IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 78
EMPC 144/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VULCAN STEEL LIMITED Plaintiff
AND	MANUFACTURING & CONSTRUCTION WORKERS UNION Defendant

Full Court:	Judge J C Holden Judge B A Corkill
Hearing:	9, 10, 11 and 15 March 2022 (heard at Wellington via Virtual Meeting Room)
Appearances:	C Patterson and A Reid, counsel for plaintiff P Cranney, counsel for defendant
Judgment:	11 May 2022

JUDGMENT OF THE FULL COURT

Introduction

[1] Vulcan Steel Limited (Vulcan Steel) and the Manufacturing and Construction Workers' Union (Christchurch) (the union) settled a series of collective employment agreements (CAs), to which several documents were attached, two of which are relevant to this case:

- a Drug, Alcohol and Substance Policy (the Policy); and
- a Drug, Alcohol and Substance Procedure (the Procedure document).

[2] Vulcan Steel is a steel manufacturing distribution, plate processing, coil processing, and producer of long products in both Australia and New Zealand, with approximately 400 staff in each country. The company operates in many safety-sensitive areas where health and safety are important. In that context, the abuse of drugs and alcohol is understandably considered by both parties to be an important issue.

[3] The Policy and Procedure documents provide that alcohol and/or drug testing could be undertaken pre-employment, for reasonable cause when an employee is attending work, post-incident at work, and for random or saturation testing.

[4] This case focuses on drug tests. The Procedure document describes the drug testing process as follows:

- an initial drug test through the collection and analysis of urine, hair, or oral fluid; and
- upon a non-negative test result being obtained on site, by a confirmatory test in an accredited laboratory.

[5] The parties are at odds, however, as to who determines the method of drug testing after a test in any of the described categories has been required of an employee.

[6] For the purposes of a dispute which was raised in the Employment Relations Authority, Vulcan Steel asserted it was entitled to choose the method, whereas the union stated that the worker was entitled to choose the method.[1] Vulcan Steel prefers the use of urine sample testing, while the union and its members prefer oral fluid testing.

[7] In the Authority, Vulcan Steel sought declarations in support of its position, and if need be, submitted that a term should be implied into the Policy and Procedure documents confirming it had the right to choose the appropriate method.[2]

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1 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2021] NZERA 2 at [4] (Member Cheyne).

2 At [56].

[8] However, the Authority concluded that the provisions of the applicable collective agreement entitled an employee who is required to undergo a drug test to choose whether to be tested by either urine sample testing or oral fluid testing. The possibility of providing a hair sample was not considered relevant.

[9] Vulcan Steel then brought a de novo challenge. It pleads that the Authority erred, that there is a gap in the documents as to who should choose the method of drug testing, and that a term should be implied stipulating that Vulcan Steel should do so.

[10] The union resists the challenge asserting either that the Procedure document provides for the employee to nominate the choice of drug testing; or alternatively, if there is a gap, the threshold for implying a term is not met, and any problem should be resolved in bargaining between the parties.

[11] The Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd,* recently said that in an implication case, the Court must:[3]

(a) first, interpret the words used by the parties in their agreement; and

(b) if that exercise results in a gap, consider whether the implication of a term is justified.

[12] These, then, are the two issues we must resolve.

[13] A preliminary point is that the documents before the Court are contractual in nature. That is why there must be a focus on what the parties are to be taken as having agreed.

[14] This case therefore differs significantly from earlier decisions dealing with workplace drug and alcohol policies which were assessed by the Court to determine whether they met the tests of lawfulness and reasonableness.[4]

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3 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] NZCCLR 17 at [116].

4 *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC); *Maritime Union of New Zealand Inc v TLNZ Ltd* (2007) 5 NZELR 87 (EmpC).

[15] The documents which are currently in force were attached to a CA entered into between the parties in September 2021, the term of which runs until 2023. They were in the same form as had been attached to three previous CAs. They differed from the original version of Vulcan Steel's drug and alcohol policy, which had been attached to a 2015/2016 CA.

[16] Detailed evidence was called by both parties as to the development of these documents. They also called expert evidence as to the pros and cons of urine and oral testing. Detailed submissions were helpfully provided by counsel. We will refer to this material where relevant.

[17] Finally, since counsel submitted that there were potentially important drug testing issues, Chief Judge Inglis appointed a full Court to determine the challenge. Under applicable public health restrictions at the time of the hearing, it was necessary for a Bench of two to resolve the challenge.

The documents

The collective agreement

[18] The current CA refers to "the drug and alcohol policy" which in fact is the Policy and the allied Procedure document. The text in the CA refers to the attachment as being at Appendix 1. There is no other provision in the CA which refers expressly to the annexed documents.

[19] In cl 3 of the CA, the parties agreed that it was to be administered in accordance "with the true intent of its terms and provisions" and they would cooperate fully to that end, so that "harmonious industrial relations may be maintained". In cl 4, the parties agreed that the CA superseded all other agreements, employment contracts, or agreements that had applied to the parties. They also agreed to work together to rectify the effects of any errors or omissions which were overlooked during their negotiations.

Drug Alcohol and Substance Policy

[20] The Policy contains high level descriptions of Vulcan Steel's approach to the abuse of alcohol and drugs, stating in summary that the possession or use of these

creates unacceptable risks, so that it has a policy of zero tolerance to illegal drugs and alcohol in its workplaces.

[21] The circumstances in which drug and alcohol testing may be undertaken are touched on: drug testing is to utilise hair and/or urine and/or saliva test techniques, as outlined in the Procedure document. No reference is made to a procedure for determining the method of drug testing once the process is initiated.

Drug Alcohol and Substance Procedure

[22] The Procedure document elaborates on the core principles of the Policy in some detail.

[23] The clauses which deal with drug testing standards and procedure relevantly state:

> **7. Alcohol Testing Standards & Procedure**
>
> 7.1. **Standards**
>
> 7.1.1. All aspects of testing will be carried out in a confidential and private manner by people trained and assessed as competent to complete the task. Testing will be performed at Vulcan Steel's expense by an authorised and accredited provider selected by Vulcan Steel.
>
> 7.1.2. Any test for alcohol will be carried out by using a breath alcohol-testing device that complies with the AS 3547-1997 for the measurement of alcohol (or successor Standards). Such device will display results as either:
>
> 7.1.2.1. Breath alcohol concentration (micrograms/1 litre of breath); or
> 7.1.2.2. Blood alcohol concentration (milligrams/100ml of blood).
>
> 7.2. **Procedure**
>
> 7.2.1. The test result will be considered non-negative if there is any level of alcohol in the employee's system above the Specified Limit.
>
> 7.2.2. The first test will require the employee to blow into the calibrated device with a disposable mouthpiece. If the result is negative then no further test will follow.

