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EMPLOYEE DRUG TESTING:

AN EVALUATION OF THE LEGAL, WORKPLACE, AND SCIENTIFIC ISSUES

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CONTENTS

ABSTRACT

This paper explores the interface between law, social policy and technology. Advances in technology can create situations which require legal regulation, or cast new light on existing legal duties. Social policies may also lag behind scientific developments, necessitating their re-examination to keep pace with technology. The recent introduction of drug testing in the New Zealand workplace is one such area where law and social policy must respond to technological advance. This paper considers the role of the law in both supporting and constraining the drug testing of employees, while assessing the relevance of the technology to its purported purpose. It concludes that while strong support can be found in existing legal duties for the introduction of drug testing, there are also significant concerns which centre around privacy rights and the interests of good industrial relations. It evaluates the usefulness of drug testing in assessing impairment, and concludes that there are several other methods of detecting (drug) impaired employees which do not pose the same threat to workplace relations and individual employee privacy rights. As such, employee drug testing is of limited use in the workplace.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16 000 words.

The law is stated as at 1 August 1996.

I INTRODUCTION

What is the relationship between law and technology? Moreover, should this relationship be worthy of our consideration? Answers to the first question will depend on the position and priority that society accords to law and the pace and state of scientific development. However, the answer to the second question must always be yes. Advances in scientific technology can create situations which exist beyond the law's frontiers. These situations also present us with the wider question of whether or not, and if so, how, the law should respond. New reproductive technologies, copyright and privacy issues raised by the information technology explosion and performance-enhancing drug use by athletes are all examples of science driving the law to respond as it expands the boundaries of the possible. New legal puzzles emerge from scientific developments - puzzles which, if we are to solve them, must be framed by principled enquiry and thoughtful response.

However, the social context and consequences of science must not be forgotten as we seek to devise the legal response: technological questions should not be our only concern. These inter-connections between law, social policy and technology are illustrated by a relatively new entrant into the debate over how society should respond to drug and alcohol issues: drug testing in the workplace.[1]

North Americans, Europeans and Australians have been grappling with the legal ramifications of workplace drug testing programmes for over a decade. Different conclusions over whether, how, and when to test can be traced to the levels of concern over drug use (perceived or actual) in each relevant society, the moral framework which informs mandatory, permissive, or prohibitive legislation, and the already-existing laws which impact on the legality of such programmes.[2]

However, it is only recently that New Zealanders with an interest in social policy and/or law have had these issues presented for their consideration. In the past year,

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1 Efforts to combat and control alcohol and drug use are at the centre of many aspects of social policy and legislation. For instance, New Zealand seeks to regulate alcohol and tobacco consumption by minors, and drug use by all its citizens, provides assistance for those seeking to rehabilitate themselves from alcohol and/or drug addiction, promotes public health and safety through anti drink-driving campaigns and smoke-free environment legislation, and bans performance-enhancing drug use by athletes.

2 For an excellent summary of the legal situation regarding drug testing as well as workers' and employers' organisation statements across Europe, North America and Australia, see ILO "Workers' privacy - Part III: Testing in the workplace" (1993) 12 (2) Conditions of Work Digest 22 - 34.

New Zealand has considered these at an elementary level as employee drug testing (EDT) issues are tentatively considered in both legal and social policy fora.[3]

For example, in July 1995, Mercury Energy released its "Fit For Work" policy, which included a pre-appointment, post-accident and "reasonable cause" drug testing programme.[4] It was swiftly challenged in the Employment Court by the three unions representing Mercury Energy workers, but the legalities of the programme remain undetermined as the programme was modified[5] and the application for an injunction consequently withdrawn.[6] In addition, the draft *National Policy on Tobacco, Alcohol, and Other Drugs* suggests that employee drug testing should be considered as part of a comprehensive strategy to combat drug and alcohol ab/use and their subsequent problems in the workplace.[7]

This paper seeks to address in a New Zealand context the issues which have arisen from developments in technology which provide for the detection of drug use and their intersection with the law relating to the relationship between employers and employees. Although drug testing already exists, or is proposed, in other contexts,[8] employment relationship is unique and comes with its own special concerns and attendant laws. Law which is appropriate in one set of circumstances should not be replicated in another without first considering the reason for such a policy and the setting in which it will operate: a different context may well require a different response.

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3 In-depth and sustained explorations of this topic from a New Zealand legal perspective are few. Two exceptions are: A Shaw "Drug Testing in the Workplace and the Bill of Rights" [1995] NZ Law Rev 22, and A Simperingham "The Legality of Employee Drug Testing" (Post Graduate Diploma in Legal Studies Research Paper, University of Auckland, 1995).

4 Mercury Energy "Fit For Work" (Mercury Energy, Auckland, July 1995) 5.

5 Personal communication with Andrew Bonwick, General Manager - Strategic Support, Mercury Energy, 13 May 1996.

6 The Engineers Union, CEWU and the PSA brought an application for an interim injunction in August but it was withdrawn on 20 December 1995 (Employment Court Registrar's records). In *Philson v Air NZ Ltd*, Unreported, 3 July 1996, Employment Court, Auckland Registry, AEC 35/96, Judge Colgan commented that "although cannabis and workplace drug testing are involved, it is not only simply not possible but also inappropriate for the Court to express any views at this stage."

7 *National Policy on Tobacco, Alcohol and Other Drugs* (Ministry of Health, Wellington, May 1996) 25 - 26.

8 Testing for performance-enhancing drugs in sport is governed by the NZ Sports Drug Testing Agency Act 1994. Drug testing in prisons is currently being considered by the House: see the Penal Institutions Amendment Bill 1996 (No 201, Public, Hon Paul East, N, Rotorua) introduced 18 July 1996.

The Minister of Health has commented that addressing these points is imperative in both the legal and social policy environments, saying:[9]

> What has to be decided is to what extent testing in the workplace is justified and where the public safety issue, the personal safety issue, the employer and employee, and employee and employee relationship sits. ... The real challenge for us all, scientists, medical experts and practitioners in the field, and politicians, is to work out where the rights of individuals begin and end, and the obligations that they have in a public, personal and workplace sense.

Addressing these concerns requires more than an ad hoc response. However, at present, New Zealand has no legislation which specifically addresses EDT. None is being planned. Social policy proposals are in their infancy. Given this state of affairs, and while an increasing number of New Zealand companies introduce EDT programmes, there is a pressing need to examine the legal rights and duties which overlay EDT. Specifically, where employee drug testing is proposed or is implemented, what role does the law play? In the absence of legislation which mandates or permits EDT, what impact does present law have on the lawfulness of EDT? Are there legal responsibilities on employers and/or employees, or shared by both, which impel us towards or justify the adoption of EDT? Or are there legal rights which serve to limit the scope or even prohibit EDT programmes?

This paper presents an analysis of New Zealand statutory and common law rights and duties as they relate to EDT, in an attempt to mark out its boundaries. Particular focus will be placed on duties relating to the provision and maintenance of safe working conditions, the "good employer" principle, employee privacy rights, and the duty of trust and confidence shared by employers and employees. Scientific evidence concerning levels of drug use in the workplace, and the efficacy of the testing process will be assessed to determine whether EDT is an appropriate way of addressing employee drug use problems. In addition, this paper will consider whether problems arising from employee drug ab/use that spills into the workplace can be addressed in some other way, without the need for EDT or EDT laws. In short, the legal, scientific, and social aspects of this issue will be canvassed in an attempt to provide a well-rounded consideration of EDT.

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9 J Shipley "Opening Address" (Speech made to the 'Australian and New Zealand International Workshop on Substance Abuse in the Workplace', Auckland, 22 November 1994) 6 - 8.

II THE PRACTICALITIES OF EDT

In many cases it will be an easy matter to tell whether an employee is under the influence of alcohol or drugs without resort to sophisticated testing procedures such as those envisaged by EDT programmes. However, in those cases where EDT is employed it is important to have a full understanding of the various procedures available and how they operate. Such an understanding will illuminate our later discussion of the relevance of various rights and duties in the workplace; it will also aid our understanding of EDT as a means of investigation which the courts require for justifying a dismissal or other disciplinary action.

A What may be tested in EDT?[10]

1 Urine testing

Urinalysis is the most common means of EDT. The worker provides a urine sample which is then tested, not for an amount of an actual drug, but for its metabolites. These are the inert by-products of a particular drug, ie, they do not contain its psycho-active ingredients. Generally there is a cut-off point below which the worker is deemed to be drug-free.

There are several reasons why urinalysis has become the method of choice for most employers who drug-test their employees. Urine testing is relatively simple and, since the development of new testing techniques in the 1970s, has become progressively less expensive.[11] Moreover, urine can be provided in larger amounts than other body specimens such as blood or saliva. The metabolites are also relatively stable in urine, which allows for long-term storage of the sample. The stability of the metabolites also means that drug use can be detected over a longer period of time than with some other methods. Finally, the collection of urine has the advantage over other methods in that it is physically non-invasive (unlike, for instance, blood testing).

Before examining the different procedures in place for testing urine for drug metabolites, we shall first canvass the advantages and disadvantages of other methods, relative to urinalysis. This will help frame the later discussion of urinalysis and its relationship with the law.

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10 This outline of testing methods is drawn from the Ontario Law Reform Commission *Report on Drug and Alcohol Testing in the Workplace* (OLRC, Toronto, 1992) 10 - 14.

11 Above n 2, 19.

2 Blood testing

Blood testing has several advantages over urinalysis. As the blood is the major path for drugs in the body, a blood sample will reveal the actual amount of drugs in a person's body at the time. Moreover, as the level of these substances disperse in the blood within hours as opposed to metabolites which may linger for weeks, a blood test is more likely to indicate recent drug use than urinalysis. Testing blood is therefore more helpful in determining the likelihood of impairment.

Despite these advantages, blood testing is unlikely to become common in the workplace. Blood testing is impractical and too expensive for the majority of employers, because obtaining a blood sample is necessarily physically invasive, involving the extraction of bodily fluids by a non-natural means. It also brings with it the risk of infection and must be carried out by medically trained personnel under sterile conditions.

3 Breath testing

Breath testing is best known in the traffic context as a means of detecting alcohol use in drivers. It is relatively non-invasive, inexpensive and easy to operate. It works on the premise that alcohol and drug metabolites reach the breath via diffusion from blood in the lungs.

However, in the workplace, there will generally be no need to resort to breath testing to ascertain whether workers are alcohol-impaired. And breath testing is not very efficient at detecting drug use. Therefore, its application to EDT is limited, unless and until the promised advances in technology make detecting drugs via breath testing much more effective.

4 Testing other bodily samples

Techniques for the detection of drugs are not limited to the analysis of urine, blood, or breath. Recent research into alternatives presents testers with new methods, which may be less physically invasive in the process of sampling and more accurate in detecting present impairment.

One new method is hair analysis. Strands of hair (roots intact) of about 7.5cm from the employee's head will provide material to determine six months' drug use history.

Due to the period of use which a normal sample reveals, it can be undertaken on an annual or six-monthly basis without compromising the integrity of the results. It also has the advantage that abstaining from using drugs for a few days will not result in a totally "clean" result - past drug use will still show up.[12]

Hair analysis is simple to carry out and does not create the concerns for physical privacy in collecting samples that urinalysis does. However, hair analysis is still only experimental,[13] and because of its rarity, expensive. US courts have also stated that hair testing evidence is presently inadmissible.

Research into saliva testing as a method of EDT is still developing, although saliva analysis has been shown to be a valuable tool in detecting alcohol consumption. A sample of saliva is obtained by the employee spitting on a blotting strip or dental sponge.

As the eye is part of the central nervous system and is located close to the brain, any drug which acts on the nervous system or brain will produce observable physical changes in the eye as the delicate operation of the eye's small muscles and nerves is disturbed.[14] Research is being undertaken into devices which can correlate the probability of the presence of impairing drugs to the level of physiological disturbance by electrically measuring drug-specific eye movements.[15]

These methods make collecting a sample for testing simple and quick. However, even though they may assuage concerns over physical privacy raised by, for example, urinalysis, they are still regarded by suspicion by the law, as their claims to be more accurate and more effective in detecting impairment over urine, blood and breath testing are not yet proven.

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12 However, there is the possibility of a lacuna in the results should an employee abstain from drug use for a few days before testing as drug use does not reveal itself in hair until a few days after consumption.

