2011] FWA 8288
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FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.739—Dispute resolution
Construction, Forestry, Mining and Energy Union
v
HWE Mining Pty Limited
(C2009/124)
VICE PRESIDENT LAWLER MELBOURNE, 30 NOVEMBER 2011

Interpretation of agreement re drug screening.
Dispute - whether employer bound by a drug policy embodying an industrial settlement by which it agreed in relation to random on-site drug screening to move from urine testing to saliva testing when an Australian Standard for saliva testing was published - neither the industrial settlement nor the policy separately enforceable - whether policy incorporated into workplace agreement by reference and therefore enforceable as part of the workplace agreement - whether employer's decision to vary the policy to retain a role for urine testing prevented by an application of the principle in the XPT case.

[1] This is a dispute referred to Fair Work Australia pursuant to the dispute resolution procedure in the *HWE Mining Gloucester Coal Workplace Agreement 2008* 1 (**2008 Agreement**). That referral was by way of an application under s.739 of the *Workplace Relations Act 2006* as continued in force in relation to the 2008 Agreement by Schedule 19 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Background

[2] Random screening tests for drugs and alcohol has long been an established part of the safety regime at coal mines. Screening tests can be conducted on-site using a suitable testing device or samples can be collected and sent for testing off-site in a laboratory. Screening tests can be conducted on both urine and oral fluids (saliva). In this decision, unless specified otherwise, a reference to 'testing' is a reference to random on-site screening testing.

[3] In 2002 and 2003 the respondent (**HWE**) was developing fitness for work policies. HWE proposed introducing random on-site urine drug screening, being a form of screening test for which there was an Australian Standard (AS4308). A dispute arose between the applicant (**CFMEU**), on behalf of employees of HWE, and the HWE over the form in which drug screening tests were administered. The CFMEU was pressing for the HWE to use saliva screening tests. At that time there was no Australian Standard for on-site drug testing using saliva (oral fluids). HWE objected to the CFMEU's demand on the basis that, on the advice it had received, the absence of adequate on-site screening test equipment and an appropriate Australian Standard for the conduct of on-site saliva screening tests meant that it was inappropriate to move from urine drug screening to saliva drug screening at that time. The dispute was resolved locally on the basis that HWE would move to saliva drug screening when an Australian Standard was published in relation to saliva drug screening. HWE's drug and alcohol policy was amended to reflect that resolution. Thus, from late 2003 HWE had a

drug testing policy entitled *Drug Testing and Disciplinary Action Procedure* (**Drug Policy**) that included the following:

> "**1.2 Purpose**
>
> The purpose of this procedure is to assist in providing a safe and healthy working environment, as the use of particular drugs and abuse jeopardises a safe working environment.
>
> No person will enter or remain on the Henry Walker Eltin – Stratford Coal Project, while in possession of, or under the influence of:-
>
> - Any illegal, or inappropriately used prescription or non-prescribed drugs.
>
> For the purposes of this procedure, all references to drugs herein, shall be as defined above.
>
> The purpose of this procedure is to define a consistent approach in dealing with drug testing and any required disciplinary follow up process.
>
> ...
>
> **2.1 Testing Limits for 'Positive Results' Drug Screenings**
>
> Screening is conducted for the substances set out in the current Australian Standards "prescribed limits" chart. The screening cut off levels used are consistent with the Australian Standards (Australian Standard 4308 - 2001) and indicate beyond reasonable doubt a 'positive result' detection. Any future changes to the standards shall be updated in this procedure. The current cut off level standards are as per Australian Standard in table 1 and table 2 in appendix 1 (attached).
>
> **2.2 Testing Processes**
>
> 2.2.1 Drug testing shall be carried out using an independently conducted urine test process in accordance with Australian Standards (AS/NZS 4308:2001), completed by an accredited and approved organisation, (eg Coal Health Services).
>
> 2.2.2 The Company will assess future developments in testing equipment and processes and revise this procedure to accommodate any agreed changes.
>
> 2.2.3 Saliva testing will be used as the drug testing procedure, if Australian Standard certification is received for this process. This procedure will be amended accordingly."
>
> (underline emphasis added)