7.2.3. If the result of the first test is non-negative, a confirmation test on the same device will be conducted after a 20-minute period.

7.2.4. The times and results of any tests will be recorded.

7.2.5. The employee and the person performing the test(s) will both sign an acknowledgment confirming the time and results of any tests.

8. Drug Testing Standards & Procedure

On-site initial drug testing will be conducted through the collection and analysis of a urine or hair or saliva specimen using a urine/hair/saliva testing device that meets the current Australian standards.
A non-negative test result will require a confirmatory test, which involves confirmation by a NATA accredited testing laboratory. Confirmation of an initial non-negative test is a positive test result.

8.1. Testing may include but is not limited to:

8.1.1. Amphetamines;
8.1.2. Methamphetamines;
8.1.3. TCH (Cannabis);
8.1.4. Opiates;
8.1.5. Cocaine;
8.1.6. Benzodiazepines;
8.1.7. Synthetic cannabinoids;
8.1.8. Synthetic drugs.

8.2. **Standards**

8.2.1. All aspects of testing will be carried out in a confidential and private manner by people trained and assessed as competent to complete the task. Generally, testing will be performed at Vulcan Steel's expense.
8.2.2. Testing for drugs will be carried out in accordance with the strict criteria of either:

8.2.2.1. AS/NZS 4308:2008, "Procedures for specimen collection and quantitation of drugs of abuse in urine" (or successor Standards); or
8.2.2.2. AS 4760:2006: "Procedures for specimen collection and quantitation of drugs in oral fluid (or successor Standards).

8.3. **Procedure**

8.3.1. Prior to undergoing a test, a test consent form will be signed by the employee consenting to the relevant method(s) of testing

8.3.2. A drugs testing custody and control form will be completed.

8.3.3. The employee will provide a hair or oral fluid sample for testing or, in private, a urine specimen.

8.3.4. The specimen will be tested (the "**screening test**"). The employee will be able to observe the complete collection process. The test will be considered non-negative if there is any level of drugs present in the employee's system.

8.3.5. The screening test:

8.3.5.1. if a non-negative test results, following random, saturation, reasonable cause, or post-incident testing, Vulcan Steel will follow the steps set out below; but

8.3.5.2. if negative, no further action will be taken, and the employee should continue to work.

8.3.6. For all non-negative test results, the testing agent will send the specimen sample(s) concerned to a NATA accredited laboratory to perform a second split sample test (the "**confirmation test**").

8.3.7. The employee may note the processing and chain-of-custody procedure of the specimen.

8.3.8. The employee will be asked to read, sign and date the chain-of-custody statement certifying the specimen is theirs and has not been changed or altered at the time of the collection.

[24] Then the Procedure document describes each of the circumstances in which Vulcan Steel may require testing to be undertaken, either pre-employment or after employment has started. For each of reasonable cause testing, post-incident testing and random testing/saturation testing, there is an express reference to the procedure to be followed for alcohol and drug testing under cls 7 and 8. In each instance, reference is also made to appendices attached to the Procedure document, which depict the processes that are to be undertaken in diagrammatic form.

[25] Also included is a provision relating to a refusal to take a drug and/or alcohol test as follows:

14. Refusal to take a drug and/or alcohol test

14.1. If an employee is required to take a drug and/or alcohol test, and refuses to do so, or attempts to leave the site at time of testing, they should first explain the reason for their refusal. Vulcan Steel

> will consider any explanation given. In its sole discretion, if Vulcan Steel considers the explanation is unreasonable in the circumstances, then Vulcan Steel may take disciplinary action up to and including dismissal (with or without notice).

[26] The balance of the document contains provisions which are not directly relevant to the dispute, including cheating or tampering with an alcohol or drug test,[5] the time for providing a specimen,[6] management of employees who provide a non-negative initial test, and/or a confirmed positive result,[7] a serious misconduct provision relating to the possession or use of alcohol or drugs at work,[8] and a provision as to confidentiality and privacy issues.[9]

Issue one: interpretation of the Policy and Procedure documents

Principles relevant to interpretation

[27] In *New Zealand Airline Pilots Association Inc v Air New Zealand Ltd*, the Supreme Court confirmed that contract principles relating to contracts should apply to employment agreements.[10] The key principles were articulated by that court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* as follows:[11]

> ... The proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provides by the contract as a whole and any relevant background informs meaning.

[28] In *Bathurst*, the Supreme Court addressed the question of admissibility of evidence of prior negotiations and subsequent conduct concerning a contract. It concluded that ss 7 and 8 of the Evidence Act 2006 (the EA) would resolve any such

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5 Drug, Alcohol and Substance Procedure, cl 13.
6 Clause 15.
7 Clause 18.
8 Clause 19.
9 Clause 20.
10 *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [74]–[78].
11 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] (footnotes omitted).

issues. These important provisions of the EA would assist in the task of proving anything relevant to the notional reasonable person.[12] Evidence which shows only a party's subjective intentional belief as to the meaning of words, or as to an undeclared negotiating stance or position should, under that Act, be inadmissible.

[29] In *Maritime Union of New Zealand v TLNZ Ltd*, this Court discussed the application of EA principles in this way:[13]

> ... Although the Employment Court is noticeable by its absence from the schedule of courts to which the Evidence Act applies expressly, the Evidence Act's principles and contents are nevertheless an important source of reference whenever the admissibility of evidence is challenged or otherwise in question.

[30] More recent cases have emphasised that the equity and good conscience test under s 189(2) of the Act is the focus of the enquiry.[14] Nevertheless, it is clear that, in the interests of justice, hearings should not be bogged down with evidence which is irrelevant.[15] As this is also the purpose of ss 7 and 8 of the EA, we consider it appropriate in this case to rely on the statements of the Supreme Court as to admissibility.

[31] Finally, it is not unusual when considering the background circumstances of a CA to have regard to the fact that a given provision has a long history, adopted in successive collective agreements.[16] Those agreements and surrounding documents are extrinsic evidence which is potentially part of the background and thus subject to ss 7 and 8 of the EA, if its principles are followed, like any other contextual evidence.

Meaning of the words used in the Procedure document

[32] The interpretation issue as to the choice of drug method must focus on the language used in the Procedure document, since the Policy does not refer to this topic.

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12 *Bathurst,* above n 3, at [75].
13 *Maritime Union of New Zealand v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].
14 *Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [53].
15 *Courage v Attorney-General* [2022] NZEmpC 23 at [7].
16 *Aviation and Marine Engineers Association Inc v Air New Zealand Ltd* [2013] NZEmpC 172 at [71]–[72]; *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14] and [17]; not doubted on appeal – *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131, [2016] 2 NZLR at [76], and *New Zealand Air Line Pilots' Association v Air New Zealand Ltd,* above n 10, at [74] and [77].