13 The US National Institute of Drug Abuse has stated that urinalysis is the preferred technique: NIDA "Mandatory guidelines for federal workplace drug testing programs" (1988) 53 (69) *Federal Register* 11970 - 11989. NIDA also recommends confirmatory testing by GC/MS. See Part II B, below.

14 B Butler *Alcohol and Drugs in the Workplace* (Butterworths, Toronto, 1993) 233 - 234.

15 Such a device is the electronystagmograph (ENG): L Miike and M Hewitt "Accuracy and Reliability of Drug Tests"(1988) 36 U Kansas LR 639, 662.

B Urinalysis Testing Methods

Overseas courts generally require at least two types of test to be undertaken before they will admit evidence based on these tests. An initial screening test must be followed by a confirmatory test. At present, there is only one organisation offering forensically defensible EDT to employers in New Zealand. This is the crown entity ESR.[16] This fact confines the scope of our further consideration of drug testing methods to those practised by ESR ie, urinalysis.

ESR carries out initial screening tests by immunoassy, using the EMIT (enzyme immunoassay technique) brand. This works by attaching an enzyme to a metabolite of the drug to be detected. The urine specimen is mixed with a reagent which contains antibodies to the drug. The sample is then mixed with the drug metabolite. The enzyme in the drug metabolite will react with any antibodies to the drug which remain. This reduces the level of enzyme activity. The amount of enzyme activity is directly related to the concentration of the drug present (if any) in the urine sample.

EMIT testing is inexpensive, fast and requires only a low level of technical skill to administer and interpret the results. EMIT also has the benefit of being particularly sensitive: it can detect minute amounts of drug metabolites in a person's urine. However, EMIT is flawed as it is not as accurate as other methods. Testing by EMIT alone introduces the danger of relying on false positive and negative results.[17] EMIT's specificity rate has often been called into question, as EMIT can fail to distinguish between drug and non-drug compounds, due to similarities in the molecular and chemical properties between these substances. For example, poppyseeds can register as heroin, common cold remedies as amphetamines, and certain herbal teas as cocaine.[18]

These problems with the EMIT test mean that a second form of testing must be used before any action is taken. The gas chromatography/mass spectrometry (GC/MS) method, when combined with EMIT, is said to be almost 100% accurate at identifying a substance in someone's urine, assuming no operator or calibration errors.[19] It is

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16 The Institute of Environmental and Scientific Research, a division of the former DSIR.

17 There is a large body of literature amassed on this point. For example, see above n 15 and DT Barnum and JM Gleason "The Credibility of Drug Tests: A Multi-Stage Bayesian Analysis" (1994) 47 Industrial and Labor Relations R 610.

18 For a list of common cross-reactive substances, see MA Rothstein "Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law" (1987) 63 Chicago-Kent LR 683, 698.

19 D Blaze-Temple *et al Considering Alcohol and Drug Testing in the Workplace* (Workwell, Perth, 1993) 6.

mandatory as a confirmatory test in several American states[20] and was recommended to the Canadian House of Commons in the report *Booze, Pills and Dope: Reducing Substance Abuse in Canada*.[21] This is the method used by ESR.

GC/MS first separates the specially prepared sample into its molecular or chemical components by vapourising the urine and passing it through a tube of helium gas. Each component is then bombarded by a stream of electrons. This makes the chemicals fragment into ions. The resulting pattern of ion masses creates a unique "chemical fingerprint" of the drug metabolite.[22] This "fingerprint" can be compared with up to 35 000 other compounds to determine the exact composition. GC/MS, as well as being extremely accurate, is also highly sensitive: it can identify substances in parts as low as parts per billion.[23]

The combined cost for EMIT and GC/MS testing offered by ESR is presently $ 100 + GST per sample.[24]

C What are Samples tested for?

The substances that drug tests can detect are only limited by what humans choose to put into their bodies. However, it would be a time-consuming and usually fruitless exercise to test on each occasion for all the numerous psycho-active substances that people may consume. Testing is usually for illicit substances only. Further, EDT programmes do not often focus on alcohol. Alcohol use is widespread in the community and by far the majority of people do not need the assistance of a chemical testing regime to determine whether employees are alcohol-impaired. In New Zealand, ESR tests samples for the illegal substances cannabis (marijuana and hashish), opiates, cocaine, amphetamines but also benzodiazepines, which are legal/prescription drugs which may be being abused by being taken in greater than recommended quantities.[25]

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20 Connecticut, Rhode Island and Vermont have all legislated for the use of GC/MS.

21 Canada. House of Commons. Report of the Standing Committee on National Health and Welfare on Alcohol and Drug Abuse. Ottawa. 1987: 47.

22 Above n 2, 20.

23 Above n 10, 19.

24 ESR "Drugs in the Workplace - An ESR Solution" (ESR, Auckland, 1994) 11.

25 Above n 24, 11.

D When can testing take place?

The timing of testing can be categorised in several ways. First, testing can take place at some point before or during the employment relation. Second, testing can be carried out according to some or no level of cause, with varying levels of cause evident in a number of programmes. Thirdly, the timing of the test may be sourced to some specific event, such as an accident, or it may be more or less random. These combine to create a complex array of options for employers who wish to implement EDT. Depending on the combination chosen for the EDT policy, all or some of the workforce may be involved.[26] The matrix below shows how the various options could be combined.

EMPLOYMENT STATUS	TIMING	RATIONALE
Pre-employment		Post-accident
During employment	Random	Reasonable suspicion
On return to employment (after holiday, leave etc)	Periodic	Probable cause
Workplace transfer to safety-sensitive position	Triggering event	Deterrence
Union/Non-union member		No rationale given to employees

The considerations that accompany EDT are many. Employers turn their minds to when they see it as appropriate to test their workers, what sort of sample they will require for testing and how and by what methods they will test. All these issues must be considered as well as the justifications for testing: what are the empirical and legal reasons that encourage employers to institute EDT programmes? To these concerns we now turn.

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26 For example Mercury Energy's policy applies only to those working in "safety critical" areas, defined as "any position where an impairment of ability affects, or can affect, the safety of an individual, workmates or the public." See above n 4, 2. Compare the EDT policy of Parker Drilling where only non-union employees are subject to EDT: below n 38.

III JUSTIFICATIONS FOR EDT

We now know how EDT operates. This section of the paper concentrates on the reasons why EDT may be being used by some employers and considered by others.

A Workplace Concerns

Scientific studies have consistently shown that the workplace is not isolated from the general level and social spread of drug use in society. While the levels of drug use and the percentages of workers who use various substances both on and off the job differ in different countries,[27] it is fairly safe to make the basic assumption that no workplace can claim to be drug-free with absolute certainty. The most recent survey of drug use in New Zealand is the 1990 report *Drugs in New Zealand*.[28] Overall, drug use was reported as being infrequent. Although ESR widely promotes the statistic that 70% of the NZ workforce has used drugs in the last year,[29] this is not the same as saying that 70% of New Zealand workers work under the influence of drugs. It is the 3% of employees who regularly consume cannabis ie, five or more times in a 30-day period, which is more relevant.[30] Other drugs apart from cannabis were consumed regularly at such low levels that they were not recorded.[31]

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27 For US statistics, see R Cropanzano and M Konovsky "Drug Use and its Implications for Employee Drug Testing" in GR Ferris (ed) *Research in Personnel and Human Resources Management* (JAI Press, London, 1993) 209 - 215. In Canada, see above n 14, 7 - 26. See below n 28, 25 - 26 for comparisons between NZ, Australia, Canada and the US.

28 S Black and S Casswell *Drugs in New Zealand - A Survey, 1990* (Alcohol and Public Health Research Unit, University of Auckland, Auckland, 1993).

29 SL Nolan *Drug Abuse in the Workplace: A Survey of the Evidence in New Zealand and Overseas* (ESR, Auckland, 1994) 12. Care should be taken with the ESR report as the Auckland Alcohol and Public Health Research Unit has voiced its concern over the way ESR has used its research, calling it "exaggerated" and "misleading". See Y Martin "Drug figures 'exaggerated'" *Sunday Star Times*, Wellington, New Zealand, 27 November 1994, A5. Dr Casswell, the Unit's Director, has also been reported as saying: "what we have to realise is that ESR is looking for work and [ESR's report] is a marketing exercise, not a piece of science." G Wong "Workplace Drug Testing" *NZ Herald*, Auckland, New Zealand, 10 September 1994, Section 3, 1.

30 Dr Casswell in the *NZ Herald*, above n 29. See also *Drug Abuse in the Workplace*, above n 29, 15.

31

DRUG	Cannabis	Cocaine	Opiates	Amphetamines	Benzodiazepines
Ever Used	43%	3%	3%	5%	2%
Used in last year	18%	0.4%	0.7%	2%	0.6%
Frequent Use (10 x pm)	3%	--	--	--	--

Compiled from n 28, 11 and 21 - 24.

Despite these low levels of drug use in New Zealand, and even lower workplace usage, these figures cannot be brushed aside.[32] A minimum assumed level of worker drug involvement has consequences for both employers and employees. The primary concern is the effect of drugs on worker performance, which includes productivity, efficiency, worker safety and absenteeism considerations.[33] The scientific literature is unanimous in its findings on the effects of drugs on the human mind and body.[34] We focus on marijuana, as this is by far the most common drug used by workers. However, the other drugs tested for by ESR will also be discussed.

Marijuana use impairs several cognitive functions. In addition to adversely affecting short and long term memory, learning ability is reduced and the time needed to make decisions increased. Users are also less able to divide their attention between two or more tasks and their attention span is limited. Psychomotor effects are also significant: co-ordination is impaired, as is the ability to perform repetitive tasks, while the user's perception of danger is altered, reaction times are slowed, and the user becomes more easily distracted and distressed. Marijuana has also been shown to have "hangover" effects similar to alcohol, where these effects can linger as long as 24 hours after consumption. Moreover, sustained marijuana use can result in significant deterioration in mental processes, affecting memory, disturbing concentration and judgement abilities as well as the capacity to formulate abstract thoughts and process information.

Opiates (usually in the form of heroin or morphine) act on the central nervous system and gastro-intestinal tract. Opiate use can bring on mood changes, decreased activity, drowsiness and slowed motor function.

Cocaine can paradoxically improve and impair worker performance. In the early stages of a low dose, users' energy, enthusiasm and productivity in simple tasks are increased. Tracking concentration and attention can also improve. On the other hand, users can overestimate their abilities and this can lead to greater risk-taking. Performance of complex tasks is also generally impaired due to over-stimulation of the neuro-psychological system. This over-stimulation can induce dramatic mood swings and hallucinations.

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32 See below, text accompanying n 144, for statistics on workplace cannabis usage.

33 See Privacy Commissioner of Canada *Drug Testing and Privacy* (Privacy Commissioner (Can), Ottawa, 1990) 6 - 8 and Privacy Committee of New South Wales *Drug Testing in the Workplace* (Privacy Committee (NSW), Sydney, October 1992) 7 - 9 and 27 - 29.

34 This discussion is based on the comprehensive summary of scientific findings in above n 14, 31 - 38. See also above n 27, 225 - 235.

Amphetamines exhibit similar stimulant effects as cocaine. At low doses, alertness, energy and concentration all improve. However, this is at the expense of ability to judge risk and make decisions. Amphetamines can also cause anxiety, depression and irritability. The adverse effects peak during the "hangover" period where physical and psychological functioning is impaired.

Finally, benzodiazepines (tranquillisers) are, like alcohol, central nervous system depressants. Memory function, perceptual-motor performance and dexterity may be impaired, along with decreased ability to concentrate, make decisions, and perform tasks requiring complex co-ordination skills.

The mixing of any of these drugs with alcohol increases the likelihood of impairment by compounding the effects of the two. Testing employees for drugs may have a strong deterrent effect on their use and serve to eliminate, or at the very least, minimise, performance problems which are drug-sourced.[35]

Employers also have other concerns which relate to drug use. Particularly in the USA, EDT has been part of the wider moral crusade against drugs as illegal substances per se. Tied to this has been the assumption that employees who are shown to have a proclivity for illegal activities (in that they use drugs) will engage in other acts of dishonesty such as workplace theft. There is also the concern that workers who use drugs will encourage others by using the workplace as a site to push and supply drugs. Moreover, there is significant public relations value in being able to promote one's workplace as being drug-free in the context of wider societal concern over drug use.[36]

However, some have seen a darker sub-text in efforts to bring in EDT: they see it as an example of increased Foucauldian-type control over the workplace to ensure worker docility and compliance.[37]

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35 The available evidence in NZ is limited and inconclusive: see text accompanying n 145, below. See also D Elmuti "Effects of Drug-testing Programme on Employee Attitudes, Productivity and Attendance Behaviours" (1993) 14 Int J Manpower 58, 67 claiming only "circumspect support for the claims of drug-testing proponents that the programmes can reduce drug abuse in the workplace, reduce accidents, drug-related injury, and improve overall productivity."

