and the AMS Manual is the principal manual in that exposition, but there is a suite of other manuals covering particular aspects of the operation.

[76] The AMS Manual also contains at section 2 an exposition which documents Air New Zealand's quality management system for the safe and efficient operation of the airline. This exposition also includes reference to mandatory reporting in a "just culture"

[77] In the first defendant's perception, the policy is directed at ensuring that the safety of the business is maintained and improved and that safety is not compromised by the presence or effects of alcohol or drugs of abuse in employees in the workplace. The first defendant sees the policy as primarily directed at awareness, non-jeopardy self reporting, assistance and avoidance.

[78] The testing aspects of the policy are seen as a backstop, in the event that a drug or alcohol issue occurs, notwithstanding the front-end aims of the policy. The testing outcomes continue to recognise the "just culture" approach when assistance or rehabilitation is required but subject to recognised exceptions where an employee may be found to have been reckless or negligent.

[79] It is intended that there should be a phased implementation of the policy and procedures to ensure that all employees are aware of the content of the policy and have full opportunity to participate in a computer based education and awareness training programme or receive the information in hard copy or booklet form before the testing aspects of the policy become operative for existing employees.

[80] The present status is that managers are completing workshops of half a day's duration and have been asked to ensure that all employees complete or are provided with the Drug and Alcohol Awareness Programme. The EAP aspects of the policy including rehabilitation are in place and available to employees. The awareness training had taken longer than anticipated and was not yet complete at the date of the first hearing. The first defendant was likely to complete that training through information published in booklet form and issued to all employees. Pursuant to its undertaking, the first defendant had not commenced testing other than pre-employment testing under the policy. It will not do so until satisfied that all employees have completed the awareness programme or have alternatively been personally provided with the training material and information in hard copy with a request that they familiarise themselves with it and managers have completed training. Random testing would be the subject of further discussions before the first defendant proceeds in that respect.

[81] The methodology and protocols surrounding drug testing through urinalysis have been established but the first defendant is still developing the protocols and testing arrangements for breath testing for alcohol presence. This is apparently because there are external service providers for the collection of urine specimens and analysis for drug testing

purposes but the first defendant is not aware of any service providers undertaking breath alcohol testing. This will be introduced but will require the acquisition of appropriate equipment by the first defendant and full training for designated employees.

[82] The first defendant's understanding of the efficacy of testing is that breath analysis can provide sufficient information to determine whether an employee was impaired by alcohol at the time. However, it is also aware that the presence of a drug of abuse detected by urinalysis may not necessarily be capable of proving conclusively that an employee is currently impaired. This concession was a limited one because the first defendant considers that the testing undertaken under the policy is capable of demonstrating whether it is more likely than not that at a material time an employee was impaired or an employee's work was affected by drugs or alcohol. The testing programme will therefore be used as an implement to be used to detect, deter and then avoid the presence of alcohol and drugs in the workplace. In addition, and in the first defendant's mind, more importantly, it will be used in order to gain conclusive information whether an employee has breached the first defendant's policy requirement that employees, while at work, maintain a "zero" blood alcohol level and a "drug free" level (both as defined by the first defendant). Mr Sinclair said that is the purpose of the testing. He also said that his understanding from the scientific evidence provided to the first defendant is that the cut-off levels are set at such a point that conclusions can be drawn as to the likelihood whether an employee's performance is or could be affected. However, by setting the standard of zero the issue of impairment is avoided and any positive result above the cut-off levels would demonstrate that this standard has not been observed. The first defendant takes the view that the fundamental importance of safety to its business warrants its taking this approach and thereby avoiding the need to determine actual impairment. It considers that its instruction to staff to maintain a zero blood alcohol level and drug free level is both fair and reasonable in that it is entitled to expect employees to observe that direction. The testing aspects of the policy will assist in the detection and avoidance of the situation where an employee may breach that instruction.

[83] Mr Sinclair gave an assurance that testing for drugs or alcohol would only proceed in the event that an employee consents on an informed basis to undergo the test and he referred to the consent form that had been developed. The consequences of a refusal to consent will vary from circumstance to circumstance.

[84] Internal transfer testing will be triggered when a current employee is offered a new position in a safety sensitive area, having been employed by the first defendant outside such an area. The first defendant will call for a drug or alcohol test as a condition of appointment.

A refusal to undertake the test will disqualify the applicant from consideration for the offer of appointment. However, the applicant would retain his or her existing position and there will be no disciplinary consequences as a result of a refusal. If the applicant agrees to undergo the test and a positive result is confirmed, then subject to any explanation from the medical review, the applicant will not be considered for appointment but will be referred to the rehabilitation programme and to a health professional expert for assessment and recommendation of appropriate treatment. Unless it is evident that the positive result arose from some sort of wilful, reckless or negligent misconduct on the part of the employee, it is unlikely that there would be a disciplinary investigation by reason of a positive result being returned.

[85] In the case of post-accident/post-incident testing, the issue of testing will be considered whenever an accident, incident or near miss occurs and a prerequisite for requesting an employee's consent to undergo a test would be the existence of sufficient reasons for testing as set out in section 9 of the procedures. Managers will receive training in this respect.

[86] A positive test could result in recourse to disciplinary procedures and action but would not do so automatically. Depending on the outcome of the investigation, the first defendant would consider the options available to it which could include disciplinary action or rehabilitation or both. Any disciplinary action would be considered in the context of the first defendant's mandatory reporting requirements and "just culture". The overall conduct might warrant disciplinary action but a positive test alone might not. If an employee refuses consent to undergo a test, the first defendant is likely still to undertake an investigation, either pursuant to its CAA obligations or its own GIR procedures. But the refusal to consent will not be regarded as a positive result but could result in an investigation into why the employee refused to provide consent. That investigation could result in disciplinary action against the employee. The request to consent will be regarded by Air New Zealand as a lawful and reasonable instruction which therefore it will expect to be obeyed.

[87] Reasonable cause testing will proceed similarly to post-accident and post-incident testing. If an employee refuses to consent to undergo a test, then that refusal will also be taken into account in the investigation. The investigation could result in disciplinary consequences and a refusal could in itself trigger a disciplinary investigation.

[88] It is intended that when random testing comes into effect it will apply to all positions in Air New Zealand. Where it is to be undertaken, then subject to medical review, a positive

test for drugs or alcohol will result in the referral to the rehabilitation programme and to a professional expert for assessment and recommendation of appropriate treatment. A positive test result may or may not result in a disciplinary investigation being commenced and very relevant in the decision whether to commence such an investigation will be whether there was any wilful, reckless or negligent conduct on the employee's part surrounding the positive test. Subject to the rehabilitation work required, a follow-up test may be requested. If an employee refuses to provide consent, then an investigation may be commenced in relation to that refusal which could result in a disciplinary inquiry, the outcome of which could be disciplinary action.

[89] Mr Sinclair said that the results obtained by the first defendant from a test will not be shared with any party other than the testing organisation and the employee concerned. The first defendant would regard such information as medical information to be shared only with a testing organisation and employee assistance services if required, and would not provide the information to any other third party unless compelled to do so by law.

[90] By contrast with the first defendant's original policy, but less so with it in its amended form, Dr Kadehjian told us that, under the FAA mandated testing programme, the laboratory results are not reported directly to the employer but to a designated medical review officer (MRO), a physician with special expertise in drugs of abuse and drug testing. It is only after medical review of the test results with the donor, and upon determination that there is no satisfactory medical explanation for a positive result, that the results are reported to the employer as positive. In addition, drug test results are held as confidential medical records, with the results available only on a "need to know" basis. The test results are not used for adverse civil or criminal proceedings. We infer they are not so used because the law in America prohibits such use.

[91] We heard a body of evidence about the use and prevalence of drug testing of employees in other enterprises. Dr Nolan told us that she has worked with numerous companies in safety critical industries as they have developed their policies and operational protocols, and in the process she has had meetings and negotiations with unions and has acted both as a scientific and as a policy adviser for the particular company. She named a number of public and other companies among her clients. The policies were initially based on international models produced for ESR by consultants called Martin, Jenkins and Associates and critiqued by lawyers Sir Geoffrey Palmer and Mai Chen.

[92] Dr Nolan said that Air New Zealand's policy and procedures are in line with what many other safety sensitive industries are doing. In particular, pre-employment, post-accident, and reasonable cause testing are common and becoming increasingly widespread. Some companies also include random testing options and ESR has been used as the independent random selecting agent.

[93] During its 2002/2003 financial year ESR conducted 12,000 urine drug tests as part of workplace drug testing programmes. Specimens were submitted from 630 sites representing 350 companies. The most common users by industry were forestry, fishing, dairy, transport, power and roading, but also included were such diverse industries and enterprises as personnel consulting and legal. Dr Nolan also said that she provides training and education programmes covering policy awareness, the training being tailored to suit both management and employee audiences. Dr Nolan said that employers do not embark on the testing process lightly because such a regime requires a significant commitment in administrative workloads and the costs of consultancy and testing.

[94] In the process of developing its policy the first defendant had sought and received information from other employers using such policies, being particularly employers in the aviation field, the mining industry, the fishing industry and the steel/aluminium industry. Mr Sinclair has seen examples of most of the policy documents in place in these industries but he has been shown these in confidence and for that reason was unable to present them to the Court. He said, however, that the testing programmes applied were in most respects *"very similar"* to those that the first defendant intends to apply. He said that some employment agreements contain reference to the drug testing programme within them but some do not.

[95] The most significant point of difference between the first defendant and other employers appeared to Mr Sinclair to be the attitude of the unions involved. Other employers who have drug and alcohol testing programmes have them in place with the express or implicit approval or lack of objection of the unions. Mr Sinclair's overall impression is that while drug and alcohol testing may not be commonplace with all employers, it is certainly prevalent in those employers involved in safety sensitive industries. Mr Sinclair acknowledged that there is no mandatory requirement of the CAA for airlines to have drug and alcohol testing policies in place. That is left to the individual airline.

[96] Mr Little discussed briefly comparable policies in place at other workplaces. He said that in general there was no drug testing in place. He said a number of employers had

raised the issue in collective agreement negotiations and in many cases those claims had been defeated or a satisfactorily negotiated arrangement had been reached. Some of these clauses and policies have been developed on the basis of the parties' imperfect respective understandings of what the law allows in a vacuum of judicial comment. The clauses of policies should therefore, in Mr Little's view, be regarded as the outcome of the parties' respective bargaining power and with little appreciation of what the law may allow. Mr Little told the Court that a growing number of employers are working with his union to establish regimes under which employees are encouraged to take collective responsibility for the safety of themselves and their workmates and to identify employees who are impaired or unsafe for that reason. Employees so identified are dealt with in a non-punitive way at first with subsequent instances of impaired or unsafe conduct leading to an escalating range of responses.

[97] To the extent that the prevalence of drug and alcohol testing regimes may be relevant, we think Mr Little's evidence does not accurately reflect the current extent of such practices in safety sensitive enterprises. It is contradicted by the knowledgeable evidence of Dr Nolan and of the witnesses called by BNZ. We do accept that many testing regimes may exist without the involvement or even knowledge of relevant unions and others with union acquiescence or co-operation at local, but not necessarily head-office, level.

[98] Business New Zealand, the umbrella organisation of employers, gave uncontradicted evidence of drug and alcohol testing regimes in other industries and enterprises. The Government's recent employment initiative called "Jobs Jolt" also recognises that pre-employment drug testing is widespread and endorses programmes to be implemented to deal with people who have failed such tests. Drug and alcohol testing is now a feature of employment in industries, especially where there is potential for serious injury because of the inherent nature of the work undertaken. Business New Zealand publishes a guide for employers entitled "Drug Testing in the Workplace". It is endorsed by the general manager of the Occupational Safety and Health Service ("OSH") of the Department of Labour. To this extent, it appears that the department regards workplace drug testing as part of the framework of proactive hazard management under the Health and Safety in Employment Act 1992.

[99] Written in April 1998, long before this case was in contemplation and long before the recent amendments to the Health and Safety in Employment Act were known, this advice to employers impresses us as prescient, balanced, and sound. We can understand why the general manager of OSH agreed to write its foreword. It contains relevant advice to

employers considering introducing testing such as that it must be relevant to the jobs or tasks performed and that consent to testing must first be obtained. It confirms that drug tests neither detect abuse (but merely use) nor measure impairment and in particular whether an employee was impaired at the time the sample was taken. It states that drug tests merely identify the past use of a drug or drugs.

[100] The advice continues that random drug testing will usually be the hardest to justify. It advises employers that the nature of employees' duties will always be relevant in determining whether drug testing has a lawful purpose and expresses the view that it is doubtful that employees in non-safety sensitive positions can be targeted as a group without reasonable cause. It advises that justification, such as a desire to reduce the demand for illicit drugs or to promote honesty within the workplace, will not be sufficient to justify drug testing. It emphasises to employers that, as well as establishing that the purpose for which drug testing is to be carried out is lawful, they must be able to show that it is necessary for that purpose and in particular to demonstrate that there are reasonable grounds to believe that drug testing can significantly reduce safety risks and there is no practical and less intrusive process which would reduce safety risks to the same extent.

[101] It acknowledges that the collection of biological samples for drug testing may represent an acceptable privacy intrusion if it produces a sufficient safety benefit. The publication acknowledges that one factor which may determine the legitimacy of more general drug testing, as distinct from testing where there is an immediate safety risk, is the manner of its introduction. It says that a policy applicable to a company's entire workforce, aimed at greater workplace safety for all, and introduced after consultation with employees, could prove acceptable in Privacy Act terms if its introduction is carefully managed. It says such a policy will be more likely to gain approval if it provides for employees found to have drug or alcohol problems, to take part in counselling and rehabilitation programmes before any thought of dismissal is entertained. It recommends that policies provide for counselling and rehabilitation for employees suffering from alcohol or drug problems, perhaps to be paid for by the employer or the costs shared with the employee. It accepts in cases involving gross misconduct, rather than drug dependency, termination of employment should be a last resort after counselling and rehabilitation have failed.