[4] At the time the Drug Policy was first formulated there was no Australian Standard for on-site drug testing using saliva (oral fluids). An Australian Standard in relation to such testing was published on 1 November 2006, being AS4760. Thereafter, the CFMEU began to press HWE to honour the industrial settlement reached in 2003, comply with clause 2.2.3 of the Drug Policy and move from urine testing to saliva testing. A significant issue of concern for the CFMEU centres on the correlation between a positive test result and actual impairment for the different types of screening test. It is useful to explain this issue by reference to THC, the acronym of the psychoactive compound in cannabis. Actual impairment from THC lasts for a period after consumption that is measured in hours rather than days. On-site urine screening tests for a metabolite of THC that is present for days, even many days, after the consumption of cannabis, that is, for a period long after impairment has ceased. On the other hand, on-site saliva screening tests are targeted at smoke particulates in oral fluids and will only detect THC for a period of hours after consumption of cannabis. A positive result to an on-site saliva screening test correlates far more strongly with actual impairment when compared to on-site urine screening which will often return a positive result when there is no actual impairment. In a practical sense the dispute is ultimately about an intrusion into employees' privacy and whether employees who consume cannabis privately while on an

extended break from work should be exposed to a risk of a positive urine screening test when there is no prospect that they remain impaired when they return to work.

[5] HWE sought expert advice and, in reliance on that advice, refused to do as the CFMEU was seeking. HWE has maintained that, notwithstanding the publication of the Australian Standard AS4760, saliva testing has unacceptable inadequacies when compared to urine testing and that HWE's overriding statutory duties in relation to occupational health and safety require it to refuse to move to saliva testing exclusively as required by the terms of clause 2.2.3 of the Drug Policy. Specifically, HWE contends that, on the current state of the on-site screening technology, saliva testing is inadequate for a number of reasons:

- It has an unacceptably high rate of false negatives when compared to urine testing. (False negatives are bad because they mean that a person can be actually impaired but nevertheless pass the test).

- The Australian Standard for saliva testing does not include benzodiazapenes – drugs that have an incidence of abuse or misuse in the Australian community

- The target levels for various drugs, and in particular for cannabis, are too high in the Australian Standard for saliva testing.

[6] The Drug Policy remained unchanged at the time the 2008 Agreement was made. HWE has now developed a new policy that provides for saliva testing but also retains a role for urine testing. The CFMEU objects to this new policy and contends that HWE is obliged to utilise saliva testing only. This is a dispute about whether HWE is legally obliged to move from urine testing to saliva testing as provided for in clause 2.2.3 of the Drug Policy or whether it is legally entitled to change that policy and so as to retain a role for urine testing.

Consideration

[7] The law recognises that there is an area of managerial prerogative in which an employer has the right to make decisions on how to manage their business. In *Re Cram, ex parte N.S.W. Colliery Proprietors Association Limited* 2 the High Court observed that "many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee"3. That case was concerned with whether the jurisdiction of the federal tribunal (under the then legislation based on s.51(xxxv) of the Constitution) to make an award in settlement of a dispute was constitutionally limited so as to prevent any interference with managerial decisions. The High Court rejected any such limitation, observing:4

> "... we reject the suggestion, based on the remarks of Barwick C.J. in *Melbourne & Metropolitan Tramways Board*, that managerial decisions stand wholly outside the area of industrial disputes and industrial matters. There is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction: see *Federated Clerks Union*. Indeed, the difficulty of making such an implication is accentuated by the fact that the extended definition of 'industrial matters' proceeds on the footing that many management decisions are capable of generating an industrial dispute.
>
> These considerations indicate that the objection voiced by O'Connor J. in *Clancy* to the regulation and control of business enterprises by industrial tribunals is not a matter that goes to the jurisdiction of the tribunals. Rather it is an argument why an industrial tribunal should exercise caution before it makes an award in settlement of a dispute where that award amounts to a substantial interference with the autonomy of management to decide how the business enterprise shall be efficiently conducted."
>
> (footnotes omitted)

[8] Subject to express terms, there is an implied term in the contract of employment that the employee will comply with the lawful and reasonable directions of the employer 5. This is one of the principal ways in which the employer's managerial prerogative arises from a legal perspective and forms the basis on which an employer may be said to have a right to make and vary policies that employees are required to observe.

[9] As was observed by the Full Bench in *Woolworths v Brown* 6:

> "[24] In the modern era employers face an often bewildering array of statutory obligations in relation to matters such as health and safety, discrimination, taxation, trade practices and fair trading to mention the most obvious examples. Employers face potential liability arising from their common law duty of care to their employees and to members of the public. Employers may be subject to contractual obligations that require them to conduct their business in a particular way or to meet particular standards or observe particular constraints. For these reasons it is entirely reasonable, and often necessary, for employers to put in place policies, with which employees must comply, to facilitate the employer's compliance with its obligations and duties."