[33] The submissions of counsel focused on the language of cl 8.3.1 of the Procedure document.

[34] Mr Patterson, counsel for Vulcan Steel, submitted that the clause relates to the provision of a consent to be tested, because an employee who is asked by Vulcan Steel to provide a sample is entitled to choose whether to consent or not.

[35] He said that the Procedure document involves several steps, being:

- Step One: A decision to test.
- Step Two: A decision as to which method of testing is to be offered.
- Step Three: Notification of a testing decision.
- Step Four: Obtaining a consent to testing.
- Step Five: The test sample/specimen provided.
- Step Six: Sample/specimen tested.
- Step Seven: Test results notified.

[36] He argued that the parties had never been in dispute concerning steps one, three and four. Vulcan Steel understood and accepted it could not force any employee to consent to testing. Rather, the parties were in dispute as to step two, namely, how to determine what method of testing was to be undertaken.

[37] He submitted that the Authority's determination did not provide a resolution of the issue as to choice of method. He said the determination merely confirmed that it was for the employee to elect whether to consent to the test or not, which was a reference to step four. It had never been in dispute, nor was the Authority asked to confirm, that the employee could choose whether or not to provide a consent.

[38] Mr Cranney, counsel for the union, first argued that the Authority had reached the correct conclusion in finding that the words "consenting to the relevant method(s) of testing" in cl 8.3.1 had to be given a meaning. The only plausible construction of the clause was that the signing of the test consent form was the means by which the relevant method(s) of testing would be determined.

[39] He analysed the remainder of the document in some detail, pointing out inconsistencies in the document to which we will come shortly. He said that with regard to the circumstances in which testing could be required by Vulcan Steel, the various threshold events had different objectives. The purpose of reasonable cause testing, and post-incident testing, was to determine whether any employee had drugs or alcohol in their system. The stated focus of random and saturation testing was intended to act as a deterrent for alcohol and drug misuse.

[40] But Mr Cranney also acknowledged that the clause was not straightforward, submitting that the parties may have left the issue as to choice of method "up in the air". In that case, the focus would turn to the pros and cons of implication, to which we will come later.

[41] We begin our analysis by considering various drafting problems in the Procedure document.

[42] Clause 8.2.2 provides that testing for drugs is to be carried out according to the strict criteria of AS/NZS 4308:2008 (the 2008 urine standard), and AS 4760:2006 (the 2006 oral fluid standard). Both such references also refer to successor standards. The standard as to oral fluid testing was updated in 2019: AS/NZS 4760:2019 (the 2019 oral fluid standard). Despite the parties being aware of this when they settled the current CA in 2021, a reference to the outdated version of the standard for oral fluid testing remained in the document. That said, the parties in fact proceeded on the basis that the 2019 oral fluid standard, and not the 2006 oral fluid standard, applies.

[43] Despite several indications that one of the methods of drug testing would involve the provision of hair follicles, for instance in the preamble to cl 8 and in cl 8.3.3, no standard describing how this would be undertaken was referenced, unlike the position for urine and oral fluid testing. This possibility appears to have been ruled out in cl 8.2.2 in any event, because the clause states that the testing of drugs could *only* be carried out in accordance with the two standards that are referenced, the 2008 urine standard and 2006 oral fluid standard. It is unclear why that particular option was referred to, if it was then ruled out.

[44] Clause 1 of the Procedure document deals with definitions. The clause states that unless the context indicates otherwise, an "authorised and accredited provider" is an accredited organisation which assumes responsibility for collection, initial testing if applicable, storage, and dispatch of oral fluid specimens. It makes no reference to a provider dealing with a urine specimen. The term "authorised and accredited provider" is not used thereafter for either urine or oral fluid testing. It is, however, used with regard to alcohol testing.[17]

[45] "Confirmation testing" is defined as meaning a sample in a laboratory under the 2006 Australian standard dealing with oral fluid testing, to verify the onsite test result. No reference is made to confirmation testing of a urine sample.

[46] By contrast, cl 8.3.6 states that "for all non-negative results" – that is, where a screening test using either urine or oral fluid samples, the testing agent is to send the specimen sample to a "NATA accredited laboratory" to perform a second split sample test, being a confirmation test.

[47] Other unsatisfactory aspects of the document relate to the appendices. The definition of random/saturation testing states that the procedure to be followed for drug and alcohol testing is as provided under cls 7 and 8 and refers to Appendix 5. There is no Appendix 5, although Extract 1 follows the appendices which relates to random/saturation testing, being a document to be issued to the employee. No reference to Extract 1, however, appears in the text of the document.

[48] Appendix 2 is a flow diagram relating to random/saturation testing, reasonable cause testing, and post-incident/accident testing. It refers to a process whereby two trained assessors are to consider whether there is sufficient reason to perform a reasonable cause test, as outlined in the applicable clause, cl 10.3. Yet, the diagram suggests the assessment process may also apply to post-incident/accident testing, a possibility which is not referred to at all in the applicable clause, cl 11.

[49] In short, there are significant drafting problems in the document.

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[17] Clause 7.1.1.

[50] It is in that context that we must consider cl 8.3.1. This provision is not straightforward either. It is capable of two meanings.

[51] The first is that the person being tested must consent, that is approve, the relevant method(s) of testing. That is a strict grammatical approach, attributing a particular meaning to the words "the relevant method(s) of testing".

[52] There is one contextual point that supports this approach, which was identified by the Authority. It noted that there is no express consent provision with regard to alcohol testing. The Authority went on to say that if cl 8.3.1 was to be confined to the provision of a consent for a drug test, a similar clause would have been included with regard to alcohol testing. The absence of such a requirement suggested to the Authority that the consent clause regarding drug testing was intended to deal with more than the provision of consent.[18]

[53] At this stage of the analysis, there is some force in this point, although we do not attribute too much weight to it because of the problem of inconsistent drafting elsewhere in the document.

[54] The second meaning is that the clause deals with the provision of consent to a relevant method(s) of testing which has already been determined. There are several pointers to this approach.

[55] First, the parties chose to incorporate the provisions of the standards of both drug and alcohol testing in cls 7 and 8. For urine and oral fluid testing, the standards referred to a requirement that donor consent had to be obtained for the taking of a specimen. Each of the 2006 oral fluid standard and the 2008 urine standard referred to this requirement in the relevant template relating to the "chain of custody" of samples taken. The 2019 oral fluid standard, which superseded the 2006 oral fluid standard, achieves the same end in a section of text describing the provision of informed consent prior to testing being taken.[19]

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18 *Vulcan Steel Ltd*, above n 1, at [40].

