Australian Financial Review
Tuesday, April 15, 2014
Page : 51
Section :
Edition :
Region : National Metropolitan

Circulation : 64,270
Area Of Clip : 335.2 sqcm
Clip ID : 9838579

When FWC puts privacy first – and safety second

Work safety

The Fair Work Commission's inconsistent approach to workplace drug testing shows just why employers need an appeal body.

Steve Knott

Aaron Patrick's front page report in *The Australian Financial Review* on the over-allocation of important test cases to former union-aligned members of the Fair Work Commission (FWC), highlights structural problems within Australia's industrial tribunal that must be resolved by creating a separate, independent appeals body.

The most serious workplace matters at hand not just relate to traditional industrial issues but risk hampering employers' rights to properly manage safety in their workplaces.

One recent decision that again undermines managerial decision-making at Australian workplaces, was the March 10 ruling that stevedoring company DP World should not use urine testing to confirm a positive saliva drug test because it would be an "unjust and unreasonable" incursion on employee privacy.

This decision has no doubt caused great operational disruptions and is unsurprisingly being appealed. The case further highlights the Commission's inconsistent and interventionist approach to drug testing in recent years.

In 2011, scope for managerial decision-making was confirmed when resource company HWE Mining was told that it could vary its policy to include onsite urine testing as well as saliva testing to keep its workplaces safe.

In 2012, after a FWC private arbitration, energy employer Endeavour Energy was ordered to use saliva testing only, because the FWC deemed urine testing unreasonable for drug testing.

Yet in 2013, the FWC supported the actions of an employer who dismissed an employee who refused to undertake an onsite urine drug test, confirming the request was not unreasonable.

With the most recent decision involving DP World causing further confusion as to how employers can legally fulfil safety obligations, it is little wonder resource employers are raising their hands in exasperation.

The workplace health and safety obligations for resource employers are among the most stringent of any industry and urine testing has been a key feature its safety regime for more than three decades. Most major resource companies with projects in Australia also operate in various other international locations where random urine testing is accepted and occurs routinely.

Further reinforcing the importance of employers being able to implement accredited urine testing systems, the National Association of Testing Authorities (NATA) late last year withdrew its accreditation of onsite saliva testing in Australia. This means that no onsite saliva testing kit is accredited.

While union campaigns seek to protect what employees might do in their private time in terms of drug use, as if it is irrelevant to their workplace responsibilities, taking illegal substances such as marijuana, amphetamines and opiates always comes with risks of impairment when people return to work hours or even days later. Given the safety risks, it is unreasonable to limit an employer to saliva testing when there is an immediate and accredited alternative available in the form of urine testing.

Simply put, if you seek a job in sectors such as resources or seek to visit a mining, oil or gas project, you may well have to submit to the site's drug testing regime. This may involve random breath testing, oral swabs and potentially urine testing. If you are not prepared to submit to such testing, you have no place on such safety critical worksites.

The same is true in professional sporting codes. Athletes are tested for illegal substances as a condition of participation and those who do not comply do not compete. Employee safety should surely not be held to a lesser standard.

Yet we continue to see FWC members, most with little to no real life business experience, substitute their own decisions for those of employers. Such decisions undermine systems that work well to ensure workplace health and safety is maintained. They feed a perception that well-considered safety protocols can be watered down or treated as optional.

With the FWC's interventionist and contradictory findings not limited to drug testing, the time has come for governments at all levels to clarify the importance of those running a business being able to make decisions, especially where safety is concerned.

A separate independent body to hear appeals from the Fair Work Commission, as is currently being considered by the federal government, would better support sound and legitimate employers' decision making in such matters.

Such an approach would be in-line with comparable international industrial relations jurisdictions including the United Kingdom and, if realised in Australia, would help resolve this growing layer of ambiguity under employment law and allow resource employers to safely and productively get on with the job.

Steve Knott is chief executive of the Australian Mines and Metals Association.

We see FWC members, most with little business experience, substitute their own decisions for those of employers.