[10] However, managerial prerogative in relation to employees (including the employer's right to make and vary policies that employees are required to observe) is subject to legal constraints. It may be constrained by statute or the terms of an award. It may also be constrained by the terms of a contract of employment or a statutory agreement that the employer chooses to make. For example, an enterprise agreement might provide that all work must be carried out in accordance with a roster pattern specified in the agreement. In that example, unless the agreement also confers a right on the employer to vary the roster pattern, the employer has bound itself not to require employees to work a different roster pattern. In particular, an employer can bind itself in a statutory collective agreement not to change a policy or policies without, for example, the agreement of a relevant union or a majority of employees.

[11] If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative (such as the making or varying of a policy which employees are required to observe) was laid down *Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales* 7 (***XPT case***):

> "It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable. The test of injustice or unreasonableness would embrace matters of safety and health because a requirement by an employer for an employee to perform work which was unsafe or might damage the health of the employee would be both unjust and unreasonable. The ACTU submitted to us that we should apply the test as to whether the demand of the employer was just and equitable having regard to all the circumstances. It is our view that under any given set of facts the test suggested by the ACTU would not lead to a different decision from the test which the Commission has applied over time. Accordingly in reaching our decision we have approached the matter from the point of view of making a judgement whether the request of the SRA that the XPT be manned by one man is unjust or unreasonable."

[12] I proceed on the basis that an exercise of managerial prerogative will not be unreasonable in this sense if a reasonable person in the position of the employer, could have made the decision in question.

The issues

[13] It is common ground that the industrial settlement that resulted in clause 2.2.3 being added to the Drug Policy, like many industrial settlements, was not a legally enforceable agreement. It is not suggested that the Drug Policy is itself directly legally enforceable against HWE: the Drug Policy itself is not a legally binding agreement. The real issue is whether the 2008 Agreement has the effect of rendering clause 2.2.3 enforceable against HWE because it incorporated the Drug Policy by reference such that HWE must comply with clause 2.2.3 and move to saliva testing only and is prevented from adopting its new policy. If not, the only basis on which Fair Work Australia acting as private arbitrator can properly determine that HWE not vary the Drug Policy to remove clause 2.2.3 and or require it to move to saliva testing is by an application of the principle in the *XPT case*. I note that my role is to decide those issues. My role is *not* to decide whether an employer in HWE's position could reasonably move to saliva testing alone or what I would do if I was in HWE's position.

Was the Drug Policy incorporated by reference into the 2008 Agreement such that clause 2.2.3 is enforceable against HWE as part of the 2008 Agreement?

[14] The 2008 Agreement deals generally with policies in only one clause:

> "**6. CONTRACT OF EMPLOYMENT**
>
> (a) Employment shall be full-time on a weekly basis.
>
> (b) The first three months of employment of a new employee shall be on a probationary basis during which time employment may be terminated by either party by the giving of one weeks notice or by the payment or forfeiture of one weeks pay.
>
> (c) Employee's performance will be managed in accordance with the Company's performance management policy, as it exists from time to time, and assessed based upon the Stratford performance management system, refer Appendix D. Employees shall perform and be assessed on such work, as the Company shall from time to time reasonably require.
>
> (d) In carrying out their duties, an employee shall use such tools and equipment as may be required provided that the employee has been adequately trained in the use of such tools and equipment. In the event of damage to mobile equipment or other property being used or in the charge of the employee, the employee shall assist honestly in any enquiry set up to determine the cause of the damage and ways to prevent the problem in future.
>
> (e) The Company shall have the right to dismiss any employee without notice for serious misconduct that justifies instant dismissal and in such cases remuneration shall be paid up to the time of dismissal only.
>
> (f) An employee may be required to transfer to a different shift or roster upon receiving seventy-two hours notice, or payment of overtime rates until such time as that period of notice expires.
>
> (g) When working the same shifts and roster, subject to operational requirements an employee may be required to change their work location between individual Gloucester Coal operations, providing notice is given prior to the completion of the last shift worked.
>
> (h) <u>It is a condition of employment that each employee</u>:
>
> * complies with all directions of the Registered Manager relating to the safe and effective working of the mine;
>
> * <u>complies with all Company policies, procedures and requirements</u>;
>
> (i) An employee who is absent without paid leave or without a reasonable excuse may be subject to disciplinary action."