19 Procedures for Specimen Collection and the Detection and Quantitation of Drugs in Oral Fluid, cl 2.2.4.

[56] An objective and reasonable reader is thus able to conclude that the parties wished to remain faithful to the standards which they incorporated into their agreed procedure. Thus, express reference to the signing of a consent form in cl 8.3.1 was intended to stipulate the necessary informed consent requirement contained in those standards.

[57] This interpretation is reinforced by the fact that cl 8.3 deals with a range of formal requirements that are provided for in the standards to which we have referred.

[58] That the focus of the clause is on the provision of a consent of this nature is also supported by Appendix 4. As mentioned, it deals with the "test process". According to the Appendix, the employee is asked to take a "D & A test". Then, there is a decision point: "Employee consents to test?" If the answer to that question is yes, the employee is to attend the accredited test collection centre/process for the taking of samples. If the answer to that question is no, the refusal is treated as a failure to follow a lawful instruction; the disciplinary procedure outlined in cl 14 would appear then to apply. The appendix accordingly suggests that the provision of a consent is the gateway to the testing procedures, rather than the means by which the method of testing is selected.

[59] If this second approach to the interpretation of cl 8.3.1 is correct, it follows that the parties did not stipulate how the method of testing would be determined.

[60] Such a conclusion is unsurprising in a document where, as already discussed, there are other drafting errors.

[61] Having regard to the factors we have discussed, we consider that a textural analysis points to the conclusion that cl 8.3.1 relates to the provision of a consent to the taking of a test by a method that has already been determined; and that there is a gap on the issue of selection of method.

Relevant background information

[62] The Policy and the Procedure documents remained largely unchanged since 2017; as mentioned earlier, they were attached to each CA from that year.

[63] Attached to the previous collective agreement, that of 2015/2016, was a single document on the topic of drug and alcohol issues. Some of what is now seen in the current Procedure document was incorporated in the original drug and alcohol policy which was attached to that collective agreement.

[64] In the original document, the provision which became cl 8.3.1 stated:[20]

> Prior to undertaking a test, a test consent form will be signed by the employee consenting to the relevant method(s) of testing *based on the purpose of the testing (see details below)*.

[65] This form of the clause was also capable of a dual meaning. It could have meant that the employee would choose the relevant method of testing based on the purpose of testing; or it could have meant that an employee would sign the consent form in light of the method which had already been determined, which would be a purposive determination.

[66] In the version of the Procedure document which was subsequently attached to the series of CAs, the italicised words were not repeated. We will discuss the process which gave rise to the drafting of the current Procedure document later, but no obvious explanation for this deletion was referred to by either party.

[67] A second deletion was made. The original drug and alcohol policy stated, after referring to the 2008 urine standard which related to the testing of abuse of drugs in urine, that this was Vulcan Steel's "preferred manner of testing", that is, when compared with oral fluid testing.

[68] In the description of the two forms of drug testing adopted in the Procedure document, as developed in 2016 and 2017, the reference to Vulcan Steel's preferred method was not repeated. It may be this was yet another drafting problem, so we do not attribute too much significance to it.

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[20] Emphasis added.

[69] Another point which arises from the original Policy is that the alcohol testing provision referred to the fact a "test consent form" would be signed prior to undergoing an alcohol test.[21]

[70] For no obvious reason, that requirement was not repeated in the Procedure document. Again, an objective and reasonable reader would conclude this was yet another drafting defect, and that no weight can be attributed to the fact that there is no direct reference to a consent form in cl 7.

[71] Although we were taken to various email exchanges, and oral evidence of the parties as to the developing of the documents which subsequently were agreed, those exchanges are not of assistance in construing cl 8.3.1, save only to note that the parties clearly had different philosophies as to the benefits of urine testing on the one hand, and oral fluid testing on the other.

[72] Vulcan Steel's view was that it had been advised that urine testing was a more comprehensive and reliable form of testing. The union considered that oral testing was a necessary first step which had the advantage of detecting impairment soon after the use of certain drugs, particularly cannabis, whilst urine testing was invasive and demeaning.

[73] We also note that neither party pointed to any evidence where the parties had discussed and agreed as to a provision concerning the mechanics of choosing a method of testing.

[74] However, a further important – and decisive – piece of contextual evidence is the consent form which donors are required to sign under cl 8.3.1 of the Procedure document. This is a document produced by TDDA, the detection agency used by Vulcan Steel for drug and alcohol testing.

[75] We infer the form was developed in light of the governing standards to which we referred earlier.

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[21] Clause 4.3.

[76] After providing for the recording of identification details, it relevantly states the type of testing which is to be undertaken – that is, urine, oral fluid, or alcohol breath screening. The reason for testing is to be identified, as is the outcome of the initial screening test in each instance.

[77] The form contains a detailed informed consent provision, which the collector is required to read and explain in a language understood by the donor. It states:

> I consent to undergo a drug test(s) and or breath alcohol test, to be undertaken by The Drug Detection Agency (TDDA).
>
> I acknowledge this is for the purpose of determining whether I have levels of an illicit drug(s) or any misused prescribed drugs, or [illegal] designer drug(s) present in my urine and/or oral fluid, or determining whether I have any level of alcohol in my breath.
>
> Results of the drug test(s) and/or breath alcohol test will only be used for the purposes for which it was obtained, and if relevant, as set out in my employer's Drug and Alcohol Policy. Any on site screening results provided are subject to change upon an accredited Laboratory confirmation result due to the varying cut off levels in the relevant standards.
>
> I undertake to advise the nominated collector conducting the test(s) of any medications that I am taking. I also certify that I will not adulterate or attempt to cheat either of the tests and that the information provided on this form is true and correct with proof of identity.
>
> I understand that a refusal to sign this form and undergo a drug test(s) and/or breath alcohol test may be regarded as serious misconduct.
>
> I consent to the results of the drug and/or alcohol test(s) being communicated confidentially to my employer/prospective employer/employer's authorised personnel, and any client/customer of my employer/prospective employer or whoever else may legally request that such results be provided to them.
>
> I have read or had explained to me and understand the terms of this consent form.

[78] Provision is then made for the donor to sign the consent form.

[79] The exhibit to which we were taken was dated 2019.[22] It contained express references to the confirmation testing provisions of the 2008 urine standard and to the 2019 oral fluid standard.

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[22] AS/NZS 4308:2008 and AS/NZS 4760:2019.

[80] It was not contested that this was the consent form utilised by TDDA, the provider normally used by Vulcan Steel. It was in place when the parties agreed to roll over the Policy and Procedure document for the purposes of the current CA.

[81] An objective and reasonable reader can properly assume that the contents of the form were known to both parties at the time they entered into the current CA.