[102] The publication sets out the respective arguments for implementation as part of an employment contract or agreement on the one hand, or by unilateral policy on the other. It suggests that for a policy to be properly effective, it should be incorporated into applicable contracts of employment. That is said to be because an employer's unilaterally declared

policy is not a contractual arrangement binding on employees. It suggests that the best way to ensure that the drug testing requirements are binding is to follow a process of consultation and agreement with employees and their representatives and either incorporate any agreement into relevant employment contracts or to invite employees to sign a policy indicating acceptance. It advises that having the ability to drug test as a contract term is *"the better choice"* since drug testing is then contractually enforceable and any attempted withdrawal of consent would be a breach of contract.

[103] It says, however, particularly in safety sensitive areas, it may be possible to argue that a drug testing policy is necessary because of the nature of the work. Where it is not possible to obtain employee agreement to drug testing as a contractual term or where there is no self-evident safety requirement, employers wishing to impose testing by unilateral policy introduction are warned that this may be found to be unlawful. The circumstances may include that a policy is contrary to an express term of an employment contract or contrary to the implied terms of fair dealing and mutual trust and confidence. It also warns that a policy may require something of employees that is not yet agreed to and may affect employees' conditions of employment. Even in such circumstances of unilateral implementation of a policy, employers are advised that consultation is important as is the giving of reasonable notice of the policy's introduction. In connection with whether a policy's requirement to submit to drug testing constitutes a lawful and reasonable order, the publication cautions that difficulties are more likely to arise if a policy provides for random drug or alcohol testing.

[104] As demonstrated by the uncontradicted evidence of BNZ, pre-employment, post-incident, reasonable cause, and random testing are all widely used in the forestry and fishing industries. Also in the transport industry (trucking, helicopter services, bus transport and the like) numerous employers are introducing drug and alcohol testing as part of their management of health and safety in the workplace. Other industries and sectors including local governments, manufacturing, meat export processing, ports, mining and the steel industry are increasingly introducing drug testing in workplaces. This is most commonly pre-employment, reasonable cause, and post-accident or post-incident screening often in, but not necessarily limited to, safety sensitive areas. Some employers are reluctant to distinguish between testing employees in safety sensitive positions and their other employees for reasons of consistency of treatment.

[105] Most drug and alcohol testing policies are introduced by employers following consultation with employees and their representatives (often unions) at an enterprise or local level. Two particular examples of agreed drug testing practices were also given. Sealord

Group Ltd, a fishing industry employer, has collective employment agreements covering the majority of its employees who are shore based, and its seagoing employees. Both collective agreements allow for drug testing as an appropriate means of detecting and confirming drug use or impairment which may cause harm in the workplace and compromise health and safety at land-based sites or at sea. Anecdotal evidence suggests a major reduction in the incidence of positive tests since testing began in 1997.

[106] Pan Pac Forests Ltd owns forests and is engaged in planting, harvesting and processing trees as well as operating a lumber mill and a pulp mill. In addition to its own staff, Pan Pac engages approximately 500 contract staff in forests and other maintenance contractors. Pan Pac also has two unions covering its work sites including the first plaintiff in this proceeding, the NZEPMU. Before introducing its drug and alcohol policy Pan Pac consulted with both unions. Pan Pac's policy applies to all employees regardless of status or work undertaken as a matter of principle. The policy covers both drugs and alcohol. In the first instance at least, the policy is used as a tool for rehabilitation and education rather than discipline.

[107] Pan Pac requires contractors it engages to have the same minimum drugs and alcohol standards and procedures as has Pan Pac. Forest contractors are principally those who use heavy machinery and harvest logs in forests. Pan Pac's policy includes pre-employment screening for drug use as part of a pre-employment medical assessment for all positions. Other tests include for reasonable cause. A positive test results, in the first instance, in an opportunity for rehabilitation but if this is refused a disciplinary process will follow dealing with the refusal as a matter of serious misconduct. Pan Pac's experience is that approximately 10 percent of applicants for employment test positive and are screened out. Pan Pac has used post-incident testing on three occasions at its mill sites, two of which have occurred relatively recently and two of which have concerned contract maintenance staff. Testing of persons working in forests is much more common and has resulted in a substantial number of positive tests. Pan Pac does not random test although some of its contractors do have regimes allowing random tests. Pan Pac's contractors' tests also include following lost time injury and near miss incidents. The contractors' policies provide for suspension and referral to rehabilitation for a first positive test and dismissal for a second positive test or a refusal to undergo a test.

[108] Dr Kadehjian told the Court that in the United States in 2002, 22 commercial airline pilots tested positive for alcohol use, up from nine in 2001. He referred to a study which purported to show that after reaching a blood/alcohol level of 0.1 percent, the chance of a

pilot still being impaired in flying an aeroplane after eight hours was 71 percent. In a study of the presence of drugs in fatal civil aviation accidents between 1994 and 1998, 1683 pilots were tested and controlled dangerous drugs were found in 138 and alcohol above 0.04 percent in 124. It has also been shown that there is an increased risk of pilot error accidents in those commercial pilots who have prior convictions for driving while intoxicated which were also associated with a 3.5 fold increased risk in alcohol related general aviation accidents.

[109] Dr Kadehjian told us that 20 years ago, less than 1 percent of employees were subject to drug testing in the United States. Today about 49 percent of full-time workers are subject to some form of workplace drug testing. He told the Court that a survey in 1999 in the construction industry demonstrated that the use of drug tests provided a 51 percent reduction in the injury rate within two years of implementation. Alcohol testing is primarily performed using breath analysis but most drug testing is tested by urinalysis. This is because, in that specimen, much higher concentrations of drugs can be found than in other specimens; the large specimen volume allows split specimens and repeat testing; there are well-established biochemical and scientific principles and procedures and extensive case law precedents upholding test accuracy and reliability.

[110] Dr Kadehjian provided what he called a summarised commentary on the development and acceptance in drug and alcohol testing in the USA. He also dealt with the policies and mandated responses of the FAA to the positive results – removal from safety sensitive positions and evaluation prior to return to such positions. However, employers are free to take more stringent actions if they see fit. Dr Kadehjian explained that there was a degree of application of the FAA drug testing requirement to foreign carriers. He discussed some of the reasoning in the Ontario Court of Appeal case of *Entrop v Imperial Oil Ltd,* (July 21, 2000), ONCA C29762. That Court upheld post-incident and for cause urinalysis if used as one part of a larger assessment of drug abuse, meeting the statutory tests of *bona fide* occupational requirement (rationally connected to job performance, undertaken in an honest and good faith belief of its necessity, and reasonably necessary to accomplish its work related purpose). The Court also upheld such testing on commencement of employment, promotion, or transfer to a safety sensitive position, and random post-reinstatement urinalysis for those with a past substance abuse problem upon being reinstated to a safety sensitive position. Random breath alcohol testing in the workplace was also approved. However, random urine testing was not allowed under the human rights code. Dr Kadehjian criticised this part of the decision as due to the court not being presented with persuasive information on the value of urine testing in demonstrating the likelihood of impairment.

[111] Despite pre-trial encouragement of the parties to do so, we were surprised and disappointed that none presented any evidence of a first-hand and reliable nature about the practices of other airlines in similar jurisdictions. Had we received such evidence, we would have been assisted in determining the reasonableness of these proposals both in general and particular. The only evidence touching on this subject was indirect reference by one of the expert witnesses of his awareness from news media reports that Qantas has recently wished to introduce a drug and alcohol testing programme for staff but, in the face of sustained opposition, has elected to operate this as a trial for managerial personnel only. Whether that is so, or not, it is clearly not the whole picture and unsatisfactory for the purpose of making an informed comparison.

[112] Finally, we find that the plaintiffs have not proved their allegation that the policy will subject employees to disadvantage or detriment by exposing them to unnecessary stress or otherwise affecting them adversely. No employee gave any evidence suggestive of this apprehension and such other evidence as we heard on the subject was speculative, lacked any expert basis, and was insufficient to establish the assertions pleaded.

The academic and other literature

[113] Antony Shaw's article "Drug Testing in the Workplace and The Bill of Rights" [1995] New Zealand Law Review 22 was referred to by the Court of Appeal in its judgment in *Tuckers Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894. The author discusses US and Canadian cases and constitutional documents, considers the situation in New Zealand under the Bill of Rights Act 1990 ("the NZBORA"), and the cases on unreasonable search and seizure. He suggests that in exceptional circumstances some employee drug testing programmes would survive scrutiny under the NZBORA and especially s5. However, many such programmes then operating in this country would not, in the author's view, be upheld either because there is no statutory or regulatory authority for the programme or the reasons for testing are not sufficiently serious to warrant overriding s11 guarantees. That was also said to be because they are not predicated upon a probable cause or individual suspicion requirement or because the testing procedures, confidentiality safeguards, and sanctions are disproportionate in all circumstances. He ventures to suggest that New Zealand courts will not *"rush to embrace"* US decisions which are mindless of reasonable cause. He predicts that New Zealand courts will find mandatory suspicionless testing contrary to s31 of the NZBORA except in extreme and exceptional circumstances where, having regard to their totality, the interests of the employer are established through cogent and persuasive evidence to be demonstrably superior to those of the employee. The author suggests that this is likely to occur only in cases involving genuinely safety critical or security critical

positions where public safety is a paramount and overwhelming issue. He also supports the plaintiffs' reservations about the validity of the employee's consent if it is being relied upon. However, he accepts that the critical question is whether the consent is a true consent based on full knowledge and information enabling an informed choice, including awareness of the right to refuse and of the potential consequences of giving consent.

[114] Caroline Morris in "Drugs, the law, and technology: Posing some problems in the workplace" [2002] NZULR 1 dealt with the available technology, the justification for testing, the employer's common law duty of care and statutory duties to provide a safe system of work, legal constraints. She has concluded at p29 that testing is problematic, being *"enmeshed in a web of diverse legal rights and duties"*. She opines that the law both encourages and discourages employee drug testing and that legal analysis leads to a frustrating stalemate. She asks whether the end justifies the means and discusses alternatives to employee drug testing. She concludes:

> *Where there are other methods of determining whether employees are likely to pose a threat to workplace safety, and these alternatives not only identify workers who are an immediate, rather than conjectured, risk to workplace safety and do not breach employees' privacy rights, they should be adopted as part of a comprehensive programme that first identifies impaired workers, for whatever cause, and then seeks to help them overcome their problems. Such a non-punitive approach to workplace safety is more likely to uphold employers' and employees' duties to keep each others' trust and confidence than adversarial EDT* [employee drug testing] *methods, while also resulting in financial savings for employers.*
>
> *In conclusion, identifying and dealing with drug-impaired workers is certainly justified, if not encouraged, and in some cases even required, by law. But this examination has shown that EDT is neither a fair nor effective way of doing this. Other methods exist, and should be used in workplaces where people wish not only to comply with their legal duties, but also to have regard to legal rights.*

[115] The CTU relies on three overseas materials in support of its submission. First is the International Labour Organisation Code of Practice entitled "Management of alcohol- and drug-related issues in the workplace". The second is the Canadian Human Rights Commission Policy on Alcohol and Drug Testing. And the third is the report of the Standing Committee on Family and Community Affairs of The Parliament of the Commonwealth of Australia in 2003 entitled "Road to recovery".

[116] The ILO's code of practice was written in 1996. This is regarded by the CTU as the last word on international best practice in this area. The basic theme of the code is that alcohol and drug policies and programmes should promote the prevention, reduction, and management of such problems, which should be considered as health problems and should

be dealt with like any other health problem at work. The practice states that testing of bodily samples for alcohol and drugs in the context of employment involves moral, ethical, and legal issues of fundamental importance requiring determination when it is fair and appropriate to conduct such testing. The code, however, recognises that the employer has authority to discipline workers for employment related misconduct associated with alcohol and drugs, but counselling, treatment, and rehabilitation should be preferred to disciplinary action unless a worker fails to co-operate fully with the treatment programme. As usual in such matters, it is expressed to be subject to the caveat that local circumstances will determine how far it is practicable to follow the code.

[117] In appendix 5 to the code there is a document called "Guiding principles on drug and alcohol testing in the workplace as adopted by the ILO Interregional Tripartite Experts Meeting" in 1993. There is a discussion of legal and ethical issues and the conclusion is reached that the need for testing should be evaluated with regard to the nature of the jobs involved and that, with some jobs, the privacy issue may be determined to outweigh the need to test. Reference is made to the equivocal nature of the scientific evidence linking use of alcohol and drugs to negative consequences in the workplace. It is said that most evidence is anecdotal and inferential, and that alcohol and drug testing is not a valid indicator for the social or behavioural actions caused by alcohol and drug use. Emphasis is placed on the need for confidentiality.

