FWA finds random drug & alcohol testing to be reasonable - 11 October 2011

The recent Full Bench of Fair Work Australia (**FWA**) decision in *Wagstaff Piling Pty Ltd; Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union* [2011] FWAFB 6892 finds it is reasonable and lawful for an employer to instruct employees to submit to random drug and alcohol testing despite there being no express provision in an enterprise agreement permitting this.

This is actually a more significant case than one might expect at first glance. While the general expectation would be that "of course this is possible", it may surprise some that this case actually is the first real confirmation at appellate level that lawful and reasonable directions can and should sustain testing outside a specific statutory framework in the modern employment context.

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Facts

Thiess was the principal contractor on a major civil construction project and had a comprehensive Fitness for Work Policy requiring employees and subcontractors to submit to random drug and alcohol tests.

Wagstaff Piling Pty Ltd was a subcontractor to Thiess working on the Project. Wagstaff and other subcontractors on the Project had entered into an agreement with Thiess that their employees would submit to random drug and alcohol testing each month in accordance with the FFW Policy. In May 2011 the Construction, Forestry, Mining and Energy Union advised Thiess employees that Wagstaff and various other subcontractors would not cooperate with or agree to submit to the testing.

The CFMEU then notified the Victorian Building Industry Disputes Panel of a dispute involving 13 subcontractors on the Project asserting the drug and alcohol testing procedures were in breach of the relevant enterprise agreements. The basis of their argument was that the relevant enterprise agreements, and the Victorian Building Industry Alcohol and Other Drugs Policy, did not expressly allow or refer to drug and alcohol testing.

The Panel made a recommendation that any random testing on the Project cease in respect of the parties to the dispute**.**

Wagstaff (with Thiess intervening) then filed a dispute in FWA under the dispute resolution procedure in its enterprise agreement.

FWA decision at first instance

At first instance Commissioner Blair found that Wagstaff could not impose a regime of drug and alcohol testing. The Commissioner reasoned that as the agreement "*is silent, it cannot be interpreted that you can apply a drug and alcohol testing regime*" and "*that you cannot read an entitlement into an agreement that, in the Tribunal's view, is clearly not there*."

Appeal - Decision of the Full Bench of FWA

On appeal, Wagstaff argued compulsory drug and alcohol testing is a lawful and reasonable instruction and reflects the occupational health, safety and welfare obligations imposed on both it and Thiess to take appropriate steps to protect employees from safety risks. It also argued neither the Agreement, nor the Industry Policy prohibited compulsory drug and alcohol testing.

The CFMEU echoed its previous arguments and posited that the FWA first instance decision was a logical consequence of a "no extra claims" clause in the Wagstaff enterprise agreement.

The Full Bench found in favour of Wagstaff and held that although the enterprise agreement and Industry Policy were silent on the issue of drug and alcohol testing that did not lead to "*a conclusion that, absent an entitlement in the agreement to conduct compulsory drug and alcohol testing, such testing is not permissible*."

Lessons for Employers

This Full Bench decision is significant in relation to compulsory drug and alcohol testing and sets the precedent that such mandatory testing is a lawful and reasonable employer instruction:

- An enterprise agreement which does not expressly provide for these types of procedures does not necessarily prohibit an employer from implementing drug and alcohol testing policies or procedures.

- By broader extension, this potentially also applies to a wide range of other sensitive management initiatives such as GPS vehicle tracking and fingerprint time entry recording.

- In the context of the changes to the occupational health and safety laws and the arguably greater onus placed on employers and officers of businesses to ensure the safety of its workforce, this is a sensible reinforcement of the need for employers to be able to require employees to demonstrate their fitness for work.

- All employers, particularly those operating in high safety risk environments, should give serious consideration to introducing or reviewing their drug and alcohol testing requirements and procedures in light of this decision.