[82] As noted, it is a form that plainly reflects the requirements of the standards. It carefully deals with the important topic of informed consent for drug (and alcohol) testing. That topic is important because the testing is designed, at least in part, to provide a means of determining whether inappropriate drug or alcohol use has taken place. It does not state how the form of testing is to be selected.

[83] In our view, this evidence supports the second meaning we identified earlier, that is, that the clause deals with the provision of consent to a relevant method(s) of testing which has already been determined.

[84] In summary, there is no reliable contextual evidence showing an agreement as to choice of method. There is, however, some evidence that tends to support the conclusion that the form referred to in cl 8.3.1 was to ensure there would be a formal consent to a pre-selected method of testing. This was a requirement mandated by the two standards relating to drug testing.

[85] Although the reference to a consent to alcohol testing was in the original Policy and removed subsequently, donors are nonetheless required on the form just described to provide a consent to that form of testing. This point tends to suggest that no significance can be given to the apparent distinction between the requirements for drug testing on the one hand, and alcohol testing on the other, as the text might have suggested.[23]

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[23] Discussed at [52]–[53] above.

Conclusion as to interpretation

[86] We consider that cl 8.3.1 is solely concerned with the provision of a formal consent, and that it does not relate to the choice of method of testing. That topic was not addressed by the parties in either the Policy, or the Procedure document, including the various flowcharts that were attached.

[87] There being a gap on the issue of choice, we must now turn to consider whether the implication of a term regarding the choice of method of testing is appropriate in light of the legal tests relating to that possibility.

Issue two: implication of a term as to choice?

Principles

[88] The Supreme Court considered the necessary tests for implication in *Bathurst*; in doing so it resolved an issue which had arisen in the United Kingdom as to whether implication of a term was an exercise in the construction of an instrument as a whole.[24]

[89] The Supreme Court concluded that the issue of implication could only arise after the express terms of the contract had been interpreted and found not to provide for the eventuality which gave rise to the possibility of implication. Where the contract does not address the eventuality through express language or necessary inferences from that language, the Court may then move on to address whether a term should be implied.[25]

[90] In its summary of implication principles, the Supreme Court referred to the most commonly cited New Zealand authority on this topic, *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*, in these terms:[26]

> ... For a term to be implied, the following conditions (which may overlap) must be satisfied:
>
> (1) It must be reasonable and equitable;

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24 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [19].

25 *Bathurst*, above n 3, at [113].

26 *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

(2) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) It must be so obvious that "it goes without saying";

(4) It must be capable of clear expression;

(5) It must not contradict any express term of the contract.

[91] After reviewing a number of leading authorities, the Court then summarised the principal points as follows:[27]

(a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.

(b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.

(c) While the task of implication only begins when the court finds that the text of the contract does not provide for the eventuality, the implication of a term is nevertheless part of the construction of the written contract as a whole. An unexpressed term can only be implied if the court finds that the term would spell out what the contract, read against the relevant background, must be understood to mean.

(d) As with the task of interpreting a contract, the inquiry for the court when considering the implication of a term is an objective inquiry – it is the understanding of the notional reasonable person with all of the background knowledge reasonably available to the parties at the time of contract that is the focus of this assessment. The court is tasked with the role of constructing the understanding of that reasonable person.

(e) Thus, the implication of a term does not depend upon proof of the parties' actual intentions, nor does it require the court to speculate on how the actual parties would have wanted the contract to regulate the eventuality if confronted with it prior to contracting.

(f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.

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[27] At [116] (footnotes omitted).

Summary of the parties' cases

[92] In his submissions, Mr Patterson first summarised the evidence in detail. He particularly emphasised the importance of the expert witnesses who had discussed the features of each main form of testing. Both oral fluid testing and urine sample testing were useful tools for the responsible management of drug abuse in the workplace, but, he said, Vulcan Steel's experts had shown that urine testing was more comprehensive. Urine testing could detect a greater range of drugs, consumed over a longer window of time, when compared to drugs tested via oral fluid testing.

[93] The current oral testing standard was new; technology relating to it was still in its development stage, although it had progressed fairly quickly since it was adopted in New Zealand.

[94] Whilst the experts had suggested oral testing could be complementary to urine testing, oral testing alone would be wholly incomplete.

[95] It was important from a health and safety perspective that Vulcan Steel, as employer, should choose the appropriate method, rather than an employee who may have been the consumer of drugs.

[96] Mr Patterson referred to several recent decisions from the Fair Work Commission which had considered the pros and cons of each form of testing, albeit for the purposes of determining whether a policy was legal and reasonable.

[97] As to the criteria for implication, Mr Patterson emphasised that the implied term which Vulcan Steel sought was to the effect that the employer must choose the method of testing in each drug testing situation.

[98] He argued that this had always been the parties' bargain, even if it had not been expressly recorded. Such a term would be in accordance with the scheme of the Procedural document.

[99] There was no agreement that union members could decide to undertake only oral testing, as had been asserted.

[100] Vulcan Steel arguably had an obligation to properly manage health and safety risks in the workplace, under the Health and Safety at Work Act 2015 (HSW Act), particularly in a safety-sensitive workplace.

[101] If employees could select the method of testing, inconsistencies could arise, because some may select one method of testing, and others may choose another method of testing.

[102] It would be absurd if an employee could determine the means of testing for their own advantage.

[103] It should be concluded that such an implied term is reasonable and equitable, and necessary to give business efficacy to the requirements of the Procedure document. It goes without saying an employee should not be able to choose the method.

[104] The implied term was capable of clear expression, and there was nothing in the Procedure document which would contradict that term. The document would be incomplete without it.

[105] In his submissions, Mr Cranney referred to the manner in which the Policy and Procedure documents were developed.

[106] Then he submitted the purpose of the agreement was not to give the employer the right to demand urine or oral fluid testing, or even to provide an ideal testing system, but rather to balance the rights of the employer and the employees.

[107] A right of a worker to consent to a particular method would be a real right, not a truncated or artificial one. It would be consistent with equality, dignity, bodily integrity, and justice.

[108] If the employer wished to change that, it must do so in bargaining, not by the side wind of an implied term. The testing scenarios agreed to by the parties were there to improve safety, not to encourage oppression, or to enable the excessive use of

employer power. Their proper use was for dialogue, communicativeness, and good faith.

[109] There was no pressing need for the powers sought by Vulcan Steel, here, by way of an implied term; and even if there was, the answer would lie in collective bargaining.

The expert evidence

[110] Four experts gave evidence.