[118] The CTU notes the ILO's code's emphasis upon the promotion of the prevention, reduction and management of alcohol and drug related problems in the workplace through consultation and co-operation between governments, employers, workers and their representatives. Acknowledging the testing of bodily samples for alcohol and drugs in an employment context, the code emphasises that this involves moral, ethical and legal issues of fundamental importance. Particularly, the code recognises that:

> *… ethical issues are one of the most important concerns to be resolved before any testing is undertaken. Rights of workers to privacy and confidentiality, autonomy, fairness and the integrity of their bodies must be respected, in harmony with national and international laws and jurisprudence, norms and values.*
>
> *Drug and alcohol testing must be placed within the larger context of the moral and ethical issues of collective rights of society and enterprises, and of individual rights, as embodied in the Universal Declaration of Human Rights and international labour standards.*

[119] The Canadian Human Rights Commission's policy on alcohol and drug testing relied on by the CTU, has ruled that testing is justified in limited circumstances only if it is shown to

be a *bona fide* occupational requirement. The Commission in this context has given general approval to –

- random alcohol testing of employees in safety sensitive positions;
- periodic or random testing after disclosure of a current dependency or abuse problem;
- mandatory disclosure of present or past dependency or abuse in safety sensitive positions, within limits.

[120] The Commission considered that there is a human rights limit on drug and alcohol testing programmes and that requiring an employee or applicant for employment to undergo a drug test as a condition of employment will, in most cases in Canada, be considered a discriminatory practice on the grounds of disability. However, alcohol testing of employees in safety sensitive positions may be acceptable but the employer must accommodate the needs of those who test positive.

[121] The CTU emphasises s7 that prohibits direct or indirect discrimination in employment on the grounds of disability including against persons with a previous or existing dependence on alcohol or a drug. Mr Wilson for the CTU emphasised that the Canadian report, while rejecting or restricting different forms of drug and alcohol testing as being inconsistent with human rights principles, unconditionally supports other methods of drugs and alcohol management at work. These include programmes based on awareness, education, rehabilitation and effective intervention (such as peer monitoring) which are said to be the most effective ways to manage drug and alcohol problems in the workplace. Mr Wilson pointed out that this policy was developed following the judgment of the Ontario Court of Appeal in *Entrop* referred to in more detail elsewhere in this judgment.

[122] The CTU also relied on the report of the Standing Committee on Family and Community Affairs of the Australian House of Representatives. This followed an inquiry into the social and economic costs of substance abuse. It was a wide-ranging inquiry and dealt with a number of topics, including the workplace context. The conclusion was reached that there was considerable loss of national productive capacity in the paid workforce, resulting from drug-attributable sickness and death, but that there was inadequate information available to guide understanding of the relationship of substance abuse to performance in the workplace and its impact. Dr Gardner (who gave evidence) also provided evidence to this standing committee and he is named several times in the report. It records that Dr Gardner told the committee that the evidence does not support a requirement that drug

screening programmes be part of a test for fitness for duty. The committee noted that workplace testing is a contentious issue and very little is known about the extent to which people go to work when intoxicated or drug affected. The committee expressed concern about the flimsy basis on which drug testing has been built and recommended that Australian governments, with input from unions and industry, fund a large scale study to assess the efficacy of devices purporting to measure workplace drug use and impairment. It also recommended that the governments should identify the privacy concerns relating to drug testing in the workplace and examine the need for legislative changes to address those concerns and then enact them; also that guidelines for best practice implementation and use of workplace drug testing be developed.

New Zealand case law on drug testing of employees

[123] This topic was considered for what we are aware was the first and only time in New Zealand, in all three episodes of the *Tuckers Wool Processors Ltd* litigation (of which only the first two were cited to the Court by counsel). *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418 and [2000] 1 ERNZ 572 are this Court's judgments. The context was markedly different because at issue was the question whether a particular contract had been procured by harsh and oppressive means or was itself harsh and oppressive within the meaning of s57 of the Employment Contracts Act 1991. The Court found that the contract had indeed been procured by harsh and oppressive means but it also considered that in some 16 respects collectively and individually the contract was harsh and oppressive when it was entered into.

[124] The fourteenth of the 16 criticisms related to a provision dealing with drug and alcohol testing and medical examination. The drug testing provision was very brief, consisting of a single sentence requiring *"the employee's consent to undergo drug and alcohol testing procedures as and when required including prior to seasonal re-engagement, following work related accident or incident, or on a random selection"*. The only safeguard for employees was that their consent was stated to be subject to prior consultation and the appropriate procedures. There was an accompanying statement that the employer was committed to maintaining a drug and alcohol free workplace. The Court found that these provisions were harsh and oppressive.

[125] The judgment dealt with medical examination and treatment (to which employees were expected also to consent in advance, if so required by the employer) and with drug and alcohol testing, but separate reasoning was given as follows:

> *... Such testing is sought to be justified as being desirable in the interests of health and safety in the workplace. In my view, however, there is nothing in the law imposing health and safety responsibilities on employers (including the monitoring provisions of the Health and Safety in Employment Act 1992) that permits them to exercise this degree of control over employees. Of course, employees who come to work under the influence of alcohol or drugs may be a danger to themselves and to others, but the remedy for that situation is not to be found in a contractual provision requiring employees to submit in advance to such invasive and intrusive procedures, a provision that could be abused if applied to someone who is not drunk or drugged. Moreover, it is questionable whether employers are the appropriate authorities or organisations for conducting such tests. There is nothing in the contract to suggest how they will be conducted. In other environments where alcohol and drug testing is authorised there are ordinarily regimes or protocols to ensure the integrity of the process and the fairness of its application. It is a severe assault to the dignity and integrity of the individuality of employees for their employers to impose such strictures upon them. I venture to suggest that few employees would willingly agree to such a provision as reasonable. I am aware that other employers have attempted to insert provisions along these lines in their employment contracts. No doubt some have been agreed to in return for incentives seen as adequate. They would need to be generous to overcome the natural reaction of employees to find such initiatives to be unacceptably disrespectful when dealing with human beings. Arguably, the employment contract is no place for such a provision, nor is the employer an apt person to decide who should and who should not be subjected to testing, whether random or otherwise, or to conduct such tests.*

After setting out ss9 and 10 of the NZ Bill of Rights Act 1990, the Court continued:

> *The reference in s 9 to degrading treatment is instructive. The whole topic of the testing of employees for alcohol and drugs is more fitting to be the subject of legislation than of an employment contract. But even if it is to be dealt with in an employment contract in a workplace situation appropriate for such regulation, the contract would need to be fair to the employee and to contain safeguards and checks and balances to ensure that the results were reliable and were not obtained by means of serious indignity to the employee. It is difficult to see how a provision for compulsory random testing could ever be other than harsh and oppressive*

[126] The result of the case was that the Court struck out the provisions found to be harsh and oppressive, including the drug and alcohol testing provisions.

[127] On appeal in *Tuckers Wool Processors Ltd v Harrison* the Court of Appeal stated that in considering whether a provision in an employment contract was harsh and oppressive when the contract was entered into, the nature and extent of the provision, any statement of applicable criteria, discretionary elements, processes to be followed and the impact of the provision on the overall balance of rights and obligations and interests of employer and employee would be relevant to the inquiry ([74]).

> *Among the matters which might be relevant to the inquiry under s57(1)(b) are the particular rights or interests of the party affected by the power or rule (such as intrusive drug testing), the relevance of the terms to the employment in issue (such as health tests for airline pilots), societal value (as with the use of the Bill of Rights by the Chief*

> *Judge in the present case) and the circumstances of the contract, including its overall balance.* (p917)

[128] The Court of Appeal confirmed this Court's approach to consider the evidence of independent experts, and observed that the Employment Court should not depend upon its own expertise in terms of its knowledge of current contractual practice and natural justice. It referred by example to the value of recent surveys, as used in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, and went on to state:

> *[82] The drug and alcohol testing powers present different issues, but again aspects of them can be tested by reference to extrinsic material. As the Chief judge indicates, the provisions in the statute book stating the circumstances in which compulsory medical and drug testing is available, the purposes, the procedures, and other safeguards provide guidance. So too may legislation, jurisprudence, and reform proposals in other jurisdictions, eg the review by A Shaw* "Drug Testing in the Work Place and the Bill of Rights" in Drug testing – The Sporting Experience: The Employment Possibility, Legal Research Foundation 1995. *And possibly comparative contracting practice. This empirical material would not of course necessarily be decisive, but it would provide assistance for any determination to be made by the specialist Court*.

[129] Upon referral back of the case to the Employment Court the plaintiffs again succeeded after the Court had heard further evidence as recommended by the Court of Appeal. The witnesses called included an expert who gave evidence about the statistical data contained in databases about the incidence of provisions of the kind under attack in that case. The Court accepted the expert's evidence that in combination these provisions were exceptionally burdensome. The Court confirmed its original findings of fact, including the conclusion that the contract had been procured by harsh and oppressive conduct and that the drug testing provision was harsh and oppressive. However, by the time of this reconsideration, the contract was spent and it was therefore inappropriate to consider striking it or parts of it out.

[130] We accept that this litigation is distinguishable from the present situation in a number of respects. It is no answer for the first defendant to say that the distinction is that the policy issued by it is not the same as a contractual provision procured by oppressive means. A provision such as that discussed in the *Tucker* litigation would be objectionable if issued as a policy. This is because of the absence of any provision for consent at the time of the test and because of the absence of any safeguards for the employees or any rigorous testing protocols. There was no assurance that the testing would be scientifically valid. The first defendant's policy, so far as it relates to testing, is free from these criticisms because it is consent-based (subject to the question to be discussed later whether it can be so called when a failure or refusal to give consent may bring its own repercussions).

[131] Finally, we note the limited nature of legislation mandating drug testing of persons other than employees. A feature of such legislation as exists is that the results are not available for any extraneous purpose or proceeding: see, for example, New Zealand Sports Drug Agency Act 1994 s12. There is no similar safeguard for employees who consent to drug tests, a significant consideration in the *Tuckers* decisions in this Court.

[132] Mr Fardell discussed the first two *Tuckers* judgments. He submitted (and we agree) that the appropriate approach in order to determine whether the actions of the first defendant are fair and reasonable is to consider–

- the nature of the industry and the relevant concerns addressed;
- the employer's mandate for testing by reference to legislative and common law considerations;
- the utility in testing;
- the reasonableness of the policy itself;
- the grounds of opposition raised by the unions and whether some or all of the testing should be prohibited;
- whether the outcome sits comfortably with other extrinsic material, including employment trends and expectations, other legislation, and the position in comparable jurisdictions.

The Health and Safety in Employment Act 1992

[133] It is significant that most if not all of the literature and the case law pre-dates the 2002 amendment to the Health and Safety in Employment Act. It came into force in May 2003. As will be seen, this legislation has had a decisive effect on the questions at the heart of this case.

[134] The first defendant says that it is bound by this legislation as amended in 2002 to introduce alcohol and drug testing. The Act's philosophy is closely linked to the concepts of harm (illness or injury or both), hazard (actual or potential cause or source of harm, whether arising within or outside a place of work), serious harm (as defined), and significant hazard (which for most purposes means a hazard that is an actual or potential cause or source of serious harm).

[135] By way of overview, we note the Act imposes a general duty on employers to take all practicable steps to ensure the safety of employees while at work. It also imposes specific duties on them –

- to put in place effective methods for systematically identifying existing and new hazards to employees at work;
- to take all practicable steps to eliminate every significant hazard;
- to take all practicable steps to isolate it from employees if no such elimination steps are available, or have been taken but have not worked;
- to take other steps as set out below if no such isolation steps exist or work;
- to take all practicable steps to minimise the likelihood of the hazard being a cause or source of harm to the employees;
- to provide suitable protective clothing and equipment;
- to monitor the employees' exposure to the hazard;
- to take all practicable steps to obtain the employees' consent to the monitoring of their health in relation to the hazard; and
- to monitor the employees' health in relation to exposure to the hazard with their informed consent.

[136] Under s19 employees are under a duty to take all practicable steps to ensure not only their own safety while at work, but also that no action or inaction of the employee while at work causes harm to any other person. The employees' duty to ensure their own safety has been expanded to include a duty to use suitable protective clothing and equipment.

[137] This Act was strongly relied on by BNZ in its submissions as justifying the operation of drug and alcohol testing programmes. Its broad purpose was stated at the time of its passage into law to be to provide for the prevention of harm to employees at work by promoting excellence in health and safety management by employers and by imposing on employers and others duties in relation to the prevention of harm to employees.

[138] Addressing the effects of the Act, Mr Wilson for the CTU submitted that the recent amendments give legislative effect to the principle that an integral part of best practice management of health and safety is employee participation. He relied on one of the objects of the Act contained in s5(f): *"recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; …".*

[139] Mr Wilson drew our attention to other relevant and new provisions including s19A (employee participation), 19B (general duty to involve employees), 19C (development of employee participation system), Schedule 1A, Part 1 (guidance on establishing a system), Schedule 1A, Part B (function of elected health and safety representatives), and s19E (training of elected health and safety representatives). These amendments are said to give effect to recognise international best practice of encouraging and promoting the health and safety benefits of employee participation. The CTU's position is that Air New Zealand's proposed drug and alcohol testing policy is inconsistent with the objects of the amendments to the Health and Safety in Employment Act.

