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NEWSLETTER

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INSIDE THIS EDITION

DRUG TESTING IN THE WORKPLACE

According to the 2012 United Nations World Drug Report, New Zealand has comparably high levels of illicit drug taking, particularly cannabis use. Not surprisingly, this is a concern for employers wanting to maintain standards and safety in the workplace. This issue creates a conflict between an employee"s right to privacy, and the rights and obligations of employers to provide a safe, healthy and efficient working environment.

DRUG AND ALCOHOL POLICY

Having an effective drug and alcohol policy is important for employers. This policy, generally found in the employment contract or its accompanying guidelines, specifies the rights and obligations of employers and employees regarding the misuse of alcohol and the use of illicit drugs. The policy should specify the consequences of attending work under the influence of alcohol or drugs and any relevant testing regime. As with all employment issues, there is a general duty of good faith imposed on both parties. An employer may require pre-employment testing as this will take place before the employment relationship and therefore before the duty of good faith obligations begin.

RANDOM TESTING

Random or "suspicionless" testing is permitted only in safety sensitive areas of a workplace. The Employment Court noted in a case involving Air New Zealand that pilots, aircraft engineers and flight planners, as employees in safety sensitive areas, might be the subject of random testing whilst HR advisers, in-house lawyers and payroll staff would not. Clearly, there is grey area when determining whether an employee works in a safety sensitive area. In any event, provision for random

testing should be recorded in the drug and alcohol policy and provided to the employee.

REASONABLE CAUSE TESTING

Where a workplace environment is not safety sensitive, a drug and alcohol policy may specify that an employee will be subject to testing if there are reasonable grounds to believe that an employee is impaired at work. Reasonable grounds may include; immediately after an accident or near miss, or where drug use is witnessed. The reasonable grounds must be specifically related to the behaviour of the employee to be tested, and a general suspicion that employees are taking drugs is insufficient. An employee being tested must be presented with any evidence against him or her - hearsay evidence should be treated cautiously as generally this may not be sufficient.

Importantly for employers, a positive drug result will not be taken into account in determining damages for unjustified dismissal if there were no reasonable grounds for the test. In other words, the mere fact that an employee turns out to be a drug user will not remedy any procedural impropriety by the employer.

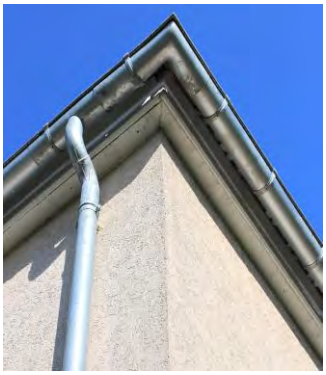
DRUG TESTING PROCEDURE

The most common procedure for drug testing is to have a preliminary "screening test" that results in an instant negative/positive result. An employee who returns a positive result should undergo a laboratory confirmation test. The confirmation test is important because the screening test is designed to be highly sensitive and may return wrongly positive results - poppy seeds and some forms of cold and flu medication may increase the chances of incorrect screening test results.

Provided that the delicate relationship between employee privacy and employer standards and safety is balanced, drug and alcohol policies benefit both parties in the workplace.

COUNCIL LIABILITY FOR LEAKY BUILDINGS

A recent Supreme Court decision has altered the scope of a council"s liability in relation to the leaky buildings saga.



Body Corporate No. 207624 v North Shore City Council (SC 58/2011) [2012] NZSC 83, held that councils owe a duty of care to all owners of buildings in regards to their relevant functions carried out under the Building Act 1991 („the 1991 Act"). Previous decisions had drawn a distinction between residential and commercial properties when it came to a council"s duty of care.

WHAT DID THE SUPREME COURT SAY?

The case before the Court involved a building that was used both as a commercial property and a residential one – the majority of the rooms were motel rooms, and there were also six residential penthouse apartments. In the judgment, the Court stated that councils owe a duty of care in their inspection role to owners of premises, both original and subsequent, regardless of what the building is used for. It also stated that the same duty applied to building certifiers who were elected to carry out the work instead of a council under the 1991 Act. This judgment only relates to the 1991 Act, as a position with regards to the Building Act 2004 („the 2004 Act") was not covered by the Judgment.