36 Above n 10, 6.

37 HJ Glasbeek and D McRobert "Privatizing Discipline: The Case of Mandatory Drug Testing" (1989) 9 Windsor Yearbook of Access to Justice 30, 55 - 59. See also FA Hanson "Some Social Implications of Drug Testing" (1988) U Kansas LR 899, 917: "Drug testing is just one of a long list of training procedures that operate in the disciplinary power of technology to inculcate automatic docility in the workforce."

In contrast, the driving rationale for the promotion and adoption of EDT in New Zealand has been worker performance and safety concerns. This is unsurprising in light of the common law and statutory obligations to provide for worker safety which characterise this side of the EDT debate. There are also the financial incentives provided by the ACC experience rating system, where a lower rate of workplace accidents reduces the premium an employer must pay to ACC. The debate has focused on heavy industry workplaces, as this is where dangers to life and limb arising from worker impairment are greatest, but it should be remembered that the law of workplace safety applies universally.

B The Legal Framework

While the adverse physical and psychological effects of drugs in the workplace have been convincingly researched and documented, there is no definitive legal opinion indicating whether New Zealand law in its present state allows, mandates, restricts or prohibits employee drug testing to deter drug use and these consequent effects on workplace performance and safety. This section first analyses recent cases which consider employees' drug involvement to determine a possible framework for assessing the legal boundaries of EDT. It then employs this framework in an evaluation of the law which regulates the employment relationship in an attempt to discover what those boundaries might be.

1 The approach of the courts to employee drug involvement: determining a framework

Neither the Employment Court, the Employment Tribunal, nor their predecessors have as yet furnished us with any direct consideration of EDT.[38] However, they have had occasion to deal with cases where employees have been dismissed for involvement with drugs (be it actual or suspected).

The most recent case is *Marriott v Parker Drilling Intl (NZ) Ltd.*[39] Mr Marriott worked on a oil drilling rig. As a result of the execution of a search warrant, a small amount of cannabis was found in his wallet. He was summarily dismissed for

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38 Two personal grievances, *Smith v A1 Radiator Specialists Ltd* Unreported, 12 April 1994, Employment Tribunal, Christchurch Registry, CT 66/94, Mr JM Goldstein and *Marriott v Parker Drilling Intl (NZ) Ltd* Unreported, 29 March 1996, Employment Tribunal, Wellington Registry, WT 40/96, Ms NM Crutchley, where EDT was involved have mentioned this fact but have not passed comment on the procedural aspects of the technique itself.

39 Above n 38.

breaching his employment contract, which prohibited the possession, soliciting, concealing or consumption of prohibited drugs. Despite the fact that the cannabis found was enough to cover a small fingernail only and Mr Marriott tested negative after a drugs test, the Employment Tribunal held that his dismissal was justified. This was because of the "heightened needs for consciousness of health and safety in the hazardous environment of a drill rig", the need for workers to be able to trust one another with their safety, and, as the employee was nonetheless in possession of cannabis, despite the rules, "the future trust such an employer can have in a worker who breaks these rules" was challenged.[40]

In *NZ Timber Industry Employees IUOW v Carter Holt Harvey Timber Ltd*,[41] the grievants who worked in a timber mill were accosted by a security officer who suspected them of smoking marijuana on their smoko break. They were then searched by the manager who recovered a cigarette butt. Upon examination by a police officer, this proved to be marijuana. After interviews with each of the grievants, they were summarily dismissed. The manager's decision was upheld by the Labour Court on the basis of safety considerations.

The employment institutions are equally convinced of the gravity of employees' involvement with drugs outside the workplace.[42] The most well-known of these cases is the 1986 *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd*.[43] In this instance a cabin attendant was arrested and charged with a number of drug offences. The report in the newspaper of her arrests gave both her name and occupation. On the same day she was suspended with full pay, following an interview with management (a union official was also present). Some months later, she pleaded guilty to experimenting with cocaine twice on one day and was convicted. She appealed. The charge against her was dismissed under s 42 of the Criminal Justice Act 1954, which was deemed to amount to an acquittal. Unfortunately, by this stage she was now unemployed, having been dismissed once the news of her conviction had come to the attention of management. Despite her subsequent acquittal, the Arbitration Court found that her dismissal was justified.

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40 Above n 38, 18. Note that the Tribunal did not look at the provisions of the Health and Safety in Employment Act 1992 in any depth but did approve of EDT as a means of satisfying its requirements.

41 [1990] 3 NZILR 855.

42 The *locus classicus* for the proposition that employee misconduct outside the workplace can be, in certain circumstances, the legitimate concern of the employer is *Clouston & Co Ltd v Corry* [1906] AC 122, 129 (PC), on appeal from NZ.

43 [1986] ACJ 462.

Uppermost in the court's reasoning was the damage done to Air NZ by the publicity. The court said: "[w]e cannot think of a matter more damaging to the reputation of an international airline than the employment ... of a person who has been ... involved with cocaine."[44] The court also touched on the security risk involved with drug use, stating that if this had been known "she could have become the subject of approaches by people involved in drugs to act as a courier."[45] Finally, the court briefly mentioned safety concerns with drug-addicted workers: "if ... addicted ... then usefulness in an emergency would be dubious."[46]

Three years earlier, the Arbitration Court had considered the personal grievance of an employee dismissed following his conviction in the District Court on two cannabis charges (possession and possession for supply).[47] The court pointed to the fact that the employee had breached Databank's house rules on drugs; thus the company was entitled to summarily dismiss him. Moreover, the dismissal was justified on the ground that the employee had become an "unacceptable security risk"[48] as he "*could*, by reason of his association with the supply of drugs, be possibly put under pressure from other people to provide information from the Databank system for gain."[49]

What these cases show is that an employee's involvement with drugs is serious misconduct that clearly constitutes grounds for summary dismissal, whether it breaches an employer's house rules or not.[50] Employees have even been dismissed for failing to control other employees under their supervision who have used drugs at work.[51] Although different considerations appear to underpin justifications for dismissal in on-job situations (safety) and off-job situations (security and employer reputation), the cases are in agreement about the seriousness of such activities per se. However, we must note that having such a strong substantive justification does not "displace the need for procedural fairness."[52] Summary dismissal is no exception to the requirement

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44 Above n 43, 464. The court also said: "The publicity surrounding her arrest, coupled with the interest that the public does show in drug related offences, inevitably, we think, brings discredit on her employer and makes it difficult for her employment to continue."

45 Above n 43, 464.

46 Above n 43, 464.

47 *NZ Bank Officers' IUOW v Databank Systems Ltd* [1984] ACJ 21.

48 Above n 47, 23.

49 Above n 47, 26.

50 Summary dismissal occurs when the employee is dismissed without being given the required period of notice. This type of dismissal is justified where the employee's misconduct is sufficiently serious to justify immediate termination of the employment: G Anderson et al *Butterworths Employment Law Guide* (2 ed, Butterworths, Wellington, 1995) 272.

51 *Northern Hotel, Hospital etc IUOW v Mt Wellington Trust (t/a Waipuna Lodge)* [1989] 3 NZILR 710.

52 Above n 50.

that both procedural and substantive fairness must be present if the employer is to avoid a personal grievance claim for unjustified dismissal.

This point is sharply underscored by several cases where attempts to dismiss employees for involvement with drugs (both in and out of the workplace) have been overturned because employers failed to comply with the requirement of procedural fairness.

For example, in *Syafrie v HJ Ryan Ltd*,[53] although several colleagues of Mr Syafrie had signed statements to the effect that they had seen Mr Syafrie smoke marijuana at work several times and on at least one occasion had purchased marijuana from him, the Employment Tribunal refused to uphold the dismissal because "there was no complete and fairly conducted enquiry." [54] In *MacFarlane v South Pacific Tyres Ltd*, three dismissals were overturned due to the employer's failure to investigate properly charges of marijuana smoking at work.[55] In 1988, a cabin attendant was been charged with conspiring to import lsd and cocaine. He was dismissed because complying with his bail conditions made carrying out his duties impossible. He was reinstated, with the lack of procedural fairness being a critical factor in the Labour Court's decision.[56] Similarly, in a 1987 case, where a supervisor claimed to have caught three employees smoking marijuana and they were subsequently dismissed, the court refused to uphold the decision as it was procedurally unfair.[57] In 1985, where the police found a quantity of cannabis in a freezing worker's hut and his employer then dismissed him, the court ordered him to be reinstated. The primary reason was "unfairness in the method of dismissal."[58]

These cases demonstrate the importance of procedural fairness when dealing with employees who are involved with drugs. Any employer who wishes to institute EDT must do so well aware of this point. But what do the courts mean by procedural fairness - especially in drugs cases?

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53 Unreported, 8 July 1993, Employment Tribunal, Auckland Registry, AT 174/93, Ms C Hicks.

54 Above n 53, 11.

55 Unreported, 8 June 1995, Employment Tribunal, Wellington Registry, WT 61/95, Mr PR Stapp.

56 *Airline Stewards & Hostesses IOUW v Air NZ Ltd* [1988] NZILR 503.

57 *NZ (with exceptions) Food Processing, Chemical etc Factory Employees IUOW v Sealord Products Ltd* [1987] NZILR 14.

58 *Squire v Waitaki NZ Refrigerating Ltd* [1985] ACJ 370.

In 1990, the Court of Appeal considered this question and stated: "an employer must prove that, as a result of a complete and fairly conducted enquiry, it was justified in believing that serious misconduct had occurred."[59] In its various characterisations, "a full investigation"[60] or "full and fair investigation"[61] or "proper inquiry"[62] is necessary to satisfy the procedural fairness requirement. These terms indicate that the employer must be thorough when exploring instances of employee drug involvement. What is procedurally fair will, to some extent, depend on the circumstances. Nevertheless, whatever the circumstances, the procedural fairness requirement does not lessen because the method of detection is a form of chemical testing.

Since its inception, the Employment Court has tended to run together the concepts of substantive justification and procedural fairness. The Chief Judge has commented that such distinctions are "unhelpful."[63] This comment has recently been echoed by the Court of Appeal, which has stated that there is "... no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all the circumstances."[64] Although this practice has been criticised by some,[65] in the context of EDT, the courts' alignment of these two requirements for a justified dismissal is particularly apt.

Before the arrival of technical methods for detecting employee drug-related activities, the discovery of such involvement and the actions subsequently dealing with it could be neatly disaggregated. Employers found out either through physical searches, by smell or when employees' involvement with criminal proceedings came to their attention. Procedural fairness, in these cases, was separate from knowledge of serious misconduct.

Now, however, the ground has shifted. The very nature of EDT means that finding out about an employee's possible drug use occurs at the same time as an employer is conducting the inquiry which may lead to dismissal. Substantive justification is linked more closely to procedural fairness than ever before. On this point,

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59 *Airline Stewards & Hostesses IOUW v Air NZ Ltd* [1990] 3 NZLR 549, 552 - 553; [1990] 3 NZILR 584, 589 (CA) flld above n 41, 859.

60 Above n 50, 328.

61 Above n 41, 861; above n 59, 555 citing the decision of the Labour Court in the same case.

62 Above n 50, 328, summarising the requirements of *Airline Stewards & Hostesses IOUW*, above n 59.

63 *Madden v NZ Railways Corp* [1991] 2 ERNZ 690, 705.

64 *Nelson Air Ltd v ALPA* [1994] 2 ERNZ 665, 668.

65 See Simperingham above n 3, 12.

Chief Judge Goddard has recently said:[66]

> [P] rocedure is power. Those who have control over the procedure may well thereby unfairly obtain control over the outcome.

These remarks are a timely reminder that taking steps to ensure the procedure is properly conducted is crucial if the employee is to be "treated fairly in all the circumstances",[67] given its centrality to both substantive justification and procedural fairness in the drug testing context, where control over both requirements is in the hands of the employer. The procedure should be underpinned by evidence for its need. A clear nexus should be established between the request/requirement to undergo EDT and the reason for detecting employee drug use. Both legal and empirical/scientific justifications are important considerations. Finally, the process itself should be fair:[68] legal rights should be respected in its execution, and the testing process should produce reliable and accurate results.