[140] It is necessary to discuss the detail of the Health and Safety in Employment Amendment Act 2002 which came into force on 5 May 2003. Section 5, which previously defined the principal object of the Act, was replaced with a new s5 stating that the object of the Act is to promote the prevention of harm to all persons at work and other persons in or in the vicinity of a place of work by –

> *(a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and*
>
> *(b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions; and*
>
> *(c) imposing various duties on persons who are responsible for work and those who do the work; and*
>
> *(d) setting requirements that –*
>
> *(i) relate to taking all practicable steps to ensure health and safety; and*
>
> *(ii) are flexible to cover different circumstances; and*
>
> *(e) recognising that volunteers doing work activities for other persons should have their health and safety protected because their well-being and work are as important as the well-being and work of employees; and*
>
> *(f) recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; and*
>
> *…*

[141] The Amendment Act also introduced a new s3A for the first time applying the principal Act to persons employed to work on board aircraft and their employer. The Amendment Act introduced a new s2A defining the meaning of practicable steps which are the steps to minimise the likelihood that a hazard will be cause or source of harm to employees where there is a significant hazard to employees at work. Moreover, as

Ms Swarbrick, counsel for BNZ, pointed out, the 2002 Act extended the definition of "hazard" to include a situation where a person's behaviour may be an actual or potential cause or source of harm to any person, notwithstanding that such a situation may result from any number of temporary conditions affecting a person's behaviour including drugs and alcohol. Other important changes to the legislation introduced as from 2003 were contained in Part 2A providing for employee participation in health and safety matters. Under these provisions employees are given the right to refuse to perform work likely to cause serious harm. The Amendment Act, in addition, has introduced a new obligation on occupiers or, to use the language of s16, to persons who control places of work. Such persons must take all practicable steps to ensure that no hazard that is or arises in the place harms people who are in the place with the person's consent.

[142] As we have already noted, the general thrust of the principal Act remains. Significant hazards (defined as hazards that are actual or potential causes or sources of harm) must be eliminated to the extent of all practicable steps and, where there are no practicable steps that may be taken, then all practicable steps must be taken to isolate them from employees, or at the very least the likelihood that the hazard will be a cause or source of harm to employees must be minimised. The steps that are required to be taken in this connection include monitoring the employees' exposure to the hazard (s10(2)).

[143] It follows from all this that it is not only reasonable but lawful and necessary for employers to identify the potential cause or source of harm that may be occasioned to employees and other persons if other employees come to work after taking alcohol which does impair performance and drugs which may impair performance. Employers are not only entitled but bound to monitor employees to see whether they come to work in an impaired condition. One form of impairment can be caused by the ingestion of alcohol or drugs.

[144] The Amendment Act does not specify what form the monitoring can take, but we assume that Parliament was using the verb in the dictionary meaning that includes the following: *"observe and check over a period of time"* and *"maintain regular surveillance over"*. Synonyms to be found in Roget's Thesaurus include examine, inspect, survey, scan, pass under review, take stock of, and check up on. It was not intended by Parliament to set any limits on the methods of monitoring so long as the general law is not broken and so long as any contractual undertakings are honoured. That must be taken to be implicit. So far as the general law is concerned, the method of monitoring may need to be subjected to limitations and we discuss that in other sections of this judgment. The starting point, however, is that employers not only may but must monitor their employees for the purpose of ascertaining

whether they are exposed to or the cause of any hazard of harm befalling themselves or any other person.

[145] It is worth noting finally under this heading that s19 of the Act, as amended in 2002, provides that every employee must take all practicable steps to ensure the employee's safety while at work, and that no action or inaction of the employee while at work causes harm to any other person. This strongly suggests, although it is a question of degree, that employees in occupations which impinge upon the safety of other persons, must see to it that they come to work substantially (perhaps, depending on the work, completely) free from the influence of alcohol or drugs. Because of this duty, they must expect to co-operate with the employer's attempts to monitor the situation. It is no different in principle to the statutory duty imposed on employees to wear protective clothing and to use protective equipment as well as a duty on employers to ensure that they do so.

[146] For the purposes of this case, the Health and Safety in Employment Act as amended provides significant guidance on the lawfulness and reasonableness of the proposed testing regime.

The overseas authorities

The United States

[147] The cases cited to us involved a variety of situations in which testing was challenged – railroad employees subject to the regulatory powers of a government agency, the federal customs service, school students wishing to take part in athletic or other extra-curricular programmes, candidates for designated state offices, maternity patients for the purpose of using law enforcement to coerce the patients into substance abuse treatment: *Skinner v Railway Labor Executives' Association* 489 U.S. 602, (1989); *National Treasury Employees Union v Von Rab* 489 U.S. 656; *Vernonia School District 47 J v Acton* 515 U.S. 646 (1995); *Chandler v Miller*, 520 U.S. 305 (1997); *Ferguson v City of Charleston*, 532 U.S. 67 (2000); *Board of Education of Independent School District No. 92 v Earls* [2002] SCT-QL 152 No. 01-332.

[148] The difficulty of cases such as these is well illustrated by the number of occasions on which the Supreme Court of the United States has agreed to entertain appeals and by the extent to which that Court has been sharply divided on the proper resolution of the issues before it.

[149] In the *Von Raab* case the majority's opinion noted:

> *The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.* (674).

[150] The minority led by Scalia J held that because of the lack of evidence of frequency of use or connection to harm had been demonstrated as even being likely, they formed the view that the rules were *"a kind of immolation of privacy and human dignity in symbolic opposition to drug use"* (712).

[151] The principles that appear to emerge are:

i. The collection and subsequent analysis of biological samples does infringe upon an employee's reasonable expectations of privacy and thus constitutes searches of the person.

ii. Compelling a person to produce a urine sample on demand intrudes deeply on privacy and bodily integrity.

iii. Where there is cause for suspicion there appears to be no unreasonableness in requiring employees to submit to a breath or urine test (*Skinner*).

iv. Where an employer has a special interest in regulating the conduct of employees who are engaged in safety sensitive tasks, which justify prohibiting them from using alcohol or drugs while on duty to ensure the safety of public and employees, that interest would outweigh the employee's reasonable expectations of privacy.

v. Where the test is suspicionless or without cause and not involved in safety sensitive areas, special interest has to be established, such as evidence of the effects of drug taking or the need to protect school-aged children (*Acton*).

vi. Where public safety was not genuinely in jeopardy and the need established is symbolic rather than special, suspicionless searches violate the Fourth Amendment, no matter how conveniently arranged (*Chandler*).

vii. If no sanction results from the testing, it is likely to be held to be reasonable (*Earles*).

Australia

[152] Three Australian cases dealing with and upholding drug testing policies were cited by the first defendant. All were decisions of the West Australian Industrial Relations Commission. In *BHP Iron Ore Ltd v Construction, Mining, Energy etc Union of Australia, Western Australian Branch* [1998] WAIRComm 130 (19 June 1998), the employer wished to introduce a drug and alcohol programme for all of its employees at each of its workplaces. The programme included compulsory drug and alcohol testing of employees in the workplace, an education programme, and provision of assistance for those suspected of having an alcohol or drug dependency condition. The programme included, as a condition of employment, random urine tests. On the first positive result the employee was liable to be sent home on paid special leave; on a second occasion, within a period of two years, sent home on unpaid special leave; and on a third occasion, further employment would be the subject of discussion. BHP sought the Western Australian Industrial Relations Commission's ruling to allow the introduction of the programme.

[153] The Commission found that there was little or no direct evidence of the extent to which the consumption of drugs was a problem at the company's work sites but would not accept that BHP's concerns were either baseless or irrational. It concluded that it would be naïve for the Commission to suggest that work sites were immune to the adverse effects of drugs. The Commission held that it was reasonable for BHP to take steps to put in place a scheme designed to affect the level of consumption of drugs and implement procedures designed to deter it.

[154] Although it involved an intrusion on the privacy of individual employees, the Commission further held that current community standards and expectations concerning health and safety in the workplace as evidenced by legislative prescriptions and judgments of courts and industrial tribunals, of necessity meant some constraint on the civil liberties of employees at times and intrusion into their privacy. The Commission equated drug testing with the requirement to wear safety clothing, irrespective of the wishes of individual employees. It observed that many of the tasks on the company's work sites included performance demands which were safety sensitive. It accepted that BHP had an obligation to protect the privacy of its employees but also had an obligation to protect the safety of all of its employees in the workplace as far as is reasonably foreseeable.

[155] The Commission referred to, but was dismissive of, the report of the Privacy Committee of New South Wales which considered drug testing in the workplace and recommended against it on the grounds of invasion of privacy, especially if it involved random drug testing. The report acknowledged that workplace safety was of such a concern that drug testing for safety reasons was justified in certain circumstances.

[156] In *Australian Railways Union of Workers, West Australian Branch & Others v Western Australian Government Railways Commission*, CR 257 1998, 20 January 1999 West Rail wanted to introduce, as part of its alcohol and drugs policy, random tests to ensure the safe operation of its rail network and the provision of a safe working environment. The Commission did not reject the use of random testing relying on the statutory obligations on West Rail and its duty of care to ensure a safe working environment.

[157] In *Pioneer Construction Materials Pty Ltd v Transport Workers' Union of Australia*, *IUOW, Western Australian Branch,* 2003 WAIRC 10049 the employer proposed to introduce drug and alcohol testing by the way of urine testing rather than saliva testing which the union sought. Pioneer operated concrete plants, quarries and sand mines. Pioneer gave evidence that random testing in an associated company had shown a significant number of personnel testing positive to marijuana. After reviewing the evidence the Commission observed that random drug and alcohol testing had become a common feature in many workplaces throughout Australia. It accepted that random testing was controversial because testing for the presence of drugs in urine does not establish whether or not an employee is impaired in work performance.

[158] *Carr v Botany Bay Council & Anor* [2003] NSWADT 209, cited by the plaintiffs, held that drug addiction or dependency is a recognised disability. The case involved allegations of the way an employee was treated after it was discovered that he had been on a registered methadone programme. It did not involve the same questions about drug testing as here.

[159] While we cannot go as far as to say that the position in Australia quite clearly allows for drug and alcohol testing including random testing, as Mr Fardell submitted, where safety issues are at stake, even in the absence of legislative requirements, this appears so far to be the position, at any rate, in Western Australia.

Canada

[160] In *Entrop v Imperial Oil Ltd*, 189 DLR (4th) 14, the Ontario Court of Appeal had to consider an unannounced alcohol and drug testing policy imposed by an employer on an employee in a safety sensitive job in an oil refinery. The immediate context was an employee's complaint that the employer had discriminated against him because of his handicap, namely alcoholism. He was a recovered alcoholic who had not had a drink for some seven years prior to the introduction of the employer's policy. His complaint was widened to include the whole topic of random drug testing. The issue was whether a workplace rule violated the Ontario Human Rights Code. Once a complainant shows that the rule is prima facie discriminatory on a prohibited ground, the onus shifts to the employer to justify it. The justification relied on was that the requirement was reasonable and bona fide in the circumstances. The test was further refined into a three step analysis. First, that the employer adopted the standard for a purpose rationally connected with the performance of the job; second, that the particular standard was adopted in an honest and good faith belief that it was necessary for the fulfilment of that legitimate work related purpose; third, whether the testing provisions were reasonably necessary to the accomplishment of that legitimate work related purpose. To show that the standard was reasonably necessary it had to be demonstrated that it was impossible to accommodate individual employees, sharing the characteristics of the claimant, without imposing undue hardship upon the employer.

[161] The drug testing provisions were held to violate the code but random alcohol testing did not. The important difference between alcohol and drug testing was said to be that a positive drug test does not demonstrate impairment, whereas a positive breathalyser reading does. The Court held that random alcohol testing for safety sensitive positions, although prima facie discriminatory, can be justified providing the sanctions for a positive test are individually tailored. The employer's case failed at the third step because random drug testing of employees could not be justified as reasonable unless it was to accomplish a goal of a safe workplace free of impairment. The employer could not measure impairment:

> *… random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.*

[162] Mr Fardell sought to distinguish the case or alternatively to contend that it was wrong on the issue of random drug testing. He submitted the case was decided within a statutory framework requiring the employer to prove that the testing was a bona fide occupational requirement which required it to be shown that it was reasonably necessary to accomplish

the stated work related purpose which was to prevent impairment at work. He submitted that because that framework does not exist here and, in particular, there is no requirement to prove necessity, the reasoning would not apply. Further, he submitted that the purpose of the first defendant in the present case was far wider.

[163] He also contended that the decision was inconsistent in upholding urinalysis in respect of some aspects of the testing (thereby accepting its probative value), but disallowing random drug testing because a positive test did not demonstrate impairment. He observed that there is still value in the testing process and contended that even in the case of alcohol testing it merely showed a likelihood of impairment rather than actual impairment.

[164] Mr Fardell also observed that in reliance on the *Entrop* decision, the Canadian Human Rights Commission issued a policy on alcohol and drug testing which stated that pre-employment alcohol testing, random drug testing and random alcohol testing of employees in non-safety sensitive positions could not be established as bona fide occupational requirements and were therefore unacceptable. If an employer can demonstrate that in safety sensitive areas such testing is for bona fide occupational requirements, for example where there is reasonable cause or it is required post-accident, or following disclosure of a current drug or alcohol dependency or abuse problem, random testing might be acceptable. Employees who test positive must be accommodated to the point of undue hardship and policies that result in an employee's automatic loss of employment or reassignment which imposes inflexible reinstatement conditions without regard to the personal circumstances of the employee, are unlikely to meet that requirement.

[165] Mr Fardell sought to distinguish the policy on the grounds that it is derived from the discrimination of persons with perceived handicaps and the *Entrop* case, and consequently the Canadian Human Rights Commission policy, should be seen to be in the context of the aim of Imperial Oil's policy to prevent impairment at work. Mr Fardell repeated that the first defendant's aim is to ensure that the safety of the business is maintained and improved to the fullest extent possible and never compromised or capable of being compromised by the effects of alcohol and/or drugs in the workplace. Thus, he submitted, it is a broader aim capable of being achieved by the information which drug testing can disclose, without having to prove impairment.