[111] Vulcan Steel called Dr John Lewis, a consultant toxicologist, and casual academic at the Centre for Forensic Science at the University of Technology in Sydney where he lectures. He has over 30 years' experience as a toxicologist in the field of drug abuse and testing individuals for the presence of drugs. He is a leading expert and publisher in the field in Australia. He was Chairman of Standards Australia CH-036 (1993-2019), when that committee was responsible for the development of Australian and New Zealand standards with regard to specimen collection processes; that included the promulgation of the 2008 urine standard. Amongst other relevant experience, he has given evidence in family courts and industrial courts and has assisted the Police Commissioner of New South Wales on internal matters.

[112] The second witness called for Vulcan Steel was Mr Bryce Dick, who since 2013 has been Managing Director of The Drug Detection Agency (TDDA) in New South Wales and the Australian Capital Territory in Australia. TDDA operates in both New Zealand and Australia, and specialises in workplace drug and alcohol testing, education, and risk-management based prevention. He has given evidence in other cases where the efficacy of drug testing has been in issue. His relevant expertise has been developed conducting at least a thousand on-site tests, and by drafting policies.

[113] The union called Dr Michael Robertson, a pharmacologist and forensic toxicologist at Independent Forensic Consulting. He has had more than 25 years' professional experience dealing with both practical and academic pharmacology and forensic toxicology. Regarding workplace drug testing, he is a consultant for a number of national drug testing organisations, and an expert in Australian Standard compliant

drug testing for both urine and oral fluid methodologies. He is the immediate past-Chair of the Standards Australia oral fluid committee which was responsible for preparing the 2019 oral fluid standard. He is currently Chair of the Standards Australia urine committee which is reviewing and updating the 2008 urine standard. He has prepared expert reports and testified in Australia and overseas on numerous relevant topics.

[114] The union also called Ms Anne-Louise Anderson, a biochemistry science graduate who has worked in laboratories for at least 25 years. There, she has been involved in establishing drug testing for workplace use, immunosuppression, and therapeutic drug testing applications, and in undertaking immunoassay work (a rapid antigen test that relies on biochemistry to measure the presence of the target).

[115] Ms Anderson has broad experience as to the development and implementation of workplace policies including occupational health and safety initiatives involving the risks posed by drugs and alcohol. She is an active member of the Australia and New Zealand Standards Committee, which was responsible for the revision of the urine standard in 2001 and 2008 and which is now involved in revising these standards again for publication later this year. She was a nominated member of the Standards Committee that revised the 2006 oral fluid standard, which was adopted as a joint Australia and New Zealand standard in 2019.

[116] In 2007, Ms Anderson formed a company InScience Ltd, which amongst other activities supports onsite workplace drug testing, using either urine or oral fluid techniques. That entity distributes Draeger alcohol breathalysers, and Draeger oral fluid testing devices. She is also involved with Drugwise Ltd, established in 2018, which is a provider of drug and alcohol testing on site. Ms Anderson provides technical management support to that entity.

[117] Because of the view we take as to the correct approach in this case, we will not summarise in detail the extensive evidence provided by all the expert witnesses, each of whom are undoubtedly well qualified, and who gave careful analytical evidence as to the pros and cons of urine and oral fluid testing. Rather, we summarise the main themes which they identified.

[118] Of the particular drugs which are referred to in the Procedure document,[28] Dr Lewis understood that Vulcan Steel is most concerned about THC (cannabis), Methamphetamine and Methylenedioxymethamphetamine (ecstasy).

[119] For the purposes of assessing the health and safety consequences of using these drugs, Dr Lewis referred to what he described as the three stages of impairment. They are acute impairment due to recent consumption; hangover impairment once acute impairment has subsided; and chronic impairment, which can result in serious and ongoing impairment.

[120] Dr Lewis said an individual affected by cannabis would be acutely impaired – that is, initially intoxicated – but that one to two hours after smoking cannabis, detection levels would likely be well below the cut off level provided for in the standard, so that oral fluid testing could fail to detect users who had smoked cannabis if collection occurred after that initial phase.

[121] Dr Lewis said that urine testing, however, could identify cannabis-metabolites – that is, the product of metabolising cannabis – in the subsequent phases. Oral testing would be unlikely to detect the presence of THC cannabinoids, or, for that matter, methamphetamine, the day after use.

[122] He also referred to a third class of commonly abused drugs, namely synthetic substances/prescriptions such as benzodiazepines, which includes diazepam, temazepam and alprazolam. He said although these are legally prescribed for sleep and anxiety, they can present problems of dependence and, especially when taken with alcohol, they can make operating machinery or driving vehicles a hazard. These drugs, in his view, are readily identified in urine, but cannot be easily identified in oral fluids.

[123] In summary, then, for these three commonly abused drugs, Dr Lewis considered that urine testing provides a better window of detection and/or detection of risk of impairment than oral fluid testing.

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[28] Above at para [23].

[124] For his part, Dr Robertson emphasised that oral fluid testing identifies "recent use" of drugs. That is, it detects the presence of a drug or drugs such as cannabis and methamphetamine ingested in the hour, or hours, prior to collection, during which acute effects, including impairment, may be present. Thus, he said oral fluid testing is referred to in the 2019 oral fluid standard as testing for "relatively recent exposure".

[125] Commenting on Dr Lewis' evidence, Dr Robertson said that benzodiazepines can in fact be detected in oral fluid; whilst onsite testing is limited due to their fat solubility, they can be tested in a laboratory, should that be required.

[126] Dr Robertson went on to say that, if knowledge of "recent use" is more important than "any use", oral fluid may be more useful; when knowledge of "any use" is more important than "recent use", urine testing may be more useful. Some organisations do not wish to target an individual's use of a drug in their own private time on a weekend or after work but are concerned as to whether they come to work under the influence of a drug; in that case oral testing may be preferable. If the organisation wishes to target drug use having longer term impairment, urine testing could be appropriate. He said the philosophy of the organisation would likely drive its decision as to a preferable option.

[127] There was debate between the experts as to the issue of false negatives. Dr Lewis said there are significant problems with oral testing providing false negatives, and that studies have shown that some on-site oral fluid testing devices have failed to identify drugs, especially cannabis. This was concerning because given the 2019 oral fluid standard, few oral testing devices have passed independent verification for accuracy. He pointed to a Norwegian article that suggested that in 2015 an oral fluid Draeger device used for testing approximately 300 motor vehicle drivers had returned the relatively high false negative rate of 13.4 per cent.[29]

[128] Mr Dick held similar views. He said that based on his experience, urine-based testing was significantly more accurate.

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[29] Evaluation of Draeger Drug Test 5000 in a Naturalistic Setting, Journal of Analytical Toxicology 2018, 1 – 7.