The decision applies not only to leaky building cases, but to everything councils do in their inspection role. However, it is expected to be heavily relied upon and tested in leaky building litigation.

LIMITATIONS ON CLAIMANT CRITERIA

There are some hurdles to benefitting from this judgment:

- This judgment applies only to building carried out while the 1991 Act was in force (prior to the 2004 Act),
- Civil proceedings may not be brought against anyone under the 1991 Act 10 years or more after the act or omission in question (for example, up to 10 years after the date of the council issued code compliance certificate, if that is the document relied upon in litigation),
- The council"s responsibility is limited to the exercise of reasonable care solely in terms of ensuring construction in accordance with the building code.

These constraints may be troublesome for claimants. At this point, proceedings relating to acts or omissions before January 2003 may be time barred, and given that parts of the 2004 Act came into force in November 2004, the window for claims under the 1991 Act is small and constantly getting smaller.

On the other side of the coin, the judgment opens up claims for past and present owners of buildings, and it does not only apply to leaky buildings.

WHERE TO FROM HERE?

This decision has widened the scope for civil claimants with regards to a council"s duty of care in their inspection role, and will likely lead to litigation. Potential claimants need to act quickly in identifying

and filing any claim, as timeframes are running out. It will also be a case of waiting to see what the position is with regards to the 2004 Act, as this will be of utmost importance for owners of buildings constructed under the new Act.

GUARANTEES

Acting as a guarantor for someone, often in respect of payment of money, means that you agree to meet their obligations if they do not. Guarantee clauses are common in leases, hire purchase agreements, and in general dealings with a bank. There are potential pit-falls for you to consider when agreeing to be a guarantor.

SIGNING A GUARANTEE

A guarantee agreement must be in writing and must be signed by the guarantor. It is advisable that if a party is signing in another capacity as well, that they sign the contract twice, once in their capacity as borrower (e.g. as a director of a borrowing company), and once as a guarantor.

TYPES OF GUARANTEES

There are many different types of guarantees, varying from a specific guarantee to cover a particular transaction, a continuing guarantee limited to a fixed amount through to a continuing guarantee where the guarantor agrees to meet all obligations of the other party. Many guarantee documents include both a guarantee and an indemnity, which means that not only is the guarantor guaranteeing the obligations will be met, they agree to protect the receiver of the guarantee from any harm or loss.

In most contracts where there is more than one guarantor, they are treated as being "jointly and severally liable". This means the creditor can choose to pursue whomever they like to recover the debt. Even if you are only one guarantor amongst many, you may find yourself held liable for all of the debt. In this case you may have a right to compensation from co-guarantors, but enforcing this right can be a lengthy and costly process.

RIGHTS AND OBLIGATIONS OF THE GUARANTOR

As a guarantor who has been called upon by a creditor to pay a debt, you have a right to require repayment by the original debtor. Of course in practice, this right may not amount to much protection as often the creditor is enforcing the guarantee due to the inability of the debtor to make a payment. A guarantor can however use the securities available to the original creditor. In other words, if a debt secured by a mortgage is paid in full by a guarantor, the guarantor is entitled to take over that mortgage security.

INDEPENDENT LEGAL ADVICE

Creditors rely on a guarantor making an informed decision. To ensure their guarantee is enforceable creditors should disclose to the guarantor information about the obligations they are guaranteeing and be satisfied that the guarantor appreciates the risk they are assuming. The *Code of Banking Practice* goes further, by requiring that prospective guarantors be advised to seek independent legal advice. The party providing legal advice is then required to confirm the guarantor understood the obligation they were assuming at the time they entered the guarantee.

DILIGENCE REQUIRED

If you decide to act as a guarantor for someone, including close friends and family, you should familiarise yourself with their financial position, read the contract very carefully and obtain legal advice to determine what your liability might be. Everyone is naturally optimistic when it comes to their family and friends, but it is vital to be aware of the risk you are assuming and make an informed decision.

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution („ADR") is a collective term that describes a wide range of processes used to resolve civil disputes. They are an alternative to the more traditional means of resolving disputes by way of litigation.