[166] The plaintiffs cited *Toronto Dominion Bank v Canadian Human Rights Commission and Canada Civil Liberties Association* [1998] 4 F.C. 205 as authority for the proposition that drug addiction is a recognised disability. In that case the bank's substance abuse policy required, as a condition of employment for new or returning employees, that they submit to a urine drug test, refusal to do so being grounds for dismissal. The Court of Appeal held that any policy which deprives or tends to deprive a person of employment on the basis of a drug dependency is arguably a prima facie discriminatory practice. The Court divided, two to one, on whether the bank's policy constituted a prohibited discriminatory practice, the majority concluding that the bona fide occupational requirement defence (BFOR) was not available to the bank because there was no evidence of a drug problem within the bank's workforce and no causal connection between illegal drug use and crime was established. It was also not reasonably necessary to ensure job performance and would only qualify as reasonable if the bank could demonstrate a serious threat to its other employees and the public, which it did not do.

[167] We have derived considerable assistance from the reasoning in *Entrop's case*, although we do not have in New Zealand as detailed a human rights code on discrimination as exists in Ontario. However, there is a marked similarity between the way in which Ontario and New Zealand have dealt with discrimination. By virtue of s105(1)(h) of the Employment Relations Act, disability is a prohibited ground of discrimination in employment, subject to s29 of the Human Rights Act 1993.

United Kingdom

[168] Mr Fardell cited two decisions of the Employment Appeal Tribunal as examples of cases that have concerned dismissal as a result of a positive random drug test.

[169] *O'Flynn v Airlinks The Airport Coach Company Ltd*, EAT/0269/01, 15 March 2002 dealt with the dismissal of a customer care assistant who had been dismissed for gross misconduct and failure to comply with the zero drugs and alcohol policy following a positive urinalysis and an admission of recent drug use.

[170] The company's policy of zero tolerance of drugs included a statement that a positive drug test would result in disciplinary action. Gross misconduct was defined as including reporting for duty with drugs in one's body. The applicant was aware of the change of policy and had made no objection and had continued working. The Appeal Tribunal held that there had been an agreed variation of her contract. The nature of her duties included assisting

drivers in manoeuvring coaches and also being asked to serve hot drinks on moving coaches from time to time.

[171] In dealing with the human rights argument that it was open to individuals to do what they wished in their private life outside work, subject to the constraint of the criminal law, the Appeal Tribunal held that the employer's policies only affected the employee at work. It went on to state:

> *It is thus difficult to see how the policy entrenched upon Miss O'Flynn's private life save to the limited extent of her being required to provide a sample of urine as part of an established and unopposed random screening process and save also to the extent that the company's policy and the practical effects of the testing process inescapably meant that no drugs having certain persistent detectable characteristics could be taken by employees in their private time without probably jeopardising employment.*

[172] In the second case cited, *South West Trains Limited v Ireland*, Appeal No. EAT/0873/01, 2 July 2002, the employee, a trainman guard, whose position was said to be safety critical, failed a *"random"* urine test for drugs. The test was imposed because the employer had heard a rumour that the house where the employee lived was under surveillance by police concerning drugs. The test proved positive for cannabis and benzodiazepines. The employer's drug policy was to ensure that no employee reported for duty or tried to report while unfit because of alcohol or drugs, or consumed or used them while on duty. The policy went on to state that if traces of some drugs could be found during screening this would lead to dismissal. The policy itself was not challenged and there was no appearance for the employee before the Appeal Tribunal. The Appeal Tribunal relied upon a medical officer's certificate issued following the examination that the employee was unfit for work and upheld the employer's decision to dismiss as a reasonable one taken in the circumstances.

[173] As can be seen, these were individual dismissal cases in the context of unopposed drug screening programmes. They are of little assistance in a case such as the present which is concerned with a programme that is itself controversial.

Conclusions and result

[174] We now repeat and resolve the issues that we identified in paragraph [36]:

- whether the policy amounts to a unilateral variation of contract or a direction to employees;
- whether the policy deceives or misleads employees, or is likely to do so;

- whether the policy, as a command to undergo drug tests, is lawful and reasonable having regard to -
  - the New Zealand Bill of Rights Act 1990;
  - the Privacy Act 1993 or the common law relating to privacy;
  - the Human Rights Act 1993;
  - any other considerations.

[175] We deal with the case under a number of headings derived from the plaintiffs' amended statement of claim.

Unilateral variation or employer command

[176] In law there is no such thing as a unilateral variation of contract. A variation is a further contract between the same parties whereby they agree to make some change to their rights and obligations as previously expressed, whether by way of addition, subtraction or modification.

[177] The first and second issues (variation of contract or unilateral command) are mutually exclusive alternatives. If the policy read as a whole is not a unilateral variation of contract, then it must be a command or directive, or at least plain notice of the likelihood of such. Mr Haigh placed at the forefront of his submissions that the implementation of the policy is an unacceptable unilateral variation of the employment agreement between the plaintiffs' members and the first defendant. Therefore, he contended, any direction to undergo a drug test under that policy would be unlawful and unreasonable.

[178] Mr Fardell submitted that the policy does not contravene or vary any term in the employment agreements and that more is 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 its 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. Beginning with that premise, Mr Fardell argued that it must be open for an employer to impose a zero tolerance level because of –

- the difficulties in determining actual impairment and the level of impairment as between individuals;

- the low level at which impairment can occur;
- the absence of any utility in permitting the presence of any alcohol or drugs in the workplace;
- the benefit in removing the uncertainty created by inability to self-assess;
- the integrated nature of the company's business.

[179] The plaintiffs have not pointed to a contractual right with which the policy is inconsistent. Mr Haigh was able to suggest only that by acting on suspicion of all employees, the first defendant 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 Mr Fardell's argument that there is nothing in the law or in any contract or collective agreement binding on the first defendant 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.

[180] The plaintiffs must fail on this issue because the first defendant 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 un-negotiated addition to the collective agreements or to any employee's individual agreement or contract of service. If they do suggest that, they have not proved that to be the case. We answer this issue in the first defendant's favour.

Alleged misleading or deceptive conduct

[181] Mr Haigh did not argue directly in support of the plaintiffs' pleading on this issue but developed a more general argument based upon the requirement of good faith behaviour. He argued that the abrogation of fundamental individual rights cannot be effected by policy in the absence of either lawful authority (statute or contractual agreement) or genuine and valid

consent. He pointed out that there is no legislation in New Zealand that expressly allows drug or alcohol testing in an employment context, and there is nothing in any of the employment agreements allowing such testing. He argued that issues of health and safety on their own cannot justify drug and alcohol testing. Such concerns cannot outweigh the fact that drug testing by way of urinalysis is highly intrusive of an individual's most fundamental rights, the right to privacy, the right to refuse medical treatment, and the right not to undergo unreasonable search or seizure. He submitted that in this case the first defendant had failed to prove the existence of a pressing need in the form of a real drug or alcohol problem in the workplace. However, he accepted that the Court's function was to perform a balancing exercise between the rights of the individual and the alleged benefits to safety by permitting such testing. He submitted that the rights of the individual must be zealously guarded.

[182] Mr Fardell submitted that the claim of misleading and deceptive conduct fails on its facts and the unions are unable to meet the appropriate test for demonstrating that any conduct by the company is capable of misleading or deceiving. Mr Fardell pointed to the similarity with the language of the Fair Trading Act 1986 and sought to apply the jurisprudence under that legislation. On that basis he felt able to submit that the test whether a party had been misled or deceived is an objective test, having regard to the circumstances in which the conduct occurred and the person or persons likely to be affected by it. He suggested a three-step approach –

- Consider whether the conduct – in this case, the policy – is capable of being misleading.
- Consider whether the party claiming to have been misled, was in fact misled.
- Consider whether it was reasonable for the party claiming to have been misled, to have been misled.

[183] Mr Fardell pointed out that, on the evidence, information from testing may prove a correlation with impairment and so the first defendant's implication that this is so is far from misleading. In any event, testing is not relied on to prove impairment conclusively but only to assist in determining the likelihood of impairment. He argued that there is no statement in the policy implying that the first defendant was under a duty to test under the Health and Safety in Employment Act 1992, but that Act forms an important part of the first defendant's mandate to implement testing. Mr Fardell submitted that there is no evidence capable of forming the necessary factual basis for the claims made under the second cause of action.

[184] The plaintiffs must fail on the issue of misleading or deceptive conduct for the reasons stated by Mr Fardell. Even if the first defendant's reasoning is controversial, it has been open with the work force and the plaintiffs about its intentions and its reasons for wishing to carry them into effect. When challenging a policy prior to its implementation, it seems difficult to argue that anyone is misled or deceived after a full trial, including expert evidence, cross-examination, and submissions. We are also satisfied that the policy makes it sufficiently clear that its purpose is to discover the employees who are breaching the zero tolerance requirement, not only those who may be impaired.

[185] The only reservation we have on this point is the plaintiffs' claim that the first defendant has been too sanguine in its assertion that the test results will be kept confidential. The document may not be accurate in stating that the results will be kept confidential, when it is open to government agencies to obtain them under compulsion of law. Sports drug testing, analogous for these purposes, provides express safeguards about other use of drug test results. This is an area in which legislation is needed. The Court is unable to impose any conditions that would bind other courts or government agencies. Nevertheless, this overstatement about complete confidentiality does not amount to a breach of good faith requirements and this cause of action fails.

Whether the requirement to provide bodily samples is unlawful or unreasonable

[186] Thus the only remaining issue in this case is whether the first defendant's action in introducing a protocol in part requiring employees to submit to testing is lawful and reasonable. If it is, employees must comply or risk disciplinary consequences up to dismissal for wilful disobedience to a lawful reasonable command. If it is not, they may disregard it and any demand or request made by their employer in reliance on it, with immunity from, or at least remedies for, untoward consequences. While this is the sole issue, it is a broad and important one.

[187] If it should be accepted by the Court that testing is able to be implemented in the workplace through policy, then the plaintiffs contend that the particular policy and its implementation is unlawful and unreasonable on a number of grounds, including the following:

a. It is a failure to deal with the employees in good faith.
b. It is in breach of obligations under the New Zealand Bill of Rights Act 1990.
c. It amounts to unlawful and unreasonable interference with the employees' privacy.

d. Genuine consent to such testing cannot be provided in the terms set out in the policy.
e. It is a breach of the Human Rights Act 1993.
f. It is administratively flawed and fails to recognise the medical nature of the process.

[188] These arguments are supported by the CTU which contends that the implications of drug and alcohol testing of employees are such that the issue is more than one of health and safety. The CTU accepts not only that employers have statutory and common law duties to provide safe workplaces but that parts of the aviation industry are particularly safety sensitive. Nevertheless, it says that these interests must be weighed against relevant human rights standards contained in or exemplified by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. It says the airline's policy is inconsistent with ss9, 11, and 21 of the New Zealand Bill of Rights Act 1990 dealing with degrading treatment, unreasonable search or seizure, and the refusal of medical treatment.

[189] Mr Fardell submitted –

- The New Zealand Bill of Rights Act 1990 is not of universal application and does not apply in this case.
- The Employment Court has no jurisdiction to determine a breach of the Privacy Act 1993, and this extends to any form of collateral use of the principles.
- There is no actionable right of privacy because there is no tort of privacy that the unions can invoke.

[190] Mr Haigh argued that the right to make policy must be reasonable and consistent with the relationship between the parties but that the first defendant's policy did not meet these criteria because it was premised on mistrust of employees, thus eroding trust and confidence. He also argued that the policy impacts on a previously private and autonomous aspect of employees' lives.

[191] Developing the breach of good faith argument, Mr Haigh submitted that the testing is invasive of what employees have, until now, perceived as their private very personal space, because they are being pressured into submitting to this invasion of their privacy and because the policy promises confidentiality when in fact the information provided by the employee (including the results of any tests) could be obtained by external government agencies under appropriate authority, such as a warrant.

[192] For the first defendant, Mr Fardell began by pointing out that there is much common ground between the parties concerning the obligations and responsibilities placed on an employer and an employee on the general issue of drugs and alcohol in the workplace. Even within the company's policy, there was agreement on a number of aspects, including areas where testing could be sanctioned. The only areas where the parties are significantly apart is in relation to random testing and, to a lesser extent, in the case of an employee's internal transfer to a safety sensitive position. Mr Fardell went on to argue that drug and alcohol testing has, to differing degrees, been sanctioned in other comparable jurisdictions and New Zealand would appear to be the last to consider the issue in depth. Nevertheless, drug and alcohol testing has been in use in New Zealand for some time and is prevalent in safety sensitive industries. There is no legislation in New Zealand that expressly or impliedly prohibits drug or alcohol testing in an employment context. There is nothing in any of the employment agreements which would prohibit such testing. The first defendant's position is that its policy is lawful and should be upheld, and that the plaintiff unions have been unable to demonstrate that it is unlawful.

[193] Mr Fardell pointed out that the plaintiff unions' challenge is quite narrow and therefore caution is necessary when considering the more expansive approach of the CTU and parts of the evidence of Dr Black.

[194] We agree with the broad thrust of this submission for the first defendant. Mr Haigh conceded that an employer has an obligation to take all practical steps to ensure health and safety within the workplace. Indeed, he went so far as to accept that this is a mutual obligation that is shared with employees. Further, he conceded that impairment - whether by reason of fatigue, stress, illness, or drug or alcohol use (legal or otherwise) – is a hazard within the workplace that could result in harm. Nevertheless, drug testing in most circumstances does not assess the effect of drug use on performance. Nor does it measure impairment, how much was used, or when it was used. Rather, such tests only determine past drug exposure and, even on the first defendant's evidence, the likelihood of impairment. Therefore, a drug test is not a reliable means of determining whether a person is or not capable of performing the essential requirements of the duties of their position safely or otherwise. Mr Haigh accepted that this is not necessarily the case with regard to alcohol testing but, so far as drug testing is concerned, he submitted that the implementation of a stand alone policy of this nature is a superficial method of dealing with the issue of impairment of work.

