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Drug Policies Strictly Applied

The 2009 decision, ***Parker v. Silver Fern Farms Ltd*** [2009] ERNZ 301, set the benchmark for how the Courts would deal with drug testing. Although the case did not itself resolve this issue, Chief Judge Colgan made the Court's position clear:

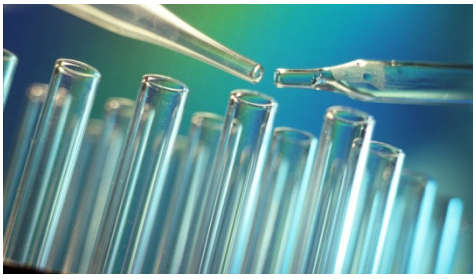
"Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the respondent, these should be interpreted and applied strictly."

In a recent decision, ***Hayllar v. The Goodtime Food Co Ltd*** (September 2012), the Court acknowledged and accepted this earlier decision.

The ***Hayllar*** case involved two employees both of whom had similar fact scenarios. The company policy provided for drug testing based on reasonable cause which was defined variously as *"where their actions, appearance, behaviour or conduct suggests drugs or alcohol may be impacting on their ability to work effectively and safely"* and later where their *"appearance, actions, or behaviour suggests that they may be affected by drugs/alcohol."*

The policy required that after a test the employee would be stood down pending the result and that if a positive result was returned, the employee would be required to participate in a rehabilitation programme. The programme itself required ongoing random tests over a 24 month period and the policy provided for summary dismissal if a positive result was returned during this period. Both employees, Hayllar and Matene, were tested for drugs and, returning a positive result for cannabis were required to attend rehabilitation. While at the hearing both challenged the validity of these first tests, they were outside of the 90 day limit and therefore this issue was not considered in the final decision.

Hayllar began rehab in early June 2010. On 7 July he suffered a workplace injury when he tripped on a loose tile and injured his back. When he returned to work a week later he was required to undergo a drug test because of the accident. After the test he was not suspended and carried on with his regular duties. The results were positive, showing measurable levels of THC Acid. He was summarily dismissed.



The second employee, Mr Matene, was similarly placed on a drug rehabilitation programme in July 2010 as the result of an earlier positive drug test.

On 9 August 2010 his employer required him to undergo a further drug test because it claimed Mr Matene had smelt of cannabis during a staff social function held two weeks earlier. The employer argued that it felt that it had reasonable cause to suspect ongoing drug use because while Mr Matene had stated that he had given up cannabis the employer suspected this may have been untrue. Like Mr Hayllar, Mr Matene was not stood down pending the outcome of the drug test. The test was positive and he was dismissed because he had agreed as part of the rehab programme that he could be dismissed if he showed a future positive result.

As part of the evidence for both men, it was accepted by the Court that the level of THC Acid was at a level where their performance would not have been impaired and that the rehab programme adopted involved a '*weaning off*' rather than a '*cold turkey*' approach to drug use.

The Court found the dismissals to have been unjustified on the basis that, as per ***Parker v. Silver Fern Farms***, drug policies significantly impinge an employee's rights and should be interpreted and applied strictly. He found that the company breached its own policies.

Firstly, the Court found the decision not to stand the men down between the test and the result to be '*completely inexplicable*'.

Secondly, both employees had returned to work after the first positive test and before their bodies could have returned to the required zero level. The Court held that by *"requiring the two plaintiffs to carry on with their normal duties after returning such high drug test results, the company was misleading them into believing that the results did not matter and, provided they continued to undergo the rehabilitation programme, then their employment was not in jeopardy."*

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Our next Employment Relations Practice Course has tentatively been set down for **Tuesday 9 and Wednesday 10 April 2013**.

Places on this course are strictly limited. Details in regard to the course will be sent out to clients in early 2013.

Further information in regard to the course content can be found on our website – www.mgz.co.nz/training. If you wish to tentatively book a place for this course please contact us.

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The Judge further held that while the policy allowed for further tests to be taken during rehabilitation, such tests ought not have resulted in dismissal. He held *"drug testing carried out whilst an employee is undergoing rehabilitation is, . . . for comparison purposes only and a resulting positive test result cannot lead to dismissal or other disciplinary action."*

Most significantly the Court found that the company did not have, within their own definition, reasonable cause to require a second test. There was no evidence to suggest that drugs were impacting on the employee's ability to perform work effectively and safely. This was particularly so for Mr Matene, who was asked for a test because of the earlier function incident.