(underline emphasis added)

[15] It may be noted that the predecessor collective agreement made in 2006 contains a relevantly identical clause.

[16] Other clauses in the 2008 Agreement that refer to "policy" or "policies" are:

> "**10.1 Reasonable Non Rostered Overtime**
>
> a) The Company may require an employee to work reasonable overtime to meet Company requirements in accordance with the Workplace Relations Act 1996.
>
> b) Where an employee gives a commitment to attend non-rostered overtime but does not attend the overtime shift, the employee shall be required to provide reasonable justification as to the absence or may be subject to disciplinary action in accordance with Company policy.
>
> ...
>
> **11. SALARY PACKAGING**
>
> Employees shall be entitled to enter into salary packaging arrangements based upon their annualised salary in accordance with Company policy.
>
> a) Employees may be entitled to enter into all legal forms of salary packaging arrangements in accordance with ATO guidelines, provided these arrangements do not incur any additional cost to the Company and are included in the HWE remuneration policy.
>
> ...
>
> **15. OCCUPATIONAL HEALTH SAFETY AND ENVIRONMENTAL MATTERS**
>
> a) It is recognised by the parties hereto that creation and maintenance of a safe working environment is an issue of joint interest and responsibility.
>
> b) The parties are committed to maintaining a division between industrial and safety issues to avoid a polarisation of attitudes and maintain a co-operative approach to safety.
>
> c) Employee Assistance Program — The Company provides assistance to employees via a formal programme known as the Company Employee Assistance Programme, in accordance with the Company's policy.
>
> ...
>
> **31.1 Investigation**
>
> a) In the event of any machinery, mobile equipment, tools, structure, environmental damage and/or breach of company policies and procedures the employee or employees involved shall make a verbal report of the incident immediately to their supervisor. A written report has to be prepared within 24 hours of the incident or as soon as reasonably practicable.
>
> ...
>
> **31.2 Discipline**
>
> a) The Superintendent is to determine the disciplinary action in accordance with Company policies and procedures.
>
> ..."

[17] Clause 6(h), by its terms, imposes an obligation on *employees* to comply with "all Company policies, procedures and requirements". It does not expressly impose any obligation on HWE in relation to policies. The CFMEU relies upon the decision of the majority of the Full Court of the Federal Court in *Riverwood International Australia Pty Ltd v McCormick* 8 (**Riverwood**) in contending that clause 6(h) should be construed as imposing an obligation on HWE to comply with clause 2.2.3 of the Drug Policy.

[18] In *Yousif v Commonwealth Bank of Australia* 9 (**Yousif**) the Full Court of the Federal Court distinguished *Riverwood* and emphasised that it was a case that turned on its own particular facts. In *Yousif* the contract of employment contained a clause headed "Policies and Procedures" that provided: "You [the employee] are required to comply with all Bank policies and procedures existing from time to time." The Full Court observed:

> "[89] ... Ms Yousif argued that this statement, although phrased only in terms of the employee's compliance, imposed a contractual obligation to comply with Bank policies, including the Appointment to Roles Policy, on the Bank as well. In this regard, she cited *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; [2000] FCA 889 and *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120.
>
> [90] In *Riverwood*, the Full Court upheld the trial judge's conclusion that, in the circumstances of the case, the contractual provision, "[y]ou agree to abide by all company policies and practices currently in place, any alterations made to them, and any new ones introduced", bound both employer and employee to the policies contained in the employer's "Policies and Procedures Manual". North and Mansfield JJ agreed with the trial judge's conclusion regarding incorporation, with Lindgren J dissenting. In upholding the trial judge's finding of incorporation, both North and Mansfield JJ paid attention to the dictionary definition of the term of "abide" (at 213 [106]–[107] and 221–222 [146]–[147]), the language of the policy manual as a whole (at 209–212 [89]–[102], 220–221[142]–[144] and 223 [151]), and the factual context in which the contract was formed (at 212 [103] and 222–223 [148]–[149]).
>
> [91] At issue in *Goldman Sachs* was whether the trial judge properly concluded that certain portions of a document titled "Working With Us", which was presented to an employee at the time he entered into his employment contract, were incorporated into that contract. Black CJ, Marshall and Jessup JJ all reached the same conclusion regarding incorporation, though by different paths. Jessup J disagreed with Black CJ's and Marshall J's conclusion as to breach. As to incorporation, all three members of the court agreed that there was no error in the trial judge's conclusion that a health and safety provision in "Working With Us" document was incorporated into the employment contract, but erred in finding that provisions addressing harassment and grievance procedures were also incorporated.
>
> [92] In oral submissions, counsel for Ms Yousif argued, essentially, that there was no relevant difference between the language in Ms Yousif's contract and that in Riverwood, and that Riverwood was therefore controlling on the issue of incorporation. In arguing that the Appointment to Roles Policy was incorporated into her contract, Ms Yousif relied on the language of para 2 of the AWA. The sole basis for her argument was the similarity between this provision and the terms construed in Riverwood and Goldman Sachs. This argument did not address the relationship of the provision with other contractual terms, or any other aspects of the surrounding context that might elucidate the parties' intent. The argument did not involve analysis the facts of this case or offer any comparison between these facts and those in *Riverwood* or *Goldman Sachs*.
>
> [93] Ms Yousif's argument involves an erroneous approach, which is inconsistent with the authorities. *Riverwood* and *Goldman Sachs* both identify the importance of the context in order to determine the objective intention of the parties: see, for example, Riverwood 177 ALR 193 at 207–210 [77], [81], [89] per North J; 221–222 [146], [150] per Mansfield J and Goldman Sachs [2007] FCAFC 120 at [23] per Black CJ and [283] per Jessup J. Whatever the differences of approach or emphasis in

Goldman Sachs, the reasons of all three Justices reflect the principle that whether or not a particular term forms a contractual obligation turns on the intent of the contracting parties, as objectively "conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened": see *Ermogenous v Greek Orthodox Community of South Australia Inc* (2002) 209 CLR 95; [2002] HCA 8 at 105–106 [25]."

[19] The Full Court agreed with the trial judge that a disclaimer in the manual against its incorporation into the contract of employment was determinative against incorporation of the manual by reference in that case 10.

[20] Relevant principles of construction in this context were usefully summarised by Tracey J in *Carr v Blade Repairs Australia Pty Ltd (No 2)* 11:

"[42] "The necessary foundation for the creation of contractual rights and obligations is the agreement of the parties": *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 401 (per Brennan J). An objective test is to be applied in determining the terms on which the parties have agreed. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 the High Court said:

> It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

[43] In determining the objective meaning of words employed in a contract, a court is concerned to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 (per Lord Hoffmann). This test was adopted by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188.

[44] The same principles which govern the construction of commercial contracts have application to contracts of employment: see *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 at 204–5 (per Lindgren J), and 217 (per Mansfield J). Commercial contracts should, as Kirby J held in *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 170 ALR 579 at 584, "be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction." An interpretation which accords with a broad approach will be preferred to one which does not: see *Upper Hunter County District Council v Australian Chilling and Freezing Company Ltd* (1968) 118 CLR 429 at 437."

[21] This practical approach accords with the established approach to the construction of industrial agreements laid down in cases such as *Kucks v CSR Ltd* 12 and *Short v FW Hercus Pty Ltd*13. Adopting that practical approach I am unable to construe the language of

clause 6(h) or the rest of the 2008 Agreement so as to conclude that HWE is prevented by the terms of the 2008 Agreement from making new policies or varying existing policies - including the drug policy. In particular, I cannot find that the reference to "the Company's performance management policy, *as it exists from time to time*" in clause 6(c) provides a basis for concluding that, objectively determined, the parties intended that only the performance management policy could be varied and that all other polices would remain unchanged.

[22] There are significant points of distinction between the 2008 Agreement and its context and the contract of employment in *Riverwood* and its context. In *Riverwood* all the relevant policies were contained in a single human resources manual and were almost entirely concerned with conferring benefits on employees. In this case, HWE clearly has a number of separate policies and there is no evidence that allows me to conclude that those policies almost entirely confer benefits on employees. The Drug Policy is manifestly a policy that is primarily for the benefit of HWE and securing its compliance with the onerous statutory occupational health and safety obligations to which it is subject and which are amenable to change. This is a fundamental point of distinction when a practical approach to construction is adopted. Moreover, clause 6(h) is not confined to policies but instead extends to "policies, procedures and requirements". The term "requirements" significantly extends the scope of clause 6(h) and, read as whole, clause 6(h) may properly be seen as an express embodiment of the implied term that employees comply with all lawful and reasonable directions - a term that is manifestly for the benefit of the employer. In *Riverwood* the employer was not seeking to vary its policy. Rather, the issue was simply whether the policy in question was enforceable against the employer. Here, the real issue is whether clause 2.2.3 of the Drug Policy is enforceable and fixed such that HWE does not have the right to vary the Drug Policy to remove clause 2.2.3 and to introduce a new drug and alcohol policy of the sort that it proposes.