[195] For his part, Mr Fardell conceded that there is no test which can conclusively prove impairment in a scientific sense, but the testing proposed was, on the evidence, the next best thing because testing can show conclusively whether drugs or alcohol are present and the level at which they are present at the time the test is performed which will be work time. The results will assist the first defendant to determine –

- the likelihood of impairment;
- the likelihood of future impairment;
- the likelihood of risk;
- the likelihood of a failure to appear to adhere to the first defendant's policy on drugs or alcohol;
- risk minimisation, including the deterrent of random testing.

[196] Mr Fardell pointed to agreement in the evidence on the unacceptability of drugs or alcohol in the workplace, on the zero tolerance rule, and on the limitations of co-worker observation and reporting. Mr Fardell argued that the purpose of testing was to assist in detecting and avoiding drugs or alcohol in the workplace and deterring their use in the workplace. He submitted that that this is an appropriate purpose. He argued that the purpose of the testing was not disciplinary, that just culture applied, that the testing itself was consent based, and that a refusal to test did not result in the presumption of a positive result but had to be investigated on its own merits.

[197] Finally, he argued that the testing is performed to an accepted best standard, the invasion of privacy is minimised, and the method of collection of specimens is not intrusive. Cut-off levels are set at a substantial level and all results are subject to a medical review. Mr Fardell accepted that, to some extent, testing may trespass into an employee's private life and activities outside work hours: he argued that is unavoidable and the information may be relevant to the ongoing foundation required for the employment relationship.

[198] If these arguments stood on their own, we might feel able to hold that, informed by the Health and Safety in Employment Act 1993, an employer is entitled to introduce drug and alcohol testing as an available practicable step to eliminate a hazard, at any rate in situations where there is a demonstrable connection between the hazard or the risk of harm and the step proposed.

[199] However, it is necessary to deal with the plaintiffs' argument that the policy cuts across employees' vested rights under a variety of statutes. They have a two-fold effect: they may render the employer's act unlawful or, if not, may inform whether it is reasonable.

The New Zealand Bill of Rights Act 1990

[200] Mr Haigh invoked s21 of the New Zealand Bill of Rights Act 1990 dealing with unreasonable search and seizure. It has been held that this guarantee is not restricted to the protection of property but goes so far as to protect privacy interests: *R v Jeffries* [1994] 1 NZLR 290. In other jurisdictions it has been held that drug testing is both a search and a seizure, the lawfulness of which must turn on consent or statutory authority (including a collective employment agreement).

[201] Mr Haigh submitted that the NZBRA applies to the situation and in particular to an employer in the private sector if the employer can be said to be acting in the performance of any public function, power, or duty by or pursuant to law. It has been held to apply to TV3 Network Limited (*TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435) and to New Zealand Post Limited (*Federated Farmers of NZ (Inc) v NZ Post Ltd* [1992] 3 NZBORR 339). Mr Haigh referred to the statutory functions that fall to Air New Zealand under the Civil Aviation Act 1990 and the CAA rules. He argued that the first defendant is subject to the NZBORA in exercising its airline operator functions. Even if that is not correct, he argued that the norms and values of the NZBORA should nevertheless be implied by the common law. Referring to particular protected rights, he mentioned s11 conferring the right to refuse medical treatment. In the broad sense, he accepted that the s11 guarantee could be overridden in a number of situations, for example –

- where a statute expressly overrides the right to refuse;
- where the employee consents to waive his or her rights; and
- by invoking the justified limitations clause.

[202] Mr Fardell began by arguing that the NZBORA does not apply to the first defendant because it does not perform any public function. He relied on the judgment of the Court of Appeal in *Alexander v Police* (1998) 4 HRNZ 632. He also argued that the function carried out by the first defendant of transporting passengers was not a power or duty imposed or conferred pursuant to law. In the present case he submitted that the first defendant's act was that of an employer towards its employees, a private matter and not a public function.

[203] Even if all that was incorrect, the reasonable limitations contained in s5 would come to the first defendant's rescue. He submitted that such limitations could be demonstrably

justified. Mr Fardell referred under this heading as well as elsewhere to the civil aviation legislation. He submitted that the circumstances of the present case meet the requirements of proportionality of the means to the ends. He submitted that the limitations were equally justified by the common law and by the first defendant's obligations to all employees and to the public.

[204] The argument on the question whether the NZBORA applies to the employment relationship between the first defendant and its employees or between the first defendant and the plaintiffs is challenging. It turns largely on the terms of s3(b) whether the issuing by the first defendant of its policy was an act done by any person in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. It is an ingenious argument and is supported by Shaw's article.

[205] The position of air carriers is regulated and underpinned by statute to such an extent that, in relation to most of the activities of such a carrier, but especially in regard to acts driven by safety considerations, it might be said that an air carrier is discharging public functions, powers, and duties conferred or imposed by or pursuant to law. The phrase *"pursuant to"* implies an indirect connection with statutory law and can apply to delegated legislation.

[206] This is illustrated by s12 of the Civil Aviation Act 1990. The first defendant is a participant within the meaning of that section. As such, it is required to comply with the Act and to ensure that the activities or functions for which it is licensed are carried out by it, and by all persons for whom the participant is responsible, safely (s12(3)). Every participant providing a service within the civil aviation system must establish and follow a management system ensuring compliance with the relevant prescribed safety standards (s12(4)(a)). It is this document that Mr Sinclair described. Other provisions of the same Act impose duties to the public using the civil aviation service.

[207] However, we do not think that is enough to bring the first defendant's operations and activities within s3 of the NZBORA. Many private commercial activities are conducted under statutory authority or licence but could not reasonably be described as discharging public functions. We therefore conclude that the first defendant is not subject to the NZBORA.

[208] Nevertheless, the NZBORA is legislation that informs other activities and, in particular, is valid to be considered when the question for decision is whether an employer's action is reasonable when it cuts across fundamental rights recognised by the NZBORA. It

emphasises that there is a balancing exercise to be carried out. The NZBORA contributes by stressing that the limits to search and seizure must be reasonable (no more than necessary), prescribed by law (including the common law) and demonstrably justified in a free and democratic society. We accept the need to lean in favour of individual rights in the manner thus indicated. Although not determining that the policy is unlawful, the NZBORA informs our decision on whether it is reasonable.

Human rights

[209] Mr Haigh also argued that the policy would breach the Human Rights Act 1993, especially so far as it contemplates a refusal or omission to employ an employee or subjecting the employee to a detriment by reason of a prohibited ground of discrimination. Mr Haigh drew attention to the definition of disability contained in s21(1)(h) of the Human Rights Act 1993. He pointed out that most prescribed medications that employees might be taking when required to undergo a test would relate to a disability, or would provide information to the employer as to the nature of such disability. Such information is not necessarily information that an employer would be legitimately entitled to in normal circumstances. There is nothing in the authority and declaration form identifying what will happen to that information or who would be privy to it. Mr Haigh submitted that there is no assurance about what will happen if the information is not relevant to the drug test, and no undertakings are given to use it only for the specific purpose of the drug testing process.

[210] The CTU submitted that Air New Zealand's policy relating to pre-employment and random testing may give rise to breaches of s22 of the Human Rights Act 1993 in that there may be unlawful discrimination on the grounds of disability (s21(1)(h) and s21(2)(b)(ii)), religious beliefs (s21(1)(c)), or race (s21(1)(f)). The CTU also submits that the policy concerning pre-employment testing may give rise to breaches of s23 of the Act by making inquiry of or about any applicant for employment which indicates, or could reasonably be understood to indicate, an intention to commit a breach of s22.

[211] Mr Fardell dealt with the Human Rights Act 1993 at considerable length. In essence, he argued that the discriminatory provisions cannot apply because an employee affected by alcohol or drugs could not claim to be *"qualified for work of any description"* and could not be said to be discriminated against if treated differently than employees who were not affected by alcohol or drugs. The exceptions in s29(1) prevent an allegation that the policy might discriminate on the grounds of disability which he accepted could include alcoholism or drug dependency.

[212] The Human Rights Act 1993 is an important piece of social legislation. Its long title expresses Parliament's intention to provide better protection of human rights in general accordance with United Nations covenants or conventions on the subject. Part 2 of the Act deals with unlawful discrimination. By virtue of s22 of the Act it is unlawful for an employer to treat an employee, who is qualified for work of any description, less favourably than other employees of similar capabilities by reason of any prohibited ground of discrimination. The prohibited grounds are listed in s21 and include disability, widely defined to comprehend virtually any impairment.

[213] This Act cannot, however, avail the plaintiffs. While we accept that alcoholism and drug dependency are disabilities, only a small proportion of those who are tested will be subject to them. Others who return a positive test will be suffering from a temporary condition due to the after-effects of taking alcohol or drugs. The expression "disability" is a wide one but it takes more definite meaning from the context in which it is used. The present context is the Human Rights Act 1993. It defines the term quite widely but contemplates some affliction of a permanent or at least long-term nature, a condition that ordinary people would regard as a handicap (which may be physical or mental or psychological) as opposed to a temporary induced state of unfitness or diminution of ability. A disability is the state of being disabled. A temporary impairment or functional decrement falls short of disablement. We accept that a disability may be imperceptibly progressive and that it may include symptoms that manifest themselves sporadically but that does not alter our conclusion.

[214] We do not accept, however, that the phrase in the section *"employee [who] is qualified for work of any description"* somehow authorises the first defendant to test all its employees at random to see whether any may be found to be in a state that disqualifies him or her from usual work. For one thing, that is not information that the testing yields because by the time the results arrive it is usually too late to stop the affected employee working from the day of testing to the day of receipt of the test results. A point that is more helpful to the first defendant is based on s21B which exempts from illegality any act or omission that is authorised or required by law. Thus the Human Rights Act 1993 does not add anything to the argument. If the policy on testing is a lawful instruction to employees, it is authorised by law. As with the arguments based on the NZBORA, however, the principles embodied in the Human Rights Act assist us in determining the policy's reasonableness.

Privacy

[215] Mr Haigh referred also to the Privacy Act 1993 while accepting that the Court does not have jurisdiction to determine whether or not the policy leads to an interference with the

privacy of an individual. However, he argued that the Court may take into account the extent to which the policy breaches or is inconsistent with obligations under the Privacy Act 1993 when determining, as part of the balancing exercise, whether any direction under such policy would be lawful and reasonable. He pointed out that the policy, when implemented, would necessarily involve the collection, holding, use and disclosure of personal information about individuals consisting not only of the urinalysis but also of the information provided by the employee on the authority and declaration form, together with any information collected by either the relevant manager or supervisor or the medical review officer reviewing the results at a later date. He argued, after discussing the applicable privacy principles, that while it may not be intended by the first defendant that it disclose personal information, there may well be circumstances where such disclosure is either by order of the Court or under a search warrant. Therefore, the first defendant could not guarantee the confidentiality of the information to the employee.

[216] Mr Fardell dealt in some detail with the Privacy Act 1993 and focused on the plaintiffs' allegation that there had been a breach of employees' right to privacy. He began by pointing out that the breach of a privacy principle does not make an action unlawful because, as the Court of Appeal has stated in *R v Wong-Tung* (1996) 2 HRNZ 272, the privacy principles do not have the force of law but a breach could form the subject of a complaint to the Privacy Commissioner. This rule extends to the collateral use of privacy principles: *Clarke v Attorney-General* [1997] ERNZ 600 and *Hosking v Runting* [2003] 3 NZLR 385. As a fallback argument, he submitted that the privacy principles 1 and 4 had not been breached.

[217] Mr Fardell next dealt with the suggested common law right to privacy. He first argued that there is no separate right to privacy actionable in the event of a breach at common law. He relied on *Hosking v Runting* at first instance and dealt with some of the authorities from other jurisdictions discussed in that case.

[218] At the heart of the Privacy Commissioner's submissions, and not contested by any party or intervener, was the fundamental proposition that the Privacy Act 1993 does not give rights or impose obligations that are enforceable in this or any other court of law. Questions of statutory privacy are to be dealt with by a discrete and exclusive procedure involving, among others, the Privacy Commissioner and the Human Rights Review Tribunal. For completeness, Mr Stevens helpfully examined the issue of common law privacy and, in particular, whether New Zealand law recognises a tort of breach of privacy. Although suing on such a cause of action, if it exists, would probably take place in one of the courts of ordinary jurisdiction, determining whether an instruction to an employee is "lawful" may entitle

this Court to consider whether this would amount to the commission of a tort and thus be unlawful.

[219] As Mr Stevens pointed out, before the enactment of the Privacy Act in 1993 some cases in New Zealand had suggested the existence of a tort of invasion of privacy: *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 and *P v D* [2000] 2 NZLR 591. Each case dealt with public disclosure of private facts as the breach of privacy. As such these cases are in our view different from the present situation where no publicity is intended or likely.

[220] Mr Stevens traversed English cases and discussed the High Court's retreat in *Hosking v Runting* from the apparent earlier certainty. The Court of Appeal has now delivered its judgment restoring, by a narrow majority, the previous trend, but limiting it although authorising further development on a case by case basis: *Hosking v Runting & Ors*, unreported, 25 March 2004, CA101/03. None of this affects the Privacy Commissioner's submission that while there may be a common law tort of privacy involving the public disclosure of private facts in New Zealand, there is no authoritative judicial statement that intrusion into personal affairs per se is actionable in New Zealand, let alone any setting out its elements and bounds. That remains the case today. The implementation of the policy will not amount to the commission of a tort and will not thereby be unlawful.