[129] By contrast, Dr Robertson said that all devices are subject to false positives and false negatives. Devices used for drug testing are required to be verified as fit for purpose, which includes evaluating rates for false negatives and false positives. He said the process for urine and oral fluid verification testing is similar, and as such, both types of device are required to perform in a similar way.

[130] We observe that this issue has to be seen in light of the technological developments that are now taking place in respect of oral fluid testing devices, and the very detailed technical requirements as to testing in the applicable standards.

[131] Drawing these threads together, it is apparent there is no one-size-fits-all method. What method, or methods, may be allowed for depends on the particular concerns, or needs, of the relevant organisation. What method or methods may be appropriate for a particular situation may well depend on the particular circumstances. In our view, these conclusions are a matter of common-sense.

[132] The evidence establishes that, at least from 2019 in New Zealand, there have been options. Indeed, parties may choose to adopt both methodologies because the two methods are seen as complementary, as here. However, some parties in New Zealand elect to adopt only urine testing, and some elect to adopt only oral fluid testing. In short, practices vary.

[133] Mr Dick was asked in cross-examination about statistics concerning TDDA's activities in Australia and New Zealand, though not for any other providers. He answered the questions appropriately, but as he emphasised, he was doing so from memory. No written analysis was available. In the circumstances, this information has limited value.

[134] By way of example, he said the experience of TDDA in Australia over a recent 12-month period indicated (approximately) a 60/40 split in favour of urine testing as against oral fluid testing. By contrast, he said that in New Zealand the proportions were between five and seven per cent for oral fluid testing, with the balance being for urine testing.

[135] The fact that oral fluid testing is more limited in New Zealand than in Australia has to be assessed in light of the fact there was no oral fluid testing which specifically applied to New Zealand until recently. We refer again to Ms Anderson's evidence that as a result of the promulgation of the 2019 oral fluid testing standard, there have been technological advances for appropriate devices in New Zealand. We also note that TDDA itself promotes all forms of testing in New Zealand, including oral fluid testing. In short, Mr Dick's statistical evidence has to be seen in context. Moreover, it does not assist the Court on an interpretation issue.

[136] This issue highlights the fact that when giving their evidence, the experts were not dealing with issues relating to the interpretation of the subject documents. Rather, their focus tended to be on their views as to the respective merits of the two types of testing as they saw it in 2022 when they gave their evidence, rather than in 2014 – 2015 which is when the parties originally negotiated their agreement.

[137] Although the union was told in 2014 that "NZDDA" – which we infer is the New Zealand arm of TDDA – had a preference or recommendation for urine testing, as it provided "the most accurate results", and made a recommendation accordingly, no reasons for this were given. That brief reference is insufficient to establish that the expert views now provided to the Court were part of the context at the time the agreement was concluded.

[138] On the evidence before us, we find none of the experts were personally involved in advising as to the form of the Policy, or as to the Procedure document. Nor is there any reliable evidence that their particular views were known to the parties as an aspect of shared context. The expert evidence cannot therefore be regarded as part of the common background circumstances, for the purposes of interpreting these documents.

[139] Nor does the expert evidence shed light on the pros and cons of selection of method. Although there was common ground that each method has advantages, their evidence did not persuade us that parties to a contract must inevitably agree that an employer should select the method of testing in particular circumstances if the drug testing process is to be effective. Their evidence tended to focus on terms included in

their views as to types of testing adopted in policies, not contracts; they did not evaluate processes for selecting methods of testing.

Other decisions[30]

[140] We were referred to Australian decisions from the Fair Work Commission, and in one instance, to an appeal from that body. These considered in depth whether certain drug testing policies were reasonable. In each proceeding, the pros and cons of urine and oral testing were assessed with it being concluded that both methods of testing had their benefits and shortcomings.[31] In another case, the Fair Work Commission found it was not unjust or unreasonable for the employer to implement urine testing for drugs.[32] The employer wished to implement urine testing only for the purposes of pre-employment, post-incident, reasonable cause, or return to work after drug rehabilitation.[33]

[141] Again, we are not assisted by the conclusions reached in those decisions, turning as they did on policies relating to urine testing rather than as to agreed contractual obligations.

[142] For completeness, we mention three New Zealand cases which have considered urine testing. Two considered whether or not such testing was reasonable under a workplace policy.[34] The third considered whether an employer which undertook urine testing in breach of a relevant policy had unjustifiably disadvantaged its employees because the privacy of the male employees involved was compromised.[35] These decisions also involve a consideration of policies and not contractual arrangements; they are therefore not on point.

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30 *Endeavour Energy v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2012] FWAFB 4998; *Arnott's Biscuits Ltd T/A Arnott's v United Voice* [2018] FWC 1714; and *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FWCFB 4075.

31 *Endeavour Energy,* above n 30, at [43] and *Port Kembla Coal Terminal Ltd*, above n 30, at [62–[63].

32 *Arnott's Biscuits Ltd t/a Arnott's,* above n 30, at [215] and [246]–[247].

33 At [18].

34 *Air New Zealand Ltd,* above n 4 and *Maritime Union of New Zealand Inc,* above n 4.

35 *Sim v Carter Holt Harvey Ltd trading as Woodproducts New Zealand* [2014] NZERA Christchurch 81.

Application of legal test as to implication

[143] Earlier we found that the text of the Policy, and of the Procedure document, do not stipulate how the drug testing method is to be selected. The documents are silent on this issue.

[144] The parties decided to refer to three methods, two of which were governed by standards, but it is common ground that the dispute centres on which of the two main methods should be selected in any given situation. But, before considering the text further, we think it appropriate to consider the relevant background.

[145] In the exchanges of the parties prior to the developing of the Policy in 2014, Vulcan Steel and the union were apart on several issues. These included whether or not to include provision for post-incident and/or random testing, as well as reasonable cause testing, which was agreed. There were also differences as to cut off levels.

[146] The union told Vulcan Steel that what employees did in their own time was their business, and that all that was required was that they turn up for work able and unimpaired. Initially, it was suggested that urine testing should not be adopted because it was invasive and demeaning, but more importantly such testing would not, according to NZTDDA forms, confirm impairment. The union said that any test should be about identifying impaired workers and not seen as "social engineering". The union said that workers should either have the option of being tested by way of an oral swab or obtaining a fit-for-work certificate from a medical practitioner.

[147] During these exchanges, Vulcan Steel adhered to its view that all the identified triggers for drug testing should apply, and that urine testing was its preferred approach. It said the company carried the health and safety risk, and in light of that responsibility, it required the "best/most accurate" test to be used.

[148] In the course of these exchanges, then, the parties had strong opposing views as to method.

[149] However, a compromise was reached. Both methods of testing were included. Each side moved to accommodate the position of the other in the Policy, which became part of the 2015/2016 CA.