In short, the dismissals were found to be unjustified because of the company's failure to follow the policy, which was to be narrowly interpreted. Although not ultimately relevant to the outcome, the Court made further and interesting comments regarding the nature of drug testing. It looked at an Australian decision, ***Endeavour Energy*** regarding the nature of drug testing, comparing urine with saliva testing. In that decision the Full Court stated:

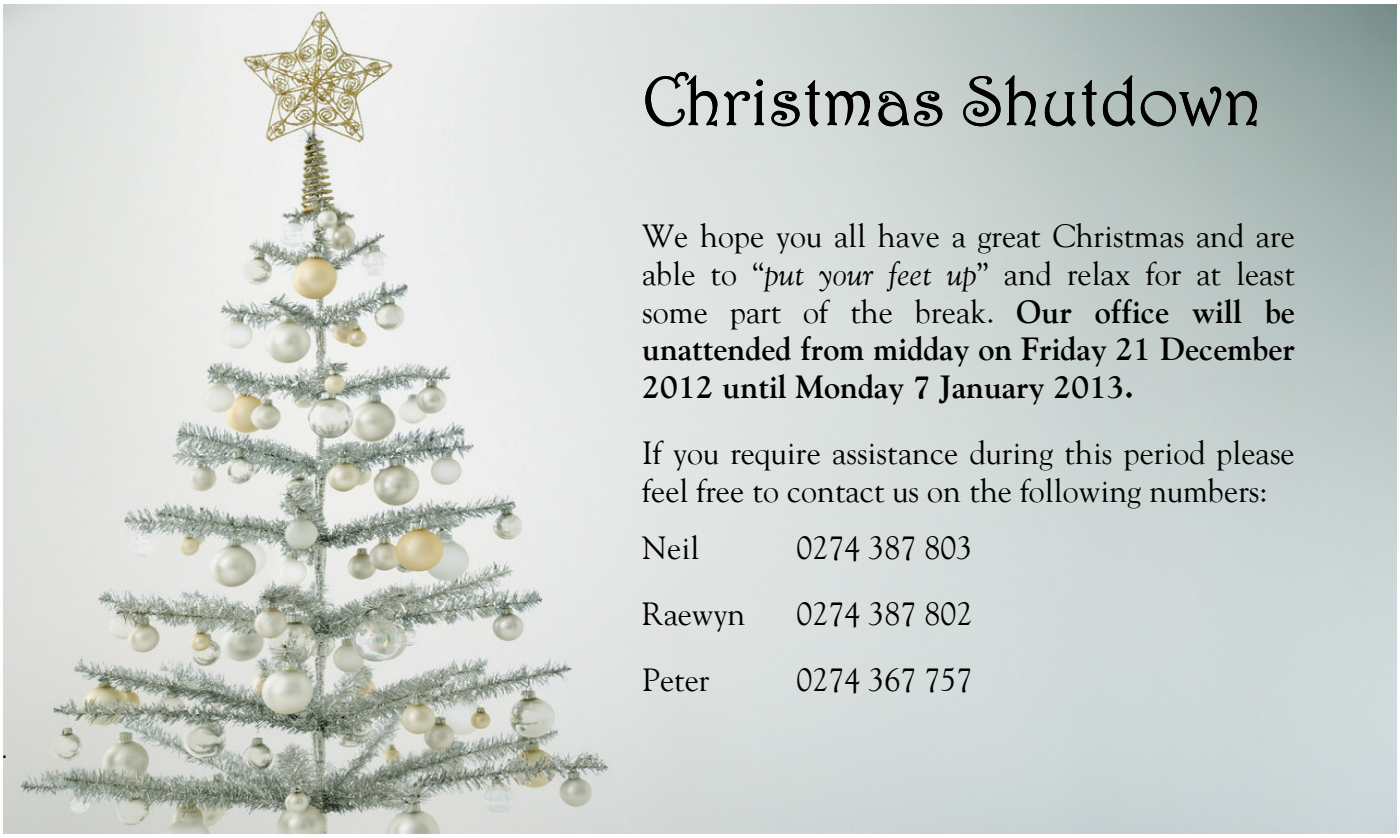
" … The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take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

It went on to indicate that the commonly used THC (urine based) test does not indicate the level of impairment:

"Not only is urine testing potentially less capable of identifying someone who is under the influence of cannabis, but it also has the disadvantage that it may show a positive result even though it is several days since a person has smoked the substance. This means that a person may be found to have breached the policy even though the actions were taken in their own time and in no way affect the capacity to do their job safely. In the circumstances where oral fluid testing - which does not have this disadvantage - is readily available, I find that the introduction of urine testing by the applicant would be unjust and unreasonable. Accordingly I find that the system of drug testing that should be used by the applicant for on-site drug testing should be that involving oral fluids. This should be done on the basis of AS4760-2006: the Australian Standard governing procedures for specimen collection and the detection and quantitation of drugs in oral fluid. "

Although not formally accepted as part of the decision, the Court has cited this Australian decision with approval, which has the potential to significantly affect all situations where the ability to test and ultimately to terminate rests on impairment or on the effect of drug use on work and on safety.

This issue is ongoing, the Courts have however indicated that they will set a very high standard and will review policies narrowly. Consequently it may be time to review your policies.



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