[221] Despite the caveat of the non-applicability of the Privacy Act's enforcement provisions, the Privacy Commissioner nevertheless provided us with a helpful analysis of relevant provisions of the Act and their application in practice to assist in determining the reasonableness of the proposed drug and alcohol testing. Reasonableness is an objective assessment of the nature and consequence of an action or intended action in all relevant circumstances including contemporary New Zealand society. The Privacy Act's provisions may be said to represent current community standards and expectations in this area and as the community's parliamentary representatives have seen fit to incorporate into, and underpin, contemporary legislation.

[222] We accept that neither breath nor urine samples are, of themselves, *"personal information"* with which the Privacy Act deals and defines as any information about an identifiable individual, although the results on an analysis of alcohol or drug metabolite content is personal information about the identified individual from whom the sample was taken. The first defendant's intended processes for the requiring, conducting, or recording

and following up of drug and alcohol tests all involve dealing with personal information about the employees concerned.

[223] Section 6 of the Privacy Act sets out the 12 information privacy principles. Rather than even summarising the helpful and full submissions Mr Stevens made about the application of the policy to each of these principles, we will simply note where counsel identified a potential breach of some of those. So, the Privacy Commissioner accepted that pre-employment testing, pre-transfer testing and "reasonable cause testing" would all seem justifiable under principle 1 relating to the lawful purpose connected with the company's legitimate functions and the necessity of doing so for that purpose. Mr Stevens asserted, however, that an analysis of the company's proposals in terms of principle 1 may be more problematic in relation to information collected by random testing where that is designed to act as a deterrent as opposed, for example, to measuring the incidence of drug taking in a particular group, because the rationale for such testing is not founded on the presence of the factors in relation to the individual being tested. Rather, the Privacy Commissioner says, random testing appears to be premised on a perception by those employees not being tested that they could be the next subjects of it, that the test would discover if they had breached the company's alcohol and drug consumption policies, and that serious consequences would or might follow from such a discovery. The Commissioner also points to the company's proposal that although pre-employment and pre-transfer drug testing would be carried out for jobs in "safety sensitive areas", "reasonable cause" testing and random testing would be carried out on any or all of the company's employees. Mr Stevens submitted on behalf of the Commissioner that it was difficult to see how there was a necessity for random testing information about an employee in a job which is not in a safety sensitive area when there is not the same necessity to test that person before appointment or transfer to that job.

[224] Counsel submitted that Air New Zealand has not provided detail of the intended frequency of random testing and evidence as to the deterrent efficacy of such a procedure, so it would seem difficult to establish that collecting the information obtained from testing a particular employee on a particular day is necessary. The question is whether, when a random test is carried out, it is necessary to record and keep information at all about that employee if the test is negative.

[225] Mr Stevens submitted that in order to satisfy the requirements of privacy principle 1 in random drug testing, Air New Zealand would have to be able to show that there was a link between the desired result (no accidents/incidents attributable to the employee being under the influence of drugs/alcohol) and the collection of drug test information for any particular

employee. Counsel's submission was that on the evidence presented to the Court, that link was not self-evident.

[226] Further, Mr Stevens submitted that for random drug testing to satisfy the second part of principle 1 (that the collection of that information must be necessary for the purpose), Air New Zealand should be expected to demonstrate a reasonable basis for believing a continuation of the process was necessary to achieve the purposes for which the scheme was introduced.

[227] Privacy principle 4 requires that personal information must be collected only by means that are lawful, or which are not, in the circumstances, either unfair or unreasonably intrusive on the personal affairs of the individual concerned. Mr Stevens submitted that the means of collection in this case would extend to the whole process including the obtaining of breath and urine samples and the related information. The principle contains three separate tests: unlawfulness, unfairness and unreasonable intrusion. Counsel submitted that lawfulness is not likely to be an issue where testing takes place with informed consent. Similarly, Mr Stevens submitted, informed consent underpins the fairness of the policy's operation although there is an issue how meaningful consent will be where an investigation (and the possibility of disciplinary action) may follow a refusal. As to the third test (reasonableness of intrusion into the individual's personal affairs), Mr Stevens submitted that different parts of the process may involve different kinds and degrees of intrusion. At one level, breath testing for alcohol may involve little intrusion while, at another, the obvious intrusiveness of collection of a urine sample and the purpose of this may enter into an individual's personal and domestic sphere by capturing information about their out of work activities and about details of any prescribed medications and associated medical history. Urine collection will be intrusive of an individual's intimate sphere. Mr Stevens pointed out that neither the Australian/New Zealand Standard nor the policy preclude observed urine collection although, as the ESR promotional/informational video illustrates, that does not appear to be undertaken at present whilst other anti-avoidance measures are considered effective and sufficient.

[228] Having considered fairness and/or intrusiveness, the test also requires those matters to be considered in light of the particular circumstances of the time. These may be such that they will diminish in intrusiveness, for example by not observing urination. Or they may be such that a certain level of intrusiveness is seen as justified in a case where otherwise it would not be: for example random testing in safety sensitive occupations might, because of

an identified risk, be seen as a reasonable intrusion, but might not be viewed as such in relation to other occupations, even in the same workplace or for the same employer.

[229] The Privacy Commissioner does not consider that Air New Zealand's policy will infringe privacy principles 2, 3, 5, 6, 7, 8, 9, 10, 11 or 12 for the reasons expanded upon by Mr Stevens in his submissions.

[230] Because of the medical nature of the procedure and analysis of results, Mr Stevens also addressed us on the privacy codes issued by the Privacy Commissioner under Part 6 of the Privacy Act 1993. In particular, one such code of practice is the Health Information Privacy Code 1994 which applies to *"Health information"* defined as including *"information … Derived from the testing or examination of any … bodily substance, donated by an individual"*. The code applies to Air New Zealand's medical officers and to their dealings with information emanating from alcohol and drug testing of employees. In the code, 12 "rules" modify and replace the information privacy principles which would otherwise apply: see s53 Privacy Act. The code, including its rules, has the same legal standing as the Information Privacy Principles in the Act. Rule 11 of the code imposes an additional step before a health agency (Air New Zealand's medical department) may make disclosures under some of the exceptions which are built into the rule (similarly to privacy principle 11) requiring the agency to obtain the individual's authorisation for the proposed disclosure unless it believes on reasonable grounds that it is either not desirable or not practicable to do so. A further refinement of rule 11, not found in the corresponding information privacy principle 11, is that any disclosure of health information admitted by those exceptions may be made only to the extent necessary.

[231] The Privacy Commissioner submitted that personal information held by the employees which is obtained by the company's medical officers will be covered by the code and the medical officers will be regarded, for Privacy Act purposes, as being a separate agency from the rest of the company. Health information received by company medical officers may still be disclosed to other persons in the company where that disclosure is one of the purposes for which the health information was obtained. The application of the code should, however, mean that the health information held by company medical officers is more securely protected against disclosures than would have been the case had it been held by other operational arms of the company. The Commissioner accepts that the now revised policy document generally provides that health information about employees is obtained and held by persons as part of a health agency and covered by the code as well as the generally complementary ethics for medical professionals.

[232] We accept the Privacy Commissioner's submissions as to the risks of infringement of principles 1 and 4. It seems unlikely that the responsible application of the policy would cause the Privacy Commissioner to form an opinion that the appropriate threshold has been crossed warranting action but no judgment can be made until an actual complaint is received.

[233] We conclude that no general tort of invasion of privacy exists under New Zealand common law except to the limited extent authorised recently by the Court of Appeal in *Hosking*. The circumstances of the case do not bring it under the purview of the recognised tort of breach of privacy.

[234] We therefore conclude that the implementation of the policy will be neither unlawful nor unreasonable on privacy grounds.

The reality of consent

[235] It was objected by the plaintiffs that the drug testing regime could not be said to be consent based because a withholding of consent would almost certainly lead to a strong risk of adverse consequences for the employee so acting. Certainly Mr Sinclair made it clear that the first defendant sees its policy and any request for an employee's consent made under its authority as a lawful and reasonable command that the first defendant expects to see obeyed with the usual consequences in the case of disobedience, at any rate when it is wilful.

[236] Mr Haigh poured scorn on the first defendant's position or argument that it does not intend to require or compel drug testing but will request employees to undergo such tests, thus requiring consent from the affected employee. Mr Haigh submitted that this position was a fiction, given the consequences for an employee who refuses such a request, as a result of which employees will be under significant pressure to comply. Referring to Mr Sinclair's evidence, especially in cross-examination, Mr Haigh argued that once the company has made a decision to test, it has effectively put its perceived safety requirement ahead of individual concerns. Mr Haigh summarised the evidence of Drs Koea, Gardner, and Black and to the inequality in bargaining power referred to in s3(a)(ii) of the Employment Relations Act. He submitted that both the Court and the first defendant must recognise that any request to undergo a drug test made by an employer is made by an inherently stronger party of a weaker one. Mr Fardell, however, submitted 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.

[237] The objection raised by the unions is not without merit. It was mentioned in submissions also by the CTU which pointed out that to decline in the cases of pre-employment testing and internal transfer testing will disqualify a person for appointment, while a refusal of random, post-incident and reasonable cause testing will trigger the company's employment investigation procedures. These consequences, the CTU says, fail to take account of the interests of employees who may object to testing on the grounds of cultural or religious beliefs regarding the collection of bodily samples, or disability.

[238] However, 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 assurance that individual circumstances of a failure or refusal will determine the outcome.

[239] The formal consent is also a safeguard for the laboratory collecting the specimen and as between it and the donor the position will quite plainly be that either consent is given after the donor has read the information endorsed on the consent form, in which case the test will proceed, or it will be refused, in which case the fact of the refusal will be reported. But it could not be said that, as between these parties, there is any lack of reality in the consent that is given.

Other considerations

[240] Mr Haigh submitted that the effect of all the cases was that there is a need to balance the interests and the dignity of the individual against the competing interests of the employer. If testing is to be allowed, the utmost protection of information must be afforded to the employee. He argued that the policy failed to afford that protection in many respects, including the preservation of the confidentiality of the information and sufficient information so that any consent is genuine.

[241] Mr Haigh's final argument, advanced in the alternative if the others should fail, is that the policy ought not be allowed to include random or pre-transfer testing. We took this submission to address all suspicionless testing. He submitted that these forms of testing have no justification in the balancing exercise to be conducted by the Court and were rightly described as suspicionless by the first defendant. While such testing cannot be described as necessary, it breaches in a substantive way the principles already identified under the banner of the NZBORA privacy, common law rights, and human rights. A refusal by the Court to permit such testing would not compromise safety. It is an additional but invasive tool that the first defendant wishes to use irrespective of principle. Taken to its extreme, the first defendant's argument would mean that it is compromising safety by not strip searching every airline passenger for weapons, drugs, etc.

[242] Mr Fardell resisted these arguments, submitting instead that the issues in the case relate to the first defendant's right to manage and to make decisions regarding the safety and security of its operation and to ensure compliance with its regulatory, contractual, and common law obligations. He submitted that, within the right to manage, the first defendant can issue reasonable instructions, including by way of policy, which do not require the employees' agreement and which the employees have an obligation to obey. He pointed out that the first defendant's right to manage, to issue instructions, and to regulate the workplace by statements of policy, was accepted by the unions.

[243] Mr Fardell conceded that there is the more specific issue whether the first defendant is acting fairly and reasonably in exercising its right to manage safety and security matters in a way that involves a comprehensive drug and alcohol policy incorporating –

- zero tolerance of drugs or alcohol in the workplace;
- an alcohol and drug awareness programme;
- assistance, education, counselling and information for employees who may be affected by drugs or alcohol related difficulties;
- rehabilitation programmes;
- testing procedures in certain defined and qualified circumstances, including a thorough medical review procedure.

[244] Mr Fardell submitted that, in this connection, the workplace setting including the just culture is highly relevant and pointed out that this is now included more fully in the policy and procedure document. Mr Fardell agreed that the decision in this case calls for a balancing

exercise to be applied to the particular circumstances and interests of the parties. Developing this point, he submitted that on the one hand the Court is required to weigh up individual interests and on the other hand the interests of the company in the safety and security of its airline operation. He characterised the individual interests as turning on the weight to be given to the social utility in taking illicit drugs or alcohol or being affected by them while at work. He adopted the reasoning of the Western Australian Industrial Relations Commission in the *BHP Iron Ore* case which is broadly to the effect that, because of the current standards and expectations of the community on the topic of health and safety in the workplace, there will necessarily be some constraint on civil liberties and intrusion into the privacy of employees.

[245] We feel bound to say again that it seems unsatisfactory that in this emerging area there is only legislation that at best hints at the possibility of drug testing of employees by employers, and none that specifies any limitations upon this power or any safeguards as to the use to which the evidence obtained with the co-operation of employees may be put.

Balancing exercise

[246] We begin by according weight to the plaintiffs' and their members' concerns which they are entitled to entertain, as has been recognised in overseas jurisdictions and by the academic writers. We accept that there is a natural and understandable reluctance on the part of some employees to provide specimens of urine for purposes of drug testing.

[247] We also accept that the Health and Safety in Employment Act and the general law impose absolute duties on employers to take all practicable steps to eliminate significant hazards to employees and others. Such hazards may include temporary manifestations of behaviour resulting from the taking of alcohol or drugs.

[248] Because of the Act's accent on safety, it is reasonable that employers should be able to discharge this duty by a variety of available practicable means, including drug testing in safety sensitive areas. We further hold that the same facility should be available where there is reasonable cause to suspect that an employee's behaviour is an actual or potential source of harm and that this is the result of the employee being affected by alcohol or drugs.