Determining from these broad guidelines what procedural fairness will require in specific cases in advance can only be a speculative exercise. However, it is suggested that employers inform employees of the reason a test is being requested,[69] whether the test is mandatory or voluntary,[70] and what consequences will follow a refusal to be tested[71] or a positive result. When drug use is indicated, the employer should keep an open mind, and not act out of malice, in haste, or with only partial knowledge. Further, the employee should be given an unbiased opportunity to explain and the employer should not rely solely on the findings of a third party such as the police.[72] In short, care must be taken to ensure that the employer's actions are beyond reproach. The number of cases where employers have failed to satisfy the courts of the fairness of the investigation procedure in drugs cases indicate that the courts will accept nothing less.

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66 *Drummond v Coca-Cola Bottlers NZ* [1995] 2 ERNZ 229, 232 - 233.

67 Above n 64.

68 "[There is] a duty on the part of the employer, if carrying out an inquiry preceding a resignation or dismissal ..., to do so in a fair and reasonable manner": *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, 383 per Cooke J.

69 See the matrix in Part II D above, for possible rationales.

70 Information Privacy Principle 2 (1)(e) (s 6, Privacy Act 1993).

71 Information Privacy Principle 2 (1)(f).

72 See above n 58, 375: "it is not sufficient for an employer to rely upon the evidence of a police officer [he] should make his own enquiries." Information Privacy Principle 2 (1) also makes it clear that the employer should collect the information (in this case, the urine sample which may indicate drug use) directly from the person concerned. Relying on court or newspaper reports and/or the words of another may now no longer be acceptable.

In summary, the following considerations should be taken to be the minimum requirements for fairness in the context of EDT: an employer should not be able to introduce this method of detection without pointing to its serving some useful purpose and being justified by law, while the method used should not infringe an employee's already existing rights and should be scientifically rigorous.

2 *Does the law encourage or justify EDT?*

We have outlined the possible consequences that may follow from employees using drugs in the workplace. These concerns alone may justify an employer instituting an EDT programme, solely for its presumed deterrent effect. However, we must also examine present law to see whether any legal justification for EDT exists. Such an assessment will assist in determining whether EDT is a fair and reasonable method for dealing with workplace drug problems. Moreover, legal justifications may reinforce employers' practical concerns.

(a) *Common law employer duties to ensure the physical safety of employees*

It is an implied term in every employment contract that the employer owes a duty of care towards all of its employees to ensure their physical safety while at work.[73] This duty is threefold: the employer must "observe reasonable care in selecting a competent work team in order that the incapacity or inexperience of any employee should not produce dangerous situations causing injury to the others";[74] the employer must provide and maintain a safe system of work;[75] and the employer must provide safe plant, equipment, tools and appliances.[76]

The first aspect of this duty is particularly relevant to EDT. Employers wishing to avoid liability for injury to an employee resulting from another employee's drug-induced incapacity could claim that pre-employment screening for drug use is a necessary part of selecting competent staff; further, continued screening is necessary to maintain compliance with this duty. The requirement to keep safe plant and so forth is necessarily tied to those who use it and bolsters concerns over worker competence.

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73 This is long-established: see *Smith v Charles Baker & Sons* [1891] AC 325, 326. In Australia, see *O'Connor v Cmr for Government Transport* (1959) 100 CLR 225, 229. In New Zealand, breach of this duty may be cause for a personal grievance for unjustifiable action: *NDU v Sheridee Holdings Ltd* [1991] 2 ERNZ 675.

74 A Szakats *Law of Employment* (3 ed, Butterworths, Wellington, 1988) 196.

75 Above n 74, 197.

76 Above n 74, 198.

While these duties of care and skill[77] are not absolute and could generally be discharged by other methods of detecting and dealing with drug problems such as performance testing, computerised skill testing, employee assistance programmes and counselling, it does not prohibit employers from being especially cautious and going beyond what the law requires. Moreover, there may be some workplaces, like the oil rig in *Marriott*, where the nature of employment and the circumstances of the case are such that the employer's duty of care can only be fulfilled through using EDT. In these cases, an employer who breached the duty of care by not using EDT would be liable in negligence for property damage or a claim for exemplary damages if personal injury had resulted.[78]

From this analysis, it can be said that these common law duties provide a permissive, and in some cases, mandatory, framework for employers to institute EDT. In their present formulation, they certainly do not restrict it.

(b) Employees' common law duty to exercise reasonable care and skill in the workplace

Mirroring the employers' duty, at common law, by making themselves available for work, employees impliedly warrant that they are fit to work. This warranty is expressed as a general duty to exercise reasonable care and skill in carrying out the terms of employment.[79]

Discussing this duty in *Lister v Romford Ice & Cold Storage Co*, Lord Radcliffe said:[80]

> If the contract of employment is viewed as a general legal relationship in which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him 'with all faults' and that the employee does not by virtue of his engagement impliedly undertake to use all reasonable care in the conduct of his employer's affairs.

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77 JJ Macken et al *The Law of Employment* (3 ed, Law Book Co, Sydney, 1990) 112.

78 Claims for compensatory damages for personal injury have, of course, been statute-barred since 1974 by NZ's accident compensation legislation.

79 This duty was first formulated in *Harmer v Cornelius* (1858) CB (NS) 236, 246; 141 ER 94, 98 per Willes J. Note that although in that case the duty was characterised as one of "skill", in recent cases "care" and "skill" have been taken as equivalent. See *Janata Bank v Ahmed* [1981] ICR 791, 795 - 796 quoting Viscount Simonds in *Lister v Romford Ice & Cold Storage Co* [1957] AC 555, 573: "'skill' ... embraces care."

80 *Lister's* case, above n 79, 586.

All tasks required of the employee are covered by this duty, which exists both in contract and tort. The duty entails an obligation not to harm the employer, fellow employees, third parties and oneself.[81]

This common law duty is paralleled by s 19 of the Health and Safety in Employment Act, where employees are to take all practicable steps to ensure their own and others' safety in the workplace. As will be demonstrated, the term "all practicable steps" requires a very high standard of care to ensure compliance.

The combined force of these employee duties constitutes a strong case for arguing that employees have a duty not to harm others through drug-induced impairment or incapacity. As noted, employees cannot expect to have "all their faults" accommodated. Drug use would certainly be one of the less tolerable faults an employee might exhibit. Being drug-free would be a reasonable, if not minimum, step towards fulfilling these common law and statutory duties. Thus employees, for their part, should support employers who bring in EDT, or at least, not resist.

(c) Employers' statutory duties to provide for the prevention of harm to employees while at work

Common law duties have largely been superseded (although not replaced) by the legislative occupational health and safety regime introduced in April 1993 by the Health and Safety in Employment Act 1992 (HSE Act). The overarching principle of this Act is "to provide for the prevention of harm to employees while at work."[82] To achieve this goal, a number of duties are imposed on employers and others (such as contractors).

The central duty of the HSE Act is found in s 6, which states: "Every employer shall take all practicable steps to ensure the safety of employees while at work." Under s 6, employers have a number of other duties. The one most relevant to a consideration of EDT is imposed by s 6(a) where employers must take all practicable steps to "provide and maintain for employees a safe working environment." At first glance, we can see that ensuring the workplace is drug-free fits in with complying with these provisions. Drug-impaired workers can create situations that are unsafe. Identifying these workers through an EDT programme and removing them from the workplace ties in with the requirement of ensuring worker safety.

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81 Above n 74, 174.

82 Section 5.

The phrase "all practicable steps" governs several important employer duties in the HSE Act. Aside from the general duty of ensuring worker safety in s 6, employers must also take "all practicable steps" to (i) eliminate,[83] or (ii) isolate, where elimination is impracticable,[84] or (iii) minimise (if options (i) and (ii) are impracticable),[85] significant hazards to employees. To assess the relevance of these duties, we must first investigate whether employee drug use is a "significant hazard" and therefore should be subject to a hazard management regime as required by ss 8 - 10. "Significant hazard" is defined as:

> [A] hazard that is an actual or potential cause or source of -
>
> (a) Serious harm; or
>
> (b) Harm (being harm that is more than trivial) ...;

"Hazard" is defined as:

> An activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; ...

Employee drug use comes within this definition as either a "substance" (the drugs themselves) or an "event" (employees being under the influence of drugs) or a "situation" (employees having used drugs). The definition also makes it clear that it makes no difference whether the drug use occurs on or off the employer's premises: provided that "hazard" is interpreted to cover drug involvement, which does not strain the definition, it will be covered.

However, an employer seeking to discover whether an EDT programme is justified under the HSE Act needs to do more than this. Drug involvement must be a "significant hazard" before it is subject to ss 8 - 10. Whether the consequences of employee drug-impaired activities result in serious harm or harm can only be judged in hindsight. But an employer does not need to point to any such harm to characterise drug use as a significant hazard. If we look again at the definition of significant hazard, we see that the hazard need only be a *potential* cause or source of harm. Given the scientific findings on the effects of drugs, it is difficult to argue that employees who are impaired due to drug use are *not* a potential cause of harm in the workplace. The corollary of this is that they should be identified and/or deterred from drug use (or in the language of ss 8 and 9, "isolated" and "eliminated") via EDT.

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83 Section 8.

84 Section 9.

85 Section 10.

Instituting an EDT regime can be seen as a significant, and possibly necessary, part of ensuring compliance with the hazards management sections of the HSE Act as well as the s 6 duty of ensuring a safe workplace. Note that the duty in s 7 of having effective methods in place for identifying hazards is not qualified, with the requirement of effectiveness implying a stronger duty[86] (to seek out employee drug use through a testing scheme) than the qualification that employers are only required to take "all practicable steps" to eliminate, or isolate or minimise hazards. This buttresses the case for EDT. However, we should still consider whether EDT falls within the ss 8 - 10 requirements; or is it beyond the "practicable steps" imperative, which might be less encouraging of EDT? What does "all practicable steps" mean?

After the HSE Act was enacted, comment was made that these statutory duties were no more stringent than those imposed by the common law.[87] The common law imposes a test of reasonableness; under statute the employer's obligations are qualified by what is "reasonably practicable."[88] This is less than what might be required by a test of pure practicality since to do what is practicable[89] involves doing more than what is reasonable.[90]

Given this point, what relevance are ss 6, 8, 9 and 10 of the HSE Act to questions of the legality of EDT? What do they add to common law obligations? Some indication of this has been furnished by recent judicial considerations of the key phrase in the Act "all practicable steps." Even at this early stage, it appears that the phrase "all practicable steps" imposes a higher duty than the common law would require, despite their similar wordings.

As David Wutzler comments, the "[courts'] overriding attitude appears to be that if harm is foreseeable, the employer can be expected to do something about it."[91] For instance, employers have been held not to have taken all practicable steps to ensure

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86 *Mazengarb's Employment Law* (Butterworths, Wellington, February 1996) Vol 3, para 6007.3.

87 See R Wilson "Occupational Safety and Health: Implications of the new OSH Environment" (Speech to the Employment Relations Conference, Auckland, 14 -15 February 1994) 6 and 8.

88 See s 2, where "all practicable steps" is defined as "all steps ... that it is reasonably practicable to take."

89 Defined by J Munkman *Employer's Liability at common law* (8 ed, Butterworths, London, 1975) 274 as "that which is feasible or possible."

90 See the discussion in above n 86, para 6002.8 on this point.

91 D Wutzler "How Far Should an Employer Go?" [1995] ELB 63.

employee safety even when:

(i) the employer may not have known about the specific hazard;[92]
(ii) a Department of Labour Inspector had not noticed a particular hazard;[93]
(iii) an employee was deliberately disobedient;[94]
(iv) harm would only result if an employee did something careless[95] or irrational.[96]

Note that the emphasis is not on reasonable foreseeability (which is expected on a strict reading of s 2), but the lower standard of possible foreseeability. Thus, in the context of EDT, it seems that it is not even necessary for the duties relating to significant hazard or workplace safety to be triggered by knowledge of drug use in a specific workplace: all an employer would need to be aware of would be the adverse effects of drugs on worker performance and the consequences this might have for worker safety, whether such a problem existed in its workplace or not. Once this awareness is established, an employer must take *all* practicable steps to deal with this potential problem, not simply *some* practicable steps. The duties are cast very widely: the HSE Act not only paves the way for the introduction of EDT; employers, whether they like it or not, appear to be being forced down that path to comply with their HSE duties.

