

12 June 2009

## Employment Law e-alert

# Another spit in the face for urine testing for drugs and alcohol

An Australian Industrial Relations Commission (AIRC) review panel recently upheld that it was unjust and unreasonable for Shell to implement a urine-based random testing regime at its Clyde Refinery. *Shell Refining (Australia) Pty Ltd –v– Construction, Forestry, Mining and Energy Union DR 2008/1555*.

The review of Senior Deputy President Hamburger's decision was conducted pursuant to a memorandum of understanding executed by Shell and the CFMEU which provided for the resolution of certain disputes by the AIRC exercising a binding arbitration, subject to review by a 3 member review panel (equivalent to the Full Bench).

Although this decision is only binding on the parties to memorandum of understanding, it indicates the position which the AIRC (and probably tribunals and courts under the *Fair Work Act*) may take if asked to decide this issue on a more general basis.

SDP Hamburger considered urine-based random testing was unjust and unreasonable when a more focused method (saliva testing) was available, particularly as a positive saliva test was more likely to indicate actual impairment.

However he conceded that it was reasonable to implement a urine-based system on an interim basis until laboratories were accredited under Australian Standards for saliva testing (and for drugs such as Benzodiazepines for which the Australian Standard does not contain target levels).

Shell subsequently sought to rely upon a report from Professor McDonald James Christie, which was obtained after the decision of SDP Hamburger on 25 August 2008, which assessed the effectiveness of both urine analysis and oral fluid analysis.

As the AIRC adopted an approach normally applied in the hearing of appeals, the review was not conducted as fresh proceedings or de novo and was restricted to whether there was a reviewable error in the SDP's decision.

The review panel therefore refused to allow Shell to rely upon Professor Christie's report, noting that it was undesirable to allow parties a second chance to present a case that should have been presented at first instance.

The review panel identified and agreed with the following 3 critical findings made by the SDP:

1. Urine testing detects drug use days rather than hours beforehand (the wide "window of detection").
2. Oral fluid testing only detects recent use and is less likely to detect drug use in an employee's own time.
3. Positive oral fluid test is far more likely to indicate actual impairment than a positive urine test.

On review, Shell's main contention was that urine testing was not unfair and that the SDP did not fully appreciate or take into account that the central principal underlying Shell's drug and alcohol policy was the detection of persons who may pose a risk to health and safety in the workplace and Shell's statutory obligation as an employer to ensure health and safety of employees at work.

The review panel rejected Shell's argument and, in determining SDP Hamburger had not made a reviewable error, observed that

*"The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed it would be unjust and unreasonable to do so."*

However as this decision did not consider the contents of Professor Christie's report, it remains to be seen what impact this report or similar evidence may have in any future proceedings.

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