[249] For the same reasons, and by analogy with pre-employment testing, already well-established, it is reasonable that employees who seek a transfer to a safety sensitive position should be expected to undergo testing as a condition of being considered.

[250] Where there has been an accident or an incident, because of the first defendant's statutory duty to ascertain the true cause of the occurrence and the limited opportunity for obtaining relevant information, it should be able to require employees involved in the accident or incident to submit to testing for the presence of alcohol or drugs.

[251] This brings us to the difficult question of random testing which is testing that is suspicionless. In our judgment, the arguments that have weighed with us so far do not apply with the same force so as to describe as reasonable the random or suspicionless testing of all employees and cannot justify the random testing of employees working outside safety sensitive areas. It is significant in our view that Air New Zealand wishes to make testing compulsory for internal transfers to safety-critical positions but not for internal transfers to other positions. That shows its distinction between safety-critical and non-safety-critical positions so far as the consequences of drug and alcohol consumption are concerned.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.

[252] We have already agreed that a balancing exercise is called for and that it involves a judgment on matters of fact and degree. In our judgment, the balance is to be struck in this case at the point at which the testing can objectively be said to have a sufficiently proximate connection between the impairment of employees by means of the consumption of alcohol or specified drugs or both, and operational safety. We hold that the necessary connection is capable of existing–

i. on reasonable cause to suspect that an employee's behaviour is an actual or potential cause or source of harm to others as a result of being affected by alcohol or drugs or both;
ii. on internal transfer to safety sensitive occupations (by analogy with pre-employment testing which is not attacked);
iii. in post-accident/incident or near miss situations;
iv. in random testing in safety sensitive areas only, not across the board.

[253] Employees in non-safety sensitive positions at Air New Zealand are in really no different a position than their counterparts who work in enterprises that do not have the same high safety standards as airlines. So, for example, the first defendant's human resources advisers, in-house lawyers, payroll staff and others may not be classifiable objectively as being in safety sensitive positions. Equally, there will be pilots, aircraft engineers, flight

planners and many others whose positions and tasks will make them employees in safety sensitive positions. There will be a myriad of other positions that may fall either way. It is not for this Court to make any determination on a case by case basis. That is the employer's role, but after consultation with the plaintiffs and the affected employees and on an objectively verifiable basis. The employer bears liabilities under the Health and Safety in Employment Act and at common law and must make the decisions about safety sensitivity.

[254] It is unreasonable to require employees engaged in non-safety sensitive roles in Air New Zealand to submit to suspicionless, random testing. Concerns about safety cannot, for such employees, override the other factors against such testing. In upholding the plaintiffs' complaint about random testing of employees in non-safety sensitive areas, and in not upholding the first defendant's wish to introduce testing across the board, we conclude that arguments for consistency of treatment of employees cannot override private rights. To do so would be to give way to symbolic arguments based upon the understandable and deserved condemnation of the abuse of recreational drugs, including alcohol.

[255] We appreciate that the expression *"safety sensitive areas"* may not always be easy to define but nevertheless it should be better defined than it is at present and the exercise of defining it, which is not one for the Court to undertake, is the responsibility of the first defendant which it should now discharge in consultation with the plaintiffs.

[256] We have reached this conclusion not without much hesitation. 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. There is some force in the plaintiffs' complaint that the first defendant's policy impliedly labels a generally loyal, long-serving, highly skilled and professional workforce as drug or alcohol abusers. Despite the employer's adamant and genuine denial that this is its intention, it is only human nature that employees subjected to testing for evidence of drugs or alcohol consumption (especially random suspicionless testing) see that as a breaking of the trust that they are entitled to expect their employer will have in them. Many employees who are in good health, have never consumed any drugs and have always come to work unaffected by alcohol (including some who will never have touched alcohol at all), may question justifiably what has changed to cause the employer to doubt its trust of them for many years performing the same work they will after

implementation of the policy. Such employees are entitled to a convincing explanation from both Air New Zealand and from this Court if it is to sanction the airline's proposals.

[257] We have found the first defendant's explanation convincing (except in one respect) and our conclusions are consistent with the way similar difficulties have been resolved by overseas jurisdictions and because of the compelling requirements of the Health and Safety in Employment Amendment Act 2002.

[258] We have also taken into account aspects of the policy which have reduced to some extent the intrusive aspects of the urine testing and the safeguards provided by the subsequent interpretation of results and their careful storage. We have also been persuaded by the context of the *"just culture"* which may lead to rehabilitation in some cases and not only to punitive consequences.

[259] So far as concerns remain about possible abuses in particular cases, we are confident that these can be addressed adequately through employment relations problem resolution mechanisms.

[260] In relation to alcohol testing, we make no ruling because it is not at present happening and it would be premature to express a view upon the first defendant's intentions when the precise methodology is unclear. We note, however, that the objection to alcohol testing does not appear to have been supported by the plaintiffs' witnesses. We note also that there is a lesser risk of the results of alcohol tests being available under search warrant for the purposes of other litigation. This is so because, under the Transport Act 1962, there is a highly technical process for proving the offences of driving with excess breath or blood alcohol; evidence of the excess can be admitted only if the driver is required by an enforcement officer to provide a specimen and therefore a specimen obtained by an employer could not be used to support a prosecution under the Transport Act. We also find that, if alcohol testing is confined to breath testing, there is no serious indignity involved.

[261] In arriving at our conclusions we have accepted as valid the proposition that has found favour with the majority in the United States Supreme Court that persons employed in safety sensitive areas must have a lesser expectation of privacy and personal autonomy than employees charged with less heavy responsibility. Therefore, it is reasonable to require them to co-operate with the employer when it desires, in the interests of public safety as opposed to general morality (on which subject there could be differences of views), to require

the workplace to be kept free of the undesirable influence or risk of impairment through the taking of alcohol or drugs, including prescribed medication.

Disposition

[262] We therefore make a declaration that the first defendant's policy is valid except to the extent that it proposes to introduce random suspicionless testing for employees employed outside safety sensitive areas.

[263] The first defendant can be released from its general undertaking but as we have not heard argument on this point, we reserve leave to the plaintiffs to object within 28 days after which time, assuming no objection but not otherwise, the undertaking will cease to apply. Should there be any difficulty arising from the first defendant's observance of the declaration we have made, we reserve leave to either side to apply further for directions or necessary orders.

[264] We do not understand it to have been suggested by any party that this is a case in which the Court should consider awarding costs. We will reserve the question of costs generally, but point out that the plaintiffs and the first defendant have respectively been successful in part and that the national employer and union national organisations do not normally seek costs. We record that we have been greatly assisted by the submissions from these organisations and also by the submissions advanced by the Privacy Commissioner.

General observations

[265] We wish to emphasise that the Court cannot determine in advance of any particular case the justification for the employer's actions following either a refusal to take a test or a positive test result. That is because even although a direction may be both lawful and reasonable and therefore an employee cannot resist it on legal grounds, disadvantage or dismissal that may ensue is tested not merely for lawfulness and reasonableness of the instruction but also on the fairness and reasonableness of the employer's actions in all the circumstances. Employees may have good reasons for either refusing tests or for returning positive tests that will mean that in spite of the direction to take the test being a lawful and reasonable instruction, such employees are not to be unjustifiably disadvantaged or even dismissed in all the circumstances.

[266] We emphasise, also, that scientific advances in testing methods, especially for drugs, can be anticipated. It seemed to be common ground that it is likely that less intrusive but

equally effective methods of testing will in future become available. These may include, but will not be limited to, testing saliva and perhaps analysis of hair or skin. It is likely that testing methods will become more sophisticated, less intrusive and more sensitive. Air New Zealand's policy should be dynamic so that account can be taken of these less objectionable means of testing for impairment.

[267] Because we know that others engaged in employment relations will look to this judgment to attempt to ascertain their rights and obligations, we also wish to emphasise that the case and our findings are specific to the particular circumstances of Air New Zealand and its workforce. Few other employers in New Zealand operate either on the same scale or in the same specialised field as Air New Zealand Limited. Recourse to specialised in-house medical personnel and the particular safety requirements of operating large jet aircraft are but two illustrations of this. The case should be regarded as specific, also, to ESR methodology of analysis and to Air New Zealand's own sample collection procedures and subsequent medical consideration procedures.

[268] Mr Haigh argued that the evidence the plaintiffs had called established that a greater risk of impairment arises from stress and anxiety and fatigue than from substance abuse, but the first defendant does not have any particular policies in relation to these more serious issues. Referring to the quality of trust and confidence pervading employment relationships, Mr Haigh submitted that the first defendant should consider adopting comprehensive workplace health policies that may include employee assistance programmes, drug education, health promotion programmes, and that it should take time to assess whether it has a real problem before taking such a draconian step as drug testing. These comments have validity but the first defendant has to start somewhere and it has chosen to begin with a comprehensive policy of the kind advocated by the plaintiffs (but with the addition of testing) banning from its workplace alcohol and drugs and prohibiting employees from coming to work before the adverse influence of alcohol or licit and illicit drugs has worn off.

GL Colgan
Judge
for the Full Court

Judgment signed at pm on Tuesday 13 April 2004

SAMPLE ONLY

To be issued to the candidate. Copy to be taken to collection centre. Must be date/time stamped.

AIR NEW ZEALAND

Authority and Declaration

The Air New Zealand Policy on Alcohol and other Drugs in the Workplace provides that employees may be tested for alcohol and/or drugs where an accident, incident or near miss occurs or where there is reasonable cause to believe that alcohol or drugs may be impacting on the employees work. The policy also provides for random testing of employees on an employee's application for a position in a safety sensitive area and pre-employment.

Instructions for Use:

Please read and acknowledge the terms and conditions set out below and also the information provided on the reverse of this form. After you have read and signed the form it will be retained by the Company, and a copy provided to the collection centre and yourself.

Authority and Declaration

I agree to provide a specimen of urine for drug testing and authorise Air New Zealand to conduct a urine drug test.

1) I consent to my urine being tested for the following:
   - Cannabinoids
   - Opiates
   - Cocaine
   - Amphetamines
   - Benzodiazepines

Certain standard medication may affect your results. ~~Please declare~~ You may wish to advise on this form any medication you are currently taking which you think might affect your results.

_____

- I understand _____(collection centre) are acting as agents for Air New Zealand and acknowledge the procedure has been explained to me to my satisfaction.
- I authorise ESR (testing laboratory) to communicate the result to the relevant Air New Zealand health professionals, who following a medical review of the result, may then advise the appropriate Company manager of the result. ~~and HR staff.~~

In all other respects the results shall remain confidential.

2) I also consent to undergoing a breath alcohol test. I understand that if a breath alcohol test is positive I will have the opportunity for a medical review with a Company medical officer to discuss the result.

I acknowledge that I have been given an opportunity to have a representative present and have been provided with a copy of the alcohol and other drugs policy and procedures. I have read and acknowledge the content of this form, including the information provided on the reverse side.

Applicants Signature _____

Print name _____ Date: _____

Administration only

Date/Time sample collected:	_____
This form was issued on:	Wednesday, 19 Nov 03 at 10:00
Candidate name:	Candidate Name
Reference for Air NZ invoice:	Medical Centre(4) – Mgr Cost Centre(6) – JobRef(7)
Address for Invoice:	HR Services, Air New Zealand, Private Bag 92007, Auckland (AKLDT03) Please note that collection should not take place without a reference number. Invoices will not be paid without the reference number being quoted.

INFORMATION FOR EMPLOYEES

- You have been asked to consent to the provision of a urine specimen for the purposes of testing for drugs and/or a breath specimen for the purposes of testing for alcohol.
- If you consent to the provision of a specimen, the specimen will be taken in accordance with the procedures explained to you.
- No urine drug test results will be reported to management until the result has been received and reviewed by a Company medical officer.
- Positive alcohol breath tests may be reported to management but an opportunity to discuss with a Company medical officer will be offered.

Post accident / post incident / reasonable cause testing

- Because of the circumstances, an investigation will be required, regardless of any testing or testing results. The Company will decide what steps, if any, should be taken to address what happened. It is possible that such an investigation could result in disciplinary action, depending on the circumstances.
- If your urine drug test result is positive, and following a medical review of the result, that information will be considered in the investigation, as will any positive alcohol test. Disciplinary consequences are not automatic from a positive result and before considering such a matter, the Company will look at all of the circumstances, not only of the incident but why a positive result occurred.
- If the medical review reports that drugs ~~are~~ were not detected or the breath test indicates alcohol was not detected above the cut-off level, the negative result will simply be recorded.
- If you decline to provide your consent the Company will investigate with you why you refused. There could be disciplinary consequences arising from that investigation, depending on the circumstances.

Safety sensitive area transfer testing/Pre-employment testing

- If you decline to provide your consent as requested, you will not have fulfilled one of the conditions for appointment ~~to a safety sensitive position~~. You will be ineligible for appointment.
- If you do consent and the result is positive you will not have fulfilled one of the conditions for appointment and you will be ineligible for appointment. It is unlikely (in the case of internal transfer testing) that there would be any disciplinary consequences as a result of a positive test but in rare cases disciplinary consequences could follow.

Random testing

- A positive result is likely to lead to your referral to one of the assistance and rehabilitation programmes available from the Company. However, it is possible, depending on all of the circumstances, that an ~~disciplinary~~ investigation could be commenced which may result in disciplinary action.
- If you decline to provide your consent the Company will investigate with you why you refused. There could be disciplinary consequences arising from that investigation, depending on the circumstances.