This conclusion is reinforced by HSE Act cases which comment generally on the workplace safety and hazard identification and management provisions. Judge Abbott in *Department of Labour v Eaden* said that "[i]t is no longer acceptable simply to react to hazardous situations as and when they arise ... an employer must be proactive."[97] Judge Everitt also emphasised the need for employer proactivity in *Regina Ltd*, observing that this required the employer to: "seek out all hazards and to take steps to

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92 *Health and Safety Inspector v Chas Luney* Unreported, 23 March 1995, District Court, Christchurch Registry (undefended hearing, oral decision).

93 *Health and Safety Inspector v Donaghys Industries* Unreported, 27 January 1994, District Court, Christchurch Registry, (undefended hearing, oral decision by Judge Noble); *Knowles v Griffins Foods Ltd* Unreported, 10 May 1994, District Court, Papakura Registry, CRN 4055004540, Judge Harvey, 3.

94 *Mair v Frasers Bacon Ltd* Unreported, 24 February 1994, District Court, Dunedin Registry, CRN 3012009612, Judge Everitt, 8; *Health and Safety Inspector v Nice and Natural Ltd* Unreported, 21 April 1994, District Court, Auckland Registry, (undefended hearing, oral decision by Judge Lawson).

95 *Department of Labour v de Spa* [1994] 1 ERNZ 339, 346.

96 *Mair v Regina Ltd* Unreported, 4 March 1994, District Court, Dunedin Registry, CRN 3045004405, Judge Everitt, 18.

97 [1995] DCR 801, 822. Overturned on a different point: *Eaden v Department of Labour* Unreported, 13 February 1996, High Court, New Plymouth Registry, AP 34/95, Morris J.

prevent injury to workers."[98] Note that his Honour refers simply to "steps", not simply those which are reasonably practicable, and to "hazards", not just "significant hazards".

These activist interpretations of the HSE Act's provisions place a heavy onus on employers to ensure worker safety and may be more than employers, employees or Parliament expected. The courts have seen the Act as ushering in a new occupational health and safety regime; employers must change their practices to suit the new climate. For example, Judge Abbott has stressed that the Act requires "a complete change in attitude on the part of employers",[99] while Judge Everitt has said that:[100]

> The Act contains a new philosophy. ... Employers are now required to be analytical and critical in providing and maintaining a safe working environment. It is not just a matter of meeting minimum standards and codes laid down by statute. It requires employers to go further and to set their own standards commensurate with the principal object of the Act, after due analysis and criticism. This is a new duty cast upon employers.

It could be said that EDT is an unforeseen recent development which Parliament did not consider and did not intend that it become a mandatory part of health and safety programmes. But in *Department of Labour v Eastern Auto Spares Ltd*, Judge Boshier said:[101]

> The Court must look at what is reasonable and practicable, not by looking over the past, ... but looking at developments in technology and what expectations are in the 1990s.

Cognisant of technological advances, the courts are fitting the legislation to suit. Employers have the technology at hand to use EDT; given this, they should not shy from it. In *Mariott*, the only case to consider EDT in conjunction with the HSE Act, the Employment Tribunal accepted the employer's submissions that the Act "places stringent burdens on employers to take all practicable steps to ensure the safety of workers ... " and that the employer had adopted an EDT policy in order to comply with its HSE Act obligations.[102] This case gives greater force to arguments that the introduction of EDT is mandated by the HSE Act.

Judicial interpretations of the HSE Act's provisions for worker safety present an interesting study of the courts placing higher burdens on employers than might have been thought desirable or possible by those who drafted the legislation. On a reading of the cases, the implications for employers point to the mandatory introduction of

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98 Above n 96, 18.
99 Above n 97, 822.
100 Above n 96, 18 - 19. The same passage also appears in *Frasers Bacon*, above n 94, 14.
101 Unreported, 7 June 1995, District Court, Auckland Registry, CRN 4004066892, 7.
102 Above n 38, 10.

drug testing as one of the steps (be it a reasonably practicable, a practicable, or simply a possible step) an employer must take to deal with the potential problems which may arise from employees who may be drug-impaired and where harm may result to others as a consequence. Theoretically, this onus is high, but the actual likelihood of calls from unions for employers to bring in EDT is minimal,[103] and it does not seem to be a priority for the Department of Labour Inspectors who enforce the Act. However, the present judiciary are unlikely to look unfavourably upon those who do introduce EDT.

(d) Duty to be a "good employer"

The duty to be a "good employer" under s 56(1) of the State Sector Act is also pertinent to this discussion of EDT. Section 56(2) outlines what it means to be a good employer. This duty includes the provision of "good and safe working conditions".[104]

Cases considering the term "good employer" are yet to consider the scope of the employer's duty to provide good and safe working conditions. Presumably therefore, the sections of the HSE Act provide some guidance for public sector employers. In addition we should note the comment of Judge Travis in *Matthes v NZ Post Ltd (No 3)* that this statutory duty adds little to the employer's ordinary common law duties to be a good employer.[105] If the State Sector Act and common law duties can be defined in part by reference to common law and statutory health and safety duties, this brings additional authority to the proposition that employer duties to ensure worker safety allow, if not positively encourage, the introduction of EDT.

(e) Other justifications

The State Sector Act also contains some other provisions which could be used to justify EDT. For example, under s 56(3), a CEO is to ensure that "all employees maintain proper standards of integrity, conduct and concern for the public interest." To provide some guidance as to the interpretation of s 56(3), the State Services

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103 The CTU has opposed EDT on privacy grounds. It also considers that checking the risk to workplace safety that drug-impaired workers may pose is very small, and characterises it as a diversion from dealing with the principle hazards that occur in the workplace, which are physical (noise, vibrations etc), ergonomic, chemical, psychosocial and biological. See CTU "Substance Abuse (Drug) Testing in the New Zealand Workplace - The New Zealand Council of Trade Unions' Response" (CTU, Wellington, 1994) Appendix 1.

104 Section 4 of the SOE Act 1986 also imposes a duty to be a good employer. The Act has the same provision for good and safe working conditions (s 4(2)(a)) but is narrower in its EEO requirements.

105 [1992] 3 ERNZ 853.

Commission may issue a code of conduct "covering the minimum standards of integrity and conduct that are to apply in the Public Service" under s 57. Such a code could rule against the use of drugs by employees within and without the workplace.[106] EDT would then be a way of ensuring that employees are complying with the code.

The Act also empowers the CEO to order staff or job applicants to undergo medical examinations.[107] A CEO could employ this section to incorporate urine testing for drugs along with testing for other conditions into a routine medical examination.

In addition, given that drug taking is *ipso facto* illegal behaviour, regardless of whether it affects the performance of the employee, section 56(3) could be used to back up an EDT programme as part of guaranteeing that employees' conduct complies with the law. Private sector employers could likewise say that they were testing employees for drugs to ensure that they were not breaching company drugs policy or engaging in serious misconduct.

(f) Employer and employee mutual duty of trust and confidence

Termed "the most significant development in ... implied [terms] since 1970",[108] the duty of employer and employee to maintain each other's trust and confidence is one of the few duties imposed on both parties. Developed by English courts in the 1970s, this mutual duty to maintain trust and confidence was adopted by the New Zealand Court of Appeal in 1985.[109]

Interestingly, this duty has not been mentioned in cases which have dealt with employee drug involvement.[110] This omission is surprising, as it would be expected that as well as the concrete safety and security reasons on which the courts have focused, the issue of an employee's involvement with drugs would go to the heart of the duty of trust and confidence.

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106 The code issued in 1990, while not mentioning drugs specifically, states: "Public servants are expected ... to refrain from conduct (such as the use of intoxicants) which might impair work performance." State Services Commission "Public Sector Code of Conduct" (SSC, Wellington, 1990) 19.

107 Section 82.

108 R Rideout *Rideout's Principles of Labour Law* (5 ed, Sweet & Maxwell, London, 1989) 91.

109 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

110 Although employee drug use was once said to have been a factor in an employer's loss of trust in an employee, as well as a number of other misdemeanours, this specific instance is not the same as the overall breakdown of the duty of trust and confidence: *Wakeley v Three Brothers* Unreported, 24 June 1993, Employment Tribunal, Auckland Registry, AT 162/93, Mr BW Stephenson, 10.

Although its existence is now well-accepted, the exact details of the duty are hard to pin down. It has been linked to the employee's duty of fidelity and the employer's duty of fair dealing,[111] the employer's duty of fair and reasonable treatment,[112] said to be seen in "good management practice",[113] characterised as a duty to treat each other "with respect",[114] or to "act reasonably towards each other",[115] or to act "in good faith and in a co-operative, and not in a disruptive way".[116] Yet while the duty of trust and confidence is related to all of these duties, it remains a separate duty with its own particular meaning.

Given these difficulties in untangling the definition of the duty of trust and confidence from other duties which accompany the employment relation, we focus first on the mutual aspect of trust and confidence: what may each party may expect of the other to maintain this relationship? What should each party do to observe this duty?

Central to the employment relationship is the not unreasonable expectation that employees will be able to do their jobs: theirs is a co-operative effort with the employer, and the other employees. Employers who wish to introduce EDT may say that EDT is a tool to ensure that they can have confidence in their employees to do their jobs drug-free. Employers should be able to trust that their workforce will apply themselves to the task at hand, be it the production of policy advice or tin cans, secure in the knowledge that these efforts will not be jeopardised by drug-impaired workers or workers more intent on supplying drugs to others than doing their jobs. Unfortunately, several cases have shown that employers cannot blindly have this sort of faith. It may be necessary to use EDT in order to reassure employers that they can have this level of trust and confidence in their employees.

As a corollary, employees should not work drug-impaired if they seek to maintain their employer's trust and confidence. Employees should also be able to trust their employer to take the necessary steps to safeguard them from the hazards created by co-workers who flout these minimum employer expectations. EDT should therefore be seen as a sensible means of assisting employers and employees to keep their levels of trust and confidence in each other that theirs is a safe and productive workplace.

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111 Cooke P in *Tisco Ltd v CEWU* [1993] 2 ERNZ 779, 782: "the duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence."

112 Above n 68, 383.

113 *Anderson v A-G* Unreported, Court of Appeal, 23 October 1992, CA 292/91, Richardson, Gault & Mackay JJ, 10 - 11.

114 IT Smith and JC Wood *Industrial Law* (2 ed, Butterworths, London, 1983) 129 - 130.

115 J Hughes "The Contract of Employment" in above n 50, 1001.

116 *CEWU v Tisco Ltd* [1992] 2 ERNZ 1087, 1098 per Chief Judge Goddard.

C *How Strong is the Impetus for EDT?*

The various legal duties which relate to maintaining a safe workplace, to be a good employer, and the duty of trust and confidence, appear to justify and in some cases, possibly mandate, EDT. Employers are not only in general encouraged by law to use EDT, but the circumstances of a particular workplace and the way judges have extended the boundaries of the HSE Act mean that EDT may be a mandatory step for employers in complying with their common law and statutory safety duties. The analysis of the duty of trust and confidence reinforces these points by unravelling what parties may expect from each other in the workplace.

While these points have not yet been tested in a court, the legal justifications for detecting drug use by employees, and thus the use of EDT, are strong. However, as we shall see, there are also some strong arguments against the procedure itself.

IV LEGAL CONSTRAINTS ON EDT

As the law which relates to EDT had been developed before it became necessary to consider where EDT is sited in the legal landscape, it is unsurprising that EDT's proponents and opponents can each find support in law for their claims. We have examined the role of the law in supporting the introduction of EDT. Opposing these arguments are laws which point to the opposite conclusion: the NZ Bill of Rights Act 1990, the Human Rights Act 1993. EDT also raises concerns over potential breaches of employee privacy rights and the common law duty of employer and employees to keep each other's trust and confidence.

This section considers the duty of trust and confidence from a different perspective and examines the role of the Privacy Act in constraining those who would bring in EDT.[117]

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117 While NZ Bill of Rights Act issues are a strong weapon for those opposing EDT, no attempt will be made to duplicate the extensive survey of US case law and anti-EDT arguments made by A Shaw, above n 3. For argument relating to the Human Rights Act, see J Edwards "Workplace Drug Testing" (1995) Human Rights L & Practice 43, but cf M Webb "Workplace Drug Testing: Another Perspective" (1995) Human Rights L & Practice 131 and P Swarbrick and M Pinsonneault "The Employers' Perspective" [1995] NZ Law Rev 82, 84 - 86. See also Simperingham, above n 3, 24 - 27 (HRA) and 40 - 42 (NZBORA).