Court litigation is adversarial by nature. Judges impose their own decisions on the parties so the process tends to be formal and requires strict rules of procedure and evidence. In this environment the parties" positions often become polarised and this can lead to an increasingly expensive and protracted resolution process. ADR seeks to avoid this by enabling the parties to achieve their own solution.

The most common examples of ADR are Mediation, Negotiation, Conciliation and Arbitration.

MEDIATION

Mediation employs a neutral third party (the mediator) to assist the parties in negotiating a settlement.

- It is fast – a mediation can be convened relatively quickly and the time needed to achieve a result is usually much less than through the Court system,
- It is cheap – while mediators charge a fee the costs are usually much less than the parties would incur by going to Court. When the use of

mediation services is directed by the Court itself mediation is usually free.

NEGOTIATION

Negotiation creates a dialogue between the parties intended to achieve mutual agreement.

- It is often assisted by the involvement of professional third parties, usually lawyers, who represent the parties‟ interests rather than being neutral,
- Tactics – negotiation is often thought of as tactical. In the context of a dispute the parties may see one another as adversaries, which leads to "hard-bargaining" as each tries to give away as little as possible. However, many disputes arise between parties where the relationship between them needs to be preserved and in these circumstances negotiation may be more integrated and focused on mutual gain.

CONCILIATION

- Conciliation involves a neutral third party acting as a "go between". The conciliator meets the parties separately in order to conciliate and reach a solution usually by way of concession.

ARBITRATION

Arbitration most resembles the Court process and is adjudicative rather than consensual.

- Disputants submit their case to an independent arbitrator who will make a binding decision. While the parties must agree to arbitrate (often by way of prior contract) they are then bound by the decision of the arbitrator,
  - The parties can agree on who the arbitrator will be, the rules of procedure and evidence, and other issues to be addressed.

ADR is growing in use and acceptance in New Zealand and around the world. The recognition of ADR as an effective means of resolving disputes has meant a number of jurisdictions, including New Zealand, often require the parties to undertake ADR as part of the ordinary judicial process. The Family Court and Tenancy Tribunal regularly make use of mediation services, and Judicial Settlement Conferences (a type of Judge led mediation) are also used in dealing with other civil disputes. Although ADR will always require the parties consent in order to resolve disputes, the parties may be required to undertake ADR in the hope an agreement can be reached before the Court will consider the dispute.

SNIPPETS

PROPOSED INTRODUCTION OF STARTING OUT WAGE

The Minimum Wage (Starting-out Wage) Amendment Bill was introduced into Parliament on 9 October 2012.

The Bill proposes to change the way in which minimum wage rates may be prescribed to workers between the ages of 16 and 19, and in limited cases workers over 20. It will open up the ability for the Government to identify multiple classes of eligible youth, and set minimum starting out wages for each class. The rate must not be set at less than 80% of the adult minimum wage, and the period of payment at this rate will last for a maximum of six months of continuous employment with the same employer, or until the worker no longer satisfies the Act‟s rate criteria, whichever comes first.

There is divided public opinion on the Bill, with its supporters on the one hand claiming that it will incentivise employment of young workers, and its detractors seeing the reduced wages as a failure to ensure a reasonable standard of living for young workers.

MAORI WARDENS

Maori Wardens are a voluntary service focused on youth, community safety and reassurance.

The office of Maori Warden was established under the Maori Social and Economic Advancement Act 1945 ("the Act"). Maori Wardens are seen as formal agents of state control, and are commonly seen in public and at Maori events providing security, general assistance, first aid, traffic control and crowd control.

Maori Wardens are not police officers but have limited powers consisting of; the right to enter into hotels for prevention of drunkenness and disorderly behaviour, the authority to prohibit the illegal sale and consumption of liquor in the vicinity of a Marae or Maori meeting place, and the power to request a driver to surrender their car keys if they are considered to be incapable of driving, due to intoxication.

At the discretion of a Maori Warden, violators (Maori or otherwise) can be tried before a Maori Committee Tribunal or through summary proceedings at a District Court and shall be liable to a fine not exceeding $40.

If you have any questions about the newsletter items, please contact us, we are here to help.