[23] I recognise that the fact of the industrial settlement that led to clause 2.2.3 being included in the Drug Policy may properly be seen as part, albeit a small part, of the historical context in which the 2008 Agreement as a whole was made. However, I am not persuaded that that factor leads to a different outcome in the present case given the breadth of the obligation in clause 6(h), the purposes specified in paragraphs 3(a) and (c) and the fact that the ownership of HWE changed in 2005.

[24] I find that on the proper construction of the 2008 Agreement clause 6(h) does not incorporate all "policies, procedures and requirements" by reference such that the Drug Policy is enforceable against HWE. On its proper construction, the 2008 Agreement does not limit HWE's managerial prerogative to vary it policies, including the Drug Policy.

Challenge to managerial prerogative on the basis of the principle in the XPT case

[25] The issue now becomes whether the principle in the *XPT case* provides a basis for interfering with HWE's exercise of managerial prerogative to vary the Drug Policy. The CFMEU and HWE each called evidence from an impressive expert witness. While there were some differences of opinion between those two experts, it is unnecessary for me to resolve them because even if I confine my consideration only to the matters accepted by Dr Gerostamoulos, the expert called by the CFMEU, I am compelled to the conclusion that the present application must be dismissed and HWE's position vindicated. Dr Gerostamoulos accepted the following:

- There is a difficulty with all oral fluid screening test devices currently available. All show a significant incidence of false negative results for some drugs, including cannabis. 14

- (Victoria is apparently the first jurisdiction in the world to introduce random roadside drug screening. That screening occurred with the 'DrugWip' screening test device.

Research has been undertaken to assess the effectiveness of that screening. In that research, drivers involved in accidents were given a roadside drug screening test but a blood sample was also then taken and tested in a laboratory. Dr Gerostamoulos gave evidence that of the 87 individuals whose blood tested positive to cannabis in the laboratory, 32 returned a negative result on the roadside screening test.[15] In a number of those 32 cases missed by the roadside screening test, laboratory analysis showed the user had sufficiently high THC levels in their blood that they would have been impaired at the time of the roadside screening test.[16] Dr Gerostamoulos accepted that only higher concentrations were identified by on-site testing. Lower concentrations, even if causing impairment, were not identified.[17])

- The Australian Standard for saliva testing, AS4760, dictates that a negative initial screening test means specimens do not go to the laboratory for testing.[18] This means that false negatives from on-site screening in accordance with the Australian Standard would not be tested in the laboratory leading to the result that in some cases a worker actually impaired by cannabis may proceed to work.[19]

- There are difficulties in detecting low levels of cannabis in oral fluid[20] because all available on-site saliva testing devices have a low sensitivity for cannabis.[21]

- The effectiveness of on-site saliva screening tests for cannabis can be reduced by the use of particular substances.[22] (I would add that, on the evidence before me, on-site urine screening tests, when conducted properly, are far less susceptible to such masking strategies.)

- On-site urine screening devices are more reliable than those currently available for oral fluid.[23]

- On-site urine screening is more likely to pick up chronic and regular users or cannabis, even though they may not be impaired on the day of the test.[24]

- There is no Australian Standard set to use oral fluids for testing for benzodiazepines (prescription drugs that can cause significant impairment), rather, there is only a target at which testing is recommended.[25] Further, current saliva on-site screening devices can only detect high concentrations of benzodiazepines[26] and cannot detect benzodiazepine levels where users would be impaired.[27]