A Duty of trust and confidence

Previous discussion of this duty focused on what employers and employers should be able to expect from one another. Underpinning their expectations is an assumption of a certain standard of behaviour which they should observe. This is the second part of the duty of trust and confidence: employer/employee expectations should be fulfilled according to certain standards.

Employers who wish to maintain the trust of their employees should be careful not to introduce EDT in a way that creates industrial friction. They should seek their employees' co-operation in their goals. Unless convincing arguments can be made for the necessity for introducing EDT such as HSE duties or real evidence of workplace drug use, and moreover, are accepted, employees are likely to resist EDT, seeing it as another attempt to undermine employee autonomy.[118] Where alternative methods of detecting employee drug use exist, employees are also likely to be suspicious of employer motives in bringing it in. Questions are likely to be asked over whether EDT is really about ensuring a safe workplace, or a means of asserting management control.

The presumption of guilt which underlies EDT, against which workers must prove their innocence (especially where testing is random and without cause), contravenes generally agreed standards of fairness. Employers could be seen to be lacking the confidence in their employees to treat them as responsible individuals who abstain from involvement with drugs. This in turn has the potential to sour the employer/employee relationship, turning it into one of mutual mistrust. EDT may therefore be seen as the catalyst for the weakening of the relationship of trust and confidence, not a means of maintaining it.

Obligations also attach to the method of carrying out EDT. Employers should act reasonably and fairly: this includes taking care not to violate employees' rights. Employers should also respect the dignity of their employees if they are to test them for drugs, carrying out the testing in a manner that is not demeaning nor degrading. This will be difficult, if not impossible, if employers rely on urinalysis. These concerns will be elaborated on in our discussion of privacy rights.

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118 Although the duty is a mutual one, we should remember that it is borne by two separate parties. Neither should be subordinated to the greater entity of the workplace and its requirements.

B Privacy rights

Central to any discussion of privacy rights must be the regulatory scheme for controlling personal information set up by the Privacy Act 1993. The Act aims to "promote and protect individual privacy" by establishing certain principles which relate to the "collection, use and disclosure ... of information relating to individuals."[119] It should be noted that the Act does not speak to drug testing per se. Rather, the Act regulates the way in which drug testing may be done as it creates a scheme for agencies[120] dealing with personal information. Bodily fluids such as urine (or other substances such as blood, hair or saliva) which may be tested for drugs are included in this scheme as they come within the scope of "personal information" under s 2.[121] "Information" is not defined in the Privacy Act, but was said by McMullin J in *Commissioner of Police v Ombudsman* to be "that which informs, instructs or makes aware."[122] Thus the collection and use of the personal information contained in bodily samples will be governed by the series of Information Privacy Principles (IPP) in s 6 which outline the scope of the right to privacy enjoyed by individuals.

The Act's main focus is the control of information (data privacy). However, the Act does also touch on physical privacy, where it is relevant in the collection of personal information. The principles most salient to EDT are IPP 1 and IPP 4.[123] IPP 1 (Purpose of collection of personal information) is the first hurdle for an employer wishing to bring in EDT. It states:

> Personal information shall not be collected by an agency unless -
> (a) The information is collected for a lawful purpose connected with a function or activity of the agency; and
> (b) The collection of the information is necessary for that purpose.

The first prong of this test can be satisfied by the existence of laws requiring certain standards of workplace safety ie, employers' and employees' common law duties, the HSE Act requirements, and the relevant aspects of the good employer principle. Trust and confidence arguments could also be used as justifications, but as we have seen, the

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119 Long Title, Privacy Act 1993.

120 This term is defined so widely so that "in practice ... virtually every individual and organisation in New Zealand today falls under the definition of 'agency'": P Roth *Privacy Law and Practice* (Butterworths, Wellington, 1994) para 102.

121 Section 2 defines personal information as "Information about an identifiable individual."

122 [1988] 1 NZLR 385, 402.

123 Note that we have already discussed IPPs 2 and 3 in Part III B above. These principles are more relevant to gaining employee consent to EDT rather than the procedure itself, which is the focus of this section.

duty of trust and confidence can also counsel against the use of EDT. Other justifications have been explored such as the need to ensure workers are not engaged in serious misconduct (which, as the cases show, includes a wide range of drug-related activities). Testing employees for drugs could be a way of making sure that workers are not dismissed without substantive justification so that employers comply with the requirements for justified dismissal. Granted, these justifications do exist, but we must ask whether it is right that employers should be allowed powers in the workplace to police their employees' conduct, simply because there is the technology available which makes it possible. Casting employers in the role of the police does not make for good workplace relations and detracts from the purpose of the workplace. Sensible employers would be wise to point to the more robust and certainly more relevant workplace safety concerns as the lawful justification required by IPP 1.

The more difficult question is whether the collection of this information through urine testing (as is proposed) can be said to be necessary to comply with workplace safety concerns. Opponents of EDT have mounted the argument that laboratory detection of employee drug use is not fundamental to complying with legal duties to maintain workplace safety. They argue that detection can be carried out in other ways (by observation of employee behaviour or performance testing); and that drug testing does not measure impairment and it is drug-impairment which triggers the need for compliance with the law, not drug use per se.[124] Conversely, others have pointed to studies showing marked reductions in workplace incidents after EDT was introduced, arguing that there are links between drug use, drug impairment and workplace efficiencies, absenteeism and performance - so it could be argued that EDT was the necessary link to a safe workplace.[125]

Assuming that an employer can claim to have complied with IPP 1, it is much less likely that an employer can comply with IPP 4 without undermining the objectives of EDT. IPP 4 governs the method for collecting personal information and states:

> Personal information shall not be collected by an agency -
> (a) By unlawful means; or
> (b) By means that, in the circumstances of the case, -
> (i) Are unfair; or
> (ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned.

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124 See Edwards, above n 117, 45.

125 M Webb "Employee Drug Testing: Implications for Policy" (1995) Social Policy J of NZ 17, 19 - 21.

This IPP addresses both aspects of privacy: physical and data privacy. The immediately obvious concern is physical privacy. Prima facie, an EDT programme which requires the employee to be watched while urinating, would generally be said to be an unfair means of collecting personal information: this is highly intrusive and humiliating. The US Supreme Court has remarked, when discussing drug testing:[126]

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemism if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.

Apart from having to perform such an intimate and private act in front of another, witnessing urinating may require the direct observation of the subject's genitals, or (where an observer is present but is not directly looking at the subject) for the subject to be completely naked, in order to safeguard against the subject hiding "clean" urine[127] or adulterating substances (such as salt or vinegar) in his or her clothing. Having to expose one's body like this also contravenes IPP 4.

In an attempt to circumvent these objections, some have proposed the use of a "dedicated bathroom" ie one with the water supply cut off, to prevent dilution of the sample with tap or cistern water (alternatively, these could be coloured), or the warming of someone else's clean urine to body temperature under the hot tap.[128] However, this would still require the employee to be searched before entering, which intrudes upon bodily privacy.

These conclusions of unfairness are based on what an ordinary employee would expect in the normal course of employment. US courts have noted that most people have a legitimate expectation (relative to the circumstances) of privacy in the process of urination.[129] However, there may be some employment situations where it is expected that witnessed urinalysis is a normal and accepted condition of employment (the armed forces, for instance).[130] In these situations, the expectation of privacy

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126 *Skinner v Railway Labor Executives' Association* 489 US 602, 617 (1989).

127 Writers in the US have commented on the growing trade in drug-free urine "in any form they want: powdered, frozen, or 'the real thing'". See VH Smith "To test or not to test: is that the question? Urinalysis screening of at will employees" (1988) 14 William Mitchell LR 393, 396.

128 See Webb, above n 117, 138.

129 See above n 18, 705- 706 for a discussion of the US cases.

130 See also *National Treasury Employees v Von Raab* 489 US 656, 668 (1989), where the US Supreme Court said: "[I]n certain limited circumstances, the Government's need to discover ... [drug problems], or to prevent their development is sufficiently compelling to justify the intrusion of privacy." It was also said that: "It is plain that certain forms of public employment may diminish privacy expectations." (*Von Raab*, 671).

would be considerably lessened and a case could be mounted that witnessed urinalysis "in the circumstances of the case" is fair.

Assuming that measures could be designed to avoid breaches of physical privacy, the chances of EDT being open to abuse increase as employee privacy is maintained. What use then are the results of such tests, when an employer cannot guarantee the integrity of the samples?

These problems arise from the nature of urine testing. Employers hoping to rely on techniques such as hair, saliva or breath testing or eye analysis which are much less physically intrusive still come up against obstacles in their endeavours to detect drugs because employees have been held to also have a privacy right in the information that comes from their bodies.[131] The Canadian Supreme Court has said:[132]

> The use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity.

Two points arise from this statement. First, it should be noted that an EDT programme may be mandatory or voluntary. However, in voluntary programmes, several commentators have pointed out that the employer/employee relationship is marked by such a power imbalance as to vitiate any notion of free consent to undergo drug testing due to the real or perceived consequences of not consenting.[133] However the programme is categorised, the realities of the employment relationship mean that requests to undergo testing are better seen as directives. Chemical surveillance of their public and private lives in this way is not something individual employees can easily escape. Safeguards on privacy should therefore be strictly enforced in an environment where employee consent to a potentially privacy-invasive procedure is an academic point. The validity of employment contracts which waive or modify privacy rights is questionable, given these questions over the genuineness of consent in this context, unless the employer has exercised its right to apply fora code to be drawn up which does just this under s 47 of the Privacy Act and this has been approved by the Privacy Commissioner (s 46).[134]

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131 See EM Hamm "Mandatory Drug Testing: Balancing the Interests" (1988) 30 Arizona LR 297, 303.

132 *R v Dyment* (1989) 55 DLR (4th) 503, 516 per La Forest J.

133 See Shaw, above n 3, 76 - 78 and B Slane "The Privacy Implications" [1995] NZ Law Rev 89.

134 Section 46 Codes of practice - (2) A code of practice may -
(a) Modify the application of any one or more of the information privacy principles by -
(i) Prescribing standards that are more stringent or less stringent than the standards that are prescribed by any such principle:
(ii) Exempting any action from any such principle, either unconditionally or subject

Secondly, by testing employees for drugs, by whatever means, employers gain access to a great deal of personal information about the employee. Employers can learn what drugs the employee has consumed in the past. But the employer cannot tell when or where those drugs were consumed. Thus drug testing opens up a "chemical window" for the employer, providing insight into the employee's off the job activities.[135] Is the employer justified in questioning the employee to determine which episodes of drug use impact on the workplace - and can it be done without breaching employees' right to keep those aspects of their private lives out of the public domain?

Drug testing can also disclose other information such as whether an employee is pregnant, or is taking medication which shows that the employee is arthritic, depressed, diabetic, epileptic, HIV +, schizophrenic, or has heart disease.[136] The potential for abuse of this information or discrimination is high, although potential personal grievances for unjustified dismissal, or unjustifiable action under the Employment Contracts Act 1991, or complaints under the Human Rights Act may act as some check on abuse.

Although there may be some jobs where this kind of medical information is relevant to the employee's ability to do the job, should this sort of information be revealed under the guise of a drug test? To comply with the Privacy Act, employees must tell employees the purpose for which information is being collected (IPP 3(1)(b)).

Unwarranted intrusions into employees' private life are also possible because medications taken by employees for these conditions or otherwise legitimately prescribed may be mistaken in the testing process for drugs proscribed by the employer. To eliminate the possibility of confusing substances, employers may require employees to fill out a questionnaire listing any medications taken and for what purpose. This complies with earlier suggestions that the employer should keep an open mind and allow the employee a chance to explain any positive results but is access to this information the legitimate concern of an employer aiming to detect drugs in its employees? Moreover, it tells the employer more about an employee than the employee may have wanted to become known. This is an unreasonable intrusion into the personal life of the employee. Employers are not entitled to look into their employees' off-duty lives by other means, so why should urinalysis EDT grant them this power?

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to such conditions as are prescribed in the code: ....