[26] In the light of these matters, HWE's conclusion that, notwithstanding the industrial settlement embodied in clause 2.2.3 of the Drug Policy, it should not move to saliva testing is eminently reasonable. Impairment by drugs or alcohol is an important safety issue at coal mines. The nature of the mining process and the plant and equipment used in mining is such that employees who are impaired by drugs or alcohol present a substantial safety risk to themselves and others that must be controlled. There are very onerous statutory occupational health and safety obligations imposed on employers in New South Wales. The key issue is impairment: it is the employee who is impaired by drugs or alcohol who presents the risk. The use of on-site screening rather than laboratory screening is well justified by HWE's concern that the delay between the taking of a sample and obtaining the results of a laboratory test may lead to employees who are actually impaired working on dangerous equipment when that would not occur if an effective on-site screening test had been used. While it may be so that the primary purpose of random screening for drugs and alcohol is deterrence and that saliva screening would still have a deterrent effect, it is reasonably open

to an employer subject to the onerous statutory occupational health and safety regime that applies to HWE to be concerned to ensure that its drug screening is as reliable as reasonably possible in detecting impaired employees. If on-site screening is to be used, the matters accepted by Dr Gerostamoulos provide compelling rational reasons for regarding saliva testing as less effective than urine testing, notwithstanding there is now an Australian Standard for saliva testing. The materially higher incidence of false negatives with on-site saliva screening and the greater scope for defeating existing on-site saliva screening tests are particularly significant.

[27] The CFMEU placed a particular reliance on the decision of Senior Deputy President Hamberger in *Shell Refining (Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union* 28 (***Shell***). I respectfully agree with that decision and his Honour's approach given the position adopted by the parties and the evidence before him. In particular I agree that considerations relating to employee privacy are an important factor.

[28] However, I have a different body of evidence before me and an employer who has adopted a position different to the employer in *Shell*. In *Shell* the employer was only ever concerned with the conduct of drug screening tests where samples were to be analysed in a laboratory: it was not seeking to introduce screening using an on-site screening device where the result is available immediately after the test is administered. The expert evidence before Hamberger SDP and before me indicated that laboratory testing of saliva is essentially as reliable as laboratory testing of urine in detecting relevant drugs - it is the currently available on-site screening devices for saliva that are materially less reliable. It was in that context that the considerations relating to employee privacy became determinative.

[29] I proceed on the basis that an exercise of managerial prerogative that is contrary to an industrial settlement could, in appropriate circumstances, on that account alone be found to be unjust or unreasonable within the meaning of the principle of the *XPT case*. However, on the evidence before me I cannot find that HWE's refusal to move to saliva testing in accordance with the industrial settlement embodied in clause 2.2.3 of the Drug Policy, and to instead change that policy to provide for saliva testing but with a continuing role for urine testing, is unjust or unreasonable such that the principle in the *XPT case* provides a basis interfering with HWE's decision to vary the Drug Policy in the way that it proposes. I would have reached a different conclusion if the evidence indicated that the reliability 'gap' between on-site urine screening and on-site saliva screening was relatively small.

[30] For these reasons, I must determine the dispute in favour of HWE and endorse its right to vary the Drug Policy in the manner it proposes and direct employees to comply with that policy as varied.

VICE PRESIDENT

Appearances:

S Crawshaw, Senior Counsel and *J Gray* for the Construction, Forestry, Mining and Energy Union.

H Dixon of Senior Counsel and *B Weir* for HWE Mining Pty Ltd.

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2009.

Sydney:

September 23 (telephone hearing).

November 19 (telephone hearing).

2010.

Sydney:

January 18 (telephone hearing).

May 24, 25.
June 29.
1 AC314474
2 (1987) 163 CLR 117
3 Ibid at p. 135
4 Ibid at pp. 136-7
5 *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143 at p. 151; *R v Darling Island Stevedoring and Lighterage Co. Limited; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at p. 621; *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 at p. 594; *Macken's Law of Employment (7th ed), para [5.790]*
6 (2005) 145 IR 285
7 (1984) 295 CAR 188
8 (2000) 177 ALR 193 (North and Mansfield JJ; Lindgren JJ dissenting)
9 (2010) 193 IR 212 (Kenny, Tracey and Jagot JJ)
10 [2010] FCAFC 8 at [94] - [96]
11 (2010) 197 IR 307
12 (1996) 66 IR 182
13 (1993) 46 IR 128
14 PN265, PN349
15 PN314
16 PN412
17 PN317
18 PN264
19 PN295-296
20 PN267
21 PN300
22 PN439-441; PN445
23 Exhibit 1, para 5; Transcript at PN298
24 PN292
25 PN268, PN273
26 PN382
27 PN383
28 [2008] AIRC 510
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