135 Above n 10, 31.

136 Above n 10, 6 and 30.

Refusing to give a medical or personal history is likely to be seen as an admission of guilt[137] and to result in the dismissal or disciplining of the employee. So employees who wants to keep their jobs, or apply for one in the first place, may effectively be forced into breaching their privacy themselves. If privacy legislation is to have any force, this sort of scenario should not be brought upon employees. But not obtaining this information leaves the employer unable to rely on the test results and unable to act on them. The testing process is thus rendered useless

C The Law and EDT: a conclusion

EDT is enmeshed in a web of diverse legal rights and duties. Considering the relationship between these rights and duties and EDT brings us to the paradoxical conclusion that the law both encourages and discourages EDT.

Those who support EDT have some powerful justifications for their case: drug-impaired workers create several problems in the workplace, while our analysis of common law duties to provide a safe workplace, the HSE Act duties of hazard identification and management, the duty to be a good employer, and the duty of trust and confidence culminates in the conclusion that EDT may be mandatory in many cases and certainly allowed by law at the very least. Employees may also be bound to support EDT as a means of ensuring that they and their colleagues are competent to do their jobs under their common law duties of care and trust and confidence.

Countering these arguments are those drawn from the duty of trust and confidence and the Privacy Act. Maintaining the trust and confidence of one's employees entails treating fairly and reasonably and respecting their rights. Particularly salient to the carrying out of EDT are employee rights under the Privacy Act. As we have seen, EDT has the potential to breach employees' rights to physical and information privacy. A testing method that can avoid these breaches is likely to have its integrity compromised in the process.

Legal analysis brings us to a frustrating stalemate. Strong arguments counsel against the introduction of EDT. There are also strong arguments which call for its

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137 See above n 4, 4 Mercury Energy's "Fit for Work" policy, which states: "Refusal by the employee to undergo assessment when required to do so, will be deemed to be acknowledgement of impairment." This policy was later refined to deem as impaired only those workers who refused to be tested after an accident or near miss. F Rotherham "Privacy vs workplace safety: Drug testing returns to spotlight" *The Independent*, Auckland, New Zealand, 2 February 1996, 22.

introduction, although, as noted, there are some exceptions. Neither side's arguments can trump the other and definitively determine the debate. This result highlights the need to look at EDT in its social and scientific context: legal considerations are not enough.

V EDT: THE SCIENTIFIC EVIDENCE

This section examines the limitations of urinalysis EDT in order to evaluate the appropriateness of drug testing employees. Whether EDT can be justified or not will be a secondary concern if it cannot be shown to be effective.

A Does the End Justify the Means?

As Paul Weiler asks, "is drug testing really an effective mechanism through which employers can reduce the use of drugs by their employees and thereby enhance the safety and productivity of their operations?"[138] Does EDT contribute materially to the maintenance of a safe workplace?

In order to answer these questions, we need to look at what information EDT can provide an employer wishing to make that judgment.[139]

A positive drug test can provide evidence that an employee has:

(i) consumed some of the tested-for substance(s) at some prior point in time.[140]

It cannot tell:

(i) when that consumption occurred;

(ii) whether consumption was intentional or accidental;[141]

(iii) whether the consumption occurred in or out of the workplace;

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138 PC Weiler *Governing the Workplace* (Harvard University Press, Cambridge, Mass., 1990) 1.

139 Adapted from *Drug Testing and Privacy* above n 33, 12 and above n 10, 113 - 114.

140 Assuming confirmation is made by the GC/MS method. If only a screening test is made, the possibility exists that an employee has taken a cross-reactive substance, such as a common cold remedy.

141 For example, through the passive smoking of marijuana.

(iv) whether that employee's performance was, is, or will be impaired, enhanced or unaffected as a result;

(v) whether that employee is a frequent, addicted, occasional or a first-time user.

In short, positive test results can tell an employer very little that relates to the duty to keep a safe workplace.

On the other hand, a negative test result may mean that an employee is not using the substance tested for and therefore there is no likelihood of drug-induced impairment. However, it provides no guarantee that the employee is not impaired due to other causes, such as illness or personal problems, or will not create hazards, due to reckless behaviour). A negative result can also be given the following interpretation:

An employee has taken the tested-for substance, but

(i) is not taking a large enough dose for it to be detected;

(ii) is not taking it frequently enough to be detected;

(iii) the test was carried out too long after consumption for the drug metabolites to still be in the employee's urine;

(iv) the test was taken before the drug could be broken down and its metabolites passed into the employee's urine;

(v) the urine sample has been diluted or tampered with;

(vi) an operator or administrative[142] error has produced a false negative reading.

A variety of different meanings can be read into positive and negative results. A positive result does not necessarily mean that a worker is impaired and thus unsafe, just as a negative result does not mean the opposite. Such a correlation could only be inferred from EDT methods which detect the psycho-active ingredients of drugs, such as blood or saliva testing; or a method which picks up the effects of drugs as they occur, such as eye analysis. EDT by urinalysis is not such a method.

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142 Chain of custody integrity is vital in this process. While ESR has made suggestions for the collection, documentation and storage of samples, there is no guarantee that these will be followed. See S Nolan "The Scientific Reliability of the Process" [1995] NZ Law Rev 10, 12.

Further, EDT by urinalysis does not assist the employer in its duties to maintain a safe workplace because EDT does not furnish proof that the drug-using worker is contributing to an unsafe workplace. What the promoters of EDT rely on instead is the inference that workers who use drugs will be impaired, that this impairment will affect the workplace, and that employers, by identifying drug-using workers via EDT, will be maintaining a safe workplace (assuming that these workers are removed from the workplace). The connections between these three points are tenuous. Even if we accept the link between the first two points,[143] bearing in mind that 89% of cannabis users never smoked at work, and less than 2% said that work was their chosen venue for smoking cannabis,[144] can we say that identifying drug-using workers satisfies the HSE Act requirements to maintain a safe working environment (and those where employers must identify, and then eliminate, minimise or isolate workplace hazards)? In the words of IPP 4, is it a necessary part of maintaining a safe workplace?

EDT can identify workplace hazards (remember that these are defined broadly as potential causes of serious harm) but, only if EDT has a strong enough deterrent effect could EDT eliminate drug-induced hazards. Evidence on this point is sparse, but it is interesting to note that a confidential report supplied to ESR from a company which has been using EDT for a year, while it could point to a reduction in drug incidents over that period, had not eliminated them: drug-related accidents were still occurring, even in the face of EDT.[145] Even if we could say that EDT will minimise workplace drug use, which seems a strange standard to reach for, as it implies that there is a minimum level of acceptable drug use in the workplace, this still does not release employers from their overall duty to maintain a safe workplace. EDT can be a part of the hazard management regime required by the HSE Act, but there is little convincing evidence that workplaces have not been or will not be safe without the introduction of EDT.

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143 The often-cited three year US Postal service study, one of the most thorough and extensive studies into the efficacy of pre-employment drug screening in reducing turnover, absenteeism, accidents and improving discipline, had this to say: "No statistically significant relationship was detected between drug-test results and accidents....[E]ven after job category was controlled, test results did not contribute significantly to the prediction of work-related accidents. Furthermore, no significant relations were detected when separate analyses were performed by accident type (motor vs. industrial), cause (fault vs. no-fault), or severity (severe vs. not severe)." See J Normand et al "An Evaluation of pre-employment drug testing" (1990) 75 J Applied Psychology 629, 635. See also DC Parish "Relation of the Pre-employment Drug Testing Result to Employment Status" (1989) 4 J General Internal Med 44: "This study did not find a relation between drug use and job performance."

144 Above n 28, 14.

145 Above n 29, 24.

B Other Concerns with EDT

As well as being unable to detect impairment, EDT by urinalysis brings other concerns to the debate. For instance, there is the possibility that EDT may be inherently racially biased. This possibility arises because of the chemical similarities between the skin pigment melanin, present in urine in fragmentary form, and the active ingredient in marijuana, THC.[146] Melanin also soaks up other chemicals in the body which are similar to THC. A non-Pakeha workforce is thus more likely to test positive for what appears to be marijuana, simply because of the colour of their skin. Employers would have to ensure that testing, and the interpretation of test results, was done in way that did not contravene the Human Rights Act 1993.

Looking outside the scientific limits of the test itself, there are potential problems in the fact that the testing process is controlled by people, not machines, and people are fallible. The opportunities for operator error are starkly depicted by this comment from the British Columbia Civil Liberties Union: [147]

> Dull, repetitive work that nonetheless requires highly skilled technicians [as GC/MS does] is a fertile breeding ground for human error.... The livelihoods of those being tested rest upon extreme diligence in routine tasks such as cleaning glassware, affixing and recording labels, reading meters, transcribing numbers, key punching and filing. Testing labs vigorously claim to have solved this problem, but nothing in the published error rates to date justifies these claims.

Tied to this is the concern that where the possibility of operator error exists, and an employee is dismissed or disciplined as a result, there is no way of independently verifying the positive result. ESR is the only organisation in New Zealand which offers both screening and confirmatory drug testing to employers. This seriously calls into question the employer's ability to satisfy its obligations of fairness towards the employee: the chance of operator error means that the ability to point to substantive justification is compromised, while being unable to double-check the result through another provider leaves the employee vulnerable to the word of an organisation working for the employer.

We also have no guarantee that employees will not find ways to subvert the testing process, however reliable it may be. The likelihood of this increases where the test is unwitnessed. Samples can be diluted to below detection levels by adding tap water or by the employee drinking a lot of water before the test. Samples can be adulterated by

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146 TA Halbert "'Coming Up Dirty': Drug Testing at the Work Place" (1987) 32 Villanova LR 691, 711.

147 Cited in *Drug Testing and Privacy* above n 33, 17.

substances such as salt or bleach or products manufactured especially for adulterating or masking purposes.[148] Employees could also come to work drug-free, test negative in the morning, yet smoke marijuana in the lunchbreak and return to work impaired. What purpose then does EDT serve? To guard against these possibilities, testing would have to be random. Moreover, it would have to be frequent. We must ask: is the effort that an employer must go to in order to rely on EDT to detect drug-using workers worth it?

EDT programmes can also be abused. Galipeau J of the Quebec Superior Court highlighted these concerns in *Re Dion* when he said:[149]

> [O]ne can also out of malice, a spirit of vengeance, or simple ignorance, submit an innocent person to the harassment, the bother, the torment, the insult, or the humiliation, of suffering one or more multiple results for urine samples, which will always give negative results.

In conclusion, the scientific capabilities of urinalysis EDT fall far short of what the law requires. It also creates a host of other problems, conflicts with rights to privacy and has the potential to disturb the employer/employee duty to keep each others' trust and confidence. However, the duty to maintain a safe workplace does not disappear just because EDT is not an appropriate way of complying with this duty. Drug use in the workplace, though a small problem compared to others identified by the CTU,[150] remains a problem.[151] Employers have an obligation to deal with it, and we know it is duty not lightly discharged. Is there a way of identifying drug-impaired workers - or workers impaired for any reason - which does not breach privacy rights, and has a positive effect on industrial relations? This question will be addressed by the next section.

VI ALTERNATIVES TO EDT

By identifying prior drug use, EDT reveals which members of the workforce might pose a potential risk to workplace safety. However, the immediate concern must surely be the actual risk created by workers who are impaired, for whatever reason. To focus on a future risk, at the expense of present risk identification, is a curious means of trying to satisfy the relevant legal duties.

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148 For example a list of companies advertising products which will mask drug consumption or alter the results specifically for workplace drug tests are easily found on the Internet, in the same location as companies advertising tests: http://www.yahoo.com/Business_and_Economics/Companies/Health/Drug_Testing.

149 *Re Dion* (1987) 30 CCC (3d) 108, 119.

150 See above n 103.

151 See the statistics in above Part I A and the cases in above Part III B 1.

A Detecting Impairment in the Workplace

1 Monitoring behaviour

The way to measure performance is to measure performance. Rather than testing the typist's urine for drug traces, why not test the typing?[152]

The traditional way of determining worker impairment relies on supervisors monitoring the behavioural patterns and performance of employees. There is nothing to suggest that this method has been surpassed by EDT, and in fact, as EDT cannot detect impairment, but can only indicate its (unspecified) likelihood in the future, behavioural monitoring is a more reliable and immediate way of deciding whether a worker is fit to do the job. Supervisors who are trained to look for signs of impairment such as deteriorating output levels and standards, absenteeism and lateness patterns eg taking long lunch-hours or often calling in sick on Mondays and Fridays, behaviour changes such as becoming argumentative, irritable, stressed or anxious, and physical signs of impairment such as tiredness, slurred speech, glassy eyes and a worsening in psychomotor function,[153] can glean a better picture of what an employee can and cannot do, rather than the blunt drug-use/no drug-use result that EDT provides, and the conjecture about impairment that must follow. Behavioural monitoring can also indicate what is behind the impairment, which aids in designing strategies to combat it.

This approach has the support of the Canadian Human Rights Commission which questioned the use of drug tests as performance indicators and concluded that "[b]etter supervision would be both more efficient and more effective in ensuring that employees are not under the influence of drugs while on the job, rather than seeking will -o-the-wisp evidence of potential drug dependency."[154]

2 Breathalyser tests

Alcohol is the most common psycho-active substance used by New Zealanders. Eighty-seven per cent of the population fifteen years and older has had some

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152 SJ Wisotsky " The Ideology of Drug Testing" (1987) 11 Nova LR 763, 776.

153 ILO "Draft code of practice on the management of drug and alcohol problems in the workplace" (ILO, Geneva, 1994) 19; Alcoholic Liquor Advisory Council "A Supervisor's Manual for an Employee Assistance Programme" (ALAC, Wellington, 1987) 9.

154 Canadian Human Rights Commission *Annual Report 1993* (CHRC, Ottawa, 1993) 36.

experience with alcohol.[155] Being legal, alcohol is much easier to obtain than the other drugs tested for by ESR. Some workplaces also encourage a culture of heavy drinking. Alcohol-affected employees are a much more likely workplace scenario than drug-affected employees, and the consequences for workplace safety are just as serious.

For employers looking for ways to keep their workplace safe, the main difference between testing for drugs and testing for alcohol is that alcohol consumption can be directly linked to impairment. While there can be an interval of several days between experiencing the effects of a drug and the point at which its metabolites pass out of the system,[156] with alcohol, detecting the presence of alcohol at certain level can be positively correlated with the existence of present impairment. Alcohol testing is thus a more effective way of identifying actual risks to workplace safety than EDT.

Testing for alcohol by breathalyser device also has the advantage of immediacy: the employer need not wait the week or so it takes for the sample to be sent to the laboratory, the sample analysed, and the results reported. Finally, testing breath for alcohol traces is not physically intrusive, unlike blood testing or urinalysis, nor does it infringe an employee's privacy rights: beyond revealing anything more than the amount of alcohol in an employee's system. It is also not a demeaning process. As confusion with cross-reactive substances will not cloud the results, there is no need for employers to seek information about employees' private lives which may have no relevance to their ability to do the job.

3 *Computer performance tests*

The most recent development in performance testing is computer testing. Particularly suitable for industries which rely heavily on their employees' reaction times, hand-eye co-ordination, and ability to do two things at once, employers may introduce computer programmes which test these skills.

There are three types of test in general use: the reaction time test; the critical tracking task (CTT) test; and the divided attention task (DAT) test.[157] The reaction time test operates by providing the employee with a random auditory or visual stimulus. The employee then has to press a button as quickly as possible in response. Consumption of alcohol and marijuana has been found to affect reaction times, but the test itself

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155 Above n 28, 32.
156 See Appendix I.
157 Above n 14, 204 - 212.

cannot determine the source of the impairment. The CTT test measures psychomotor ability. Usually, it requires the employee to keep a randomly moving pointer in the centre of the screen or within a frame. This measures both hand-eye co-ordination and compensatory reaction time. The test increases in difficulty until the employee loses control of the pointer altogether. The CTT test is more sensitive than the reaction time test. The most complex and most sensitive test is the DAT test. The employee is presented with two simultaneous and conflicting tasks and is measured on the time taken to respond from one scenario to the next.

Employees are not measured against objective standards, but take the test several times to determine their own performance baseline. Moving more than 20% below this baseline is generally deemed to be evidence of impairment. The tests are easy to administer and usually take less than a minute to do. Computer testing has several advantages over EDT: it actually measures impairment, and moreover, for any reason;[158] the results are immediately available; and the process is not privacy-invasive. Employees often see taking the test as fun, rather like playing a computer game, and this perception on their part makes for better workplace relations.

B Employee Assistance Programmes

The methods of identifying impaired workers outlined above go some way towards satisfying our first requirement for procedural fairness: they can identify actual and potential risks to workplace safety, and are a more effective way of doing so than EDT. In addition, they sensibly do not single out a small risk to workplace safety at the expense of other, more common, problems. They also comply with the second limb of our procedural fairness requirement: these methods are reliable indicators of impairment, and they do not violate employees' rights in the process.

However, good industrial practice and the law require us to go further than simply identifying workplace hazards. While impaired employees can be dismissed, especially when that impairment is drug-induced, treatment rather than dismissal is the preferable option. Replacing an employee can cost up to $ 10 000.[159]

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158 If an employer is truly concerned about workplace safety, it makes more sense to focus on all sources of impairment, not just drugs.

159 A Tucker, EAP consultant, quoted in J Mackay "Getting help" (1995) June Safeguard 26. Tucker's assessment has been questioned by others in the field: interview with P McMahon , Manager - Central Region, EAP Services, 16 May 1996. See also ALAC & PSA "Employee Assistance Programme" (ALAC & PSA, Wellington, 1988) 6 which states that it would cost approximately $15 000 to replace a basic grade clerical employee.

The Employee Assistance Programme (EAP) was introduced to the New Zealand public service in November 1985 under the auspices of ALAC.[160] Its initial focus was alcohol abuse, but it soon expanded to deal with the range of problems that can affect employees' work performance.

EAPs take different forms, but in New Zealand most EAPs are now provided by EAP Services. EAP Services provide companies with access to a range of counsellors trained to deal with stress, health, marital and family, financial, legal, accommodation and alcohol and drug problems. Counsellors can refer employees on to other specialist agencies for help, if needed. Employees can refer themselves to the counsellors, either directly, or through their workplace EAP referral officer, for problems which do or do not affect the workplace. Some companies even provide for employees' families to use the EAP counsellors. Employees may also be referred to the service by their supervisor where personal problems spill into the workplace. This can be a particularly effective technique for employees who continually denies that they have a problem.

Referral to, and use of, the services is confidential and free to the employee. The confidential nature of EAPs safeguards individuals' privacy rights, while at the same time, without identifying particular employees, EAP officers can report back to employers where alcohol and drug problems are symptomatic of deeper workplace problems: monotonous or boring work or poor working conditions, which the employer can do something about.

EAPs are a co-operative venture between management and employees for their joint benefit. They have the endorsement of the CTU and the Employers Federation.[161] EAPs bring many benefits to the workplace, as increased employee welfare leads to financial savings and improved productivity. The rehabilitative approach of the EAP, rather than the punitive step of dismissal, also strengthens the relationship of trust and confidence between employers and employees, by promoting goodwill and stimulating loyalty.[162] EAPs have also been identified as one of the ways an employer can satisfy the "good employer" principle.[163]

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160 Above n 159, 5.

161 EAP Services "National Guidelines for Employee Assistance Programmes" (EAP Services, Wellington, 1992) 3.

162 Above n 14, 171.

163 Above n 159, 6.

Where employers wish to take a pro-active approach to combatting alcohol and drug problems in the workplace, an extended EAP can go beyond reactive counselling and provide information and education services to employees. This health promotion approach is explicitly preferred by the World Health Organisation to drug testing programmes,[164] because of the "very vague relationship between safety in the workplace and the use of drug screening."[165] Moreover, educational efforts are a less punitive way of deterring worker drug use than implementing the threat of EDT. They also provide the employees with health-related reasons for not using drugs and allow them to take responsibility for their decisions on an informed basis, rather than the fear of being subjected to EDT.

Bearing these points in mind, employers may also find EDT a less attractive means of identifying possibly impaired workers when they consider the cost. Each set of screening and confirmatory tests from ESR currently costs $ 112.50. When the cost is multiplied by several workers or job applicants, the costs quickly mount into the thousands. In 1991, US House of Representatives Subcommittee on Civil Service reviewed the costs of drug testing federal employees and concluded that the cost of identifying each positive employee was US $ 77 000.[166]

EAPs and alternative methods of picking up impaired employees such as behaviour monitoring, breathalyser tests and computer testing appear to provide a more comprehensive, more effective and less adversarial means of addressing workplace drug use issues than EDT. Although we should note that the benefits of EDT alternatives have not yet been tested in New Zealand, EDT itself looks like a flawed and incomplete way of addressing workplace drug problems. Overseas researchers in this area have commented that:[167]

> Since 1960, employee assistance programs have been widely evaluated using different research populations and methods, and social scientists have consistently found them to be very effective, especially when dealing with alcohol problems. Consequently, they are a proven and potent alternative for combating the drug hysteria currently sweeping the American workplace.

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164 WHO *Health Promotion in the Workplace: Drug and Alcohol Abuse* (WHO, Geneva, 1993) 15.

165 Above n 164, 16.

166 Above n 2, 21.

167 WJ Sonnenstuhl et al "Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace" (1987) 11 Nova LR 709, 728.

VII CONCLUSION

Drug use in the workplace creates legal, social policy and safety issues. Drug-impaired workers can pose a safety risk to themselves and fellow workers, while employers incur significant costs from absenteeism and decreases in efficiency and productivity. The duty to keep a safe workplace, both at common law, and through the statutory obligations imposed by the HSE Act and the State Sector Act, provide an encouraging framework for employers who see the introduction of employee drug testing as a way to keep the workplace safe. Recent judicial interpretations of the HSE Act go even further than this, and may mean that employers are compelled to test their employees for drugs if they wish to comply with these duties. Employees' duties to keep the workplace safe and guarantee their competence indicate that employees should support, or not resist, EDT. An analysis of employers' and employees' duty to maintain each others' trust and confidence according to what each party may expect from the other supports these conclusions.

However, the range of legal rights and duties which provide the boundaries of EDT were not thought out with EDT in mind. This leaves us with the contradictory result that at the same time as the law encourages EDT, opponents of EDT can place legal barriers in its way. The mutual duty of trust and confidence delineates standards of behaviour which can be expected in the workplace: EDT, and EDT by urinalysis particularly, breaches these. The Privacy Act also makes it difficult to ensure workers' physical and information privacy rights without compromising the reliability of the test.

Legal obstacles are not the only problems with implementing EDT: EDT is limited in what it can tell employers. Furthermore, it raises questions of bias, concerns about the independence of the operator and the possibility of re-testing, and cannot be safeguarded against employee tampering or operator error.

The importance of fairness when dealing with employee drug involvement, insisted on by the courts, is only partially satisfied by EDT. Although we can clearly point to legal and empirical justifications for bringing in EDT, it is impossible to say that EDT can be carried out in a way that does not breach employees' rights, nor that the inquiry will provide results that the employer can definitely rely upon.

Where other methods of determining whether employees are likely to pose a threat to workplace safety, and these alternatives not only identify workers who are an immediate, rather than conjectured risk to workplace safety, and moreover, do not breach employees' privacy rights, these methods should be adopted as part of a

comprehensive programme that first identifies impaired workers, for whatever cause, and then seeks to help them overcome their problems. Such a non-punitive approach to workplace safety is more likely to uphold employers' and employees' duty to keep each others' trust and confidence than the adversarial EDT, while also resulting in financial savings for employers.

In conclusion, identifying and dealing with drug-impaired workers is certainly justified, if not encouraged, and in some cases, even required, by law. But our examination of EDT shows that EDT is neither a fair, nor effective, way of doing this. Other methods exist, and should be used in workplaces where people wish not only to comply with their legal duties, but also have regard to legal rights.

APPENDIX I

DRUG USE: DURATION OF EFFECTS AND DETECTION PERIOD

DRUG	DURATION OF EFFECTS	DETECTION PERIOD AFTER CONSUMPTION
Cannabis	2 - 4 hrs	5 days (casual use) 4 weeks (heavy use)
Opiates	3 - 6 hrs	3 days
Cocaine	1 - 2 hrs	2 days
Amphetamines	2 - 4 hrs	2 - 3 days
Benzodiazepines	4 - 8 hrs	up to 2 weeks

Table created from annexes 4 and 6 to ILO "Draft code of practice on the management of drug and alcohol problems in the workplace" (ILO, Geneva, 1994).

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