[150] The accommodation appears to have occurred in the lead up to finalising the 2015/2016 CA. Although little turns on it, the chronology appears to be that the Policy was debated between the parties in the course of 2014 and finalised on 28 August 2014, and that formal bargaining commenced in early 2015.[36] The parties then agreed that providing the form of the Policy was maintained so as to refer to both methods of testing, and the initial Policy would be attached to the CA as an appendix. This was a quid pro quo for the adoption of Vulcan Steel's disciplinary handbook as a second appendix.

[151] In 2016, when the Policy was being revised, Mr Yarrall on behalf of the Union said in an email to Mr Lill of Vulcan Steel that inclusion of the drug and alcohol policy as part of the CA had been contingent on it including oral swabbing as part of the testing regime. He went on to say that the union, however, had only agreed to the use of oral swabbing, and that members were opposed to urine testing due to its invasive and demeaning nature.

[152] We do not accept there was a formal agreement between the parties that only oral testing could be adopted once the Policy was annexed to the original CA, since the original Policy did not say this. Neither did the updated Policy and/or Procedure document.

[153] What a reasonable reader, however, can take from an objective assessment of this history is that there was a merging of two points of view. Oral testing was included, which would enable impairment for recent use to be detected; urine testing was included, which would provide a wider window of detection in respect of a broader range of drugs.

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[36] The date the parties have agreed for the Policy is recorded in the index to the common bundle of documents.

[154] However, the compromise reflected two different underlying approaches. The union considered that oral testing would always be desirable because it would address impairment if a worker arrived at the workplace under the influence of a drug recently taken; Vulcan Steel considered that urine testing would always be desirable because that would be more accurate and because it wished to identify employees having traces of illegal drugs in their system.

[155] There is no evidence that any discussion occurred, or more importantly, that agreement was reached as to how these differing approaches would be reconciled when determining which method would be adopted in any particular circumstance.

[156] In 2016, Vulcan Steel undertook a survey of union and non-union employees as to the preferred method of drug testing. The results of the survey were that 151 employees preferred urine testing, and 36 employees preferred oral fluid testing. Union members were in the latter group.

[157] Several weeks later, on 24 June 2016, TDDA attended one of Vulcan Steel's Christchurch sites to perform random drug testing. Employees, including union members, were asked to undergo a urine test. Members refused stating that, in the CA, Vulcan Steel had agreed to oral swab testing.

[158] Mr Yarrall raised this concern with Mr Nath of Vulcan Steel. It was then agreed that union members could undergo oral fluid testing, and this occurred. Mr Nath said this was a one-off decision on the part of Vulcan Steel; he said it could not be inferred from this circumstance that union members could routinely determine which form of testing would be undertaken. Even accepting Mr Nath's account, the incident highlighted the absence of an agreed process for selecting a method.

[159] At the time, Vulcan Steel was reviewing all its policies, including its drug and alcohol policy. It was in that context that it decided to establish two relevant documents, being an amended drug policy, and the creation of a Procedure document. Initially, the Procedure document contained no reference to oral testing. Mr Yarrall pointed out the union had not agreed to the removal of a provision as to oral fluid testing. Mr Lill then said an editing error had occurred. The next draft reinstated the

provision for that form of testing. Even at this point, the issue of selection of method did not become the subject of express discussion or agreement.

[160] Testing by hair follicles was also added by Vulcan Steel so as to "future proof" the document, but no procedural provisions were included.

[161] The amended documents were then attached to CAs from 2017 onwards. The status quo as to inclusion of the two main previously agreed testing methods continued, as did the absence of a selection procedure.

[162] Although the parties' compromise remained in place, they did not resolve the underlying issue as to method, about which they had different opinions.

[163] It is to be noted that the parties had agreed to a joint decision-making mechanism with regard to reasonable cause testing when a question arose as to whether this form of testing should be included during the 2014 negotiations. The union suggested a process, to which Vulcan Steel agreed. Two assessors, being the employees' manager and supervisor, would discuss the issue with the employee prior to finally determining whether Vulcan Steel would require the employee to be tested. This mechanism balanced the rights of the parties. It was a yet a further aspect of the original compromise in 2014.

[164] We conclude that the underlying views of the parties were never explored or reconciled for the purposes of agreeing a mechanism for the selection of method.

[165] This was notwithstanding the agreed statement in cl 4(c) of the CA that the parties would work together to rectify the effect of any errors or omissions which were overlooked during the negotiations.

[166] No doubt there were various possibilities such as the method being selected by the employer alone, by the employee alone, by the union alone, by some combination thereof, or by some other agreed procedure.

[167] The difficulty with the position which Vulcan Steel now adopts in asserting an implied term where the employer alone can select the method is that it is binary. Vulcan Steel says that it should select the method, and not the employee.

[168] Given the compromises made in developing the original, then amended Policy, and the Procedure document, the problem is not that simple.

[169] The parties continued to leave this key issue unresolved, the answer to which is now far from clear. It cannot be said the resolution of the problem is "so obvious it goes without saying".

[170] We conclude that the circumstances are not suitable for the implication of a term as to the correct approach to the selection of method, because it would not spell out what the CA, read against the relevant background, must be understood to mean.

[171] Mr Cranney also submitted that implication of the proposed term would lead to a distortion of other clauses. The most significant of these was his argument regarding the effect of the proposed implied term on cl 14, which dealt with a refusal to take a drug or alcohol test. Underlying his submission was the point that the clause, in its current context, dealt with a refusal to take a drug or alcohol test. Implication would mean the clause would apply to a refusal to consent to a drug test - that is, either a urine test or an oral fluid test. Mr Cranney submitted that to imply the term sought by Vulcan Steel would alter the balance of the clause, because it would apply to a refusal to take a drug test in a form chosen by the employer, thus significantly altering the meaning of the clause as agreed originally.

[172] We agree it is arguable the effect of the clause would change, were the proposed term to be implied. This would amount to another alteration of the parties' bargain. It is a further point telling against the appropriateness of implication.

[173] It may well be the case that, just as selection of method is a matter for the parties to bargain for in good faith in light of their respective differences, the same would apply to the scope of cl 14.

[174] It may be there are other issues which would need to be addressed, such as the form of the flowcharts.

[175] Vulcan Steel argued that implication was also necessary for health and safety reasons. Whilst it undoubtedly has important health and safety obligations, they are obligations that involve a proper consideration of employees' views, as is evidenced by the provisions of the HSW Act as to engagement with workers, and worker participation practices.[37]

[176] Vulcan Steel chose to discontinue drug testing at its Christchurch sites because of the unresolved disputes. It did not, for example, in the interests of health and safety maintain oral testing in the meantime – either for all employees or as an option for employees covered by the CA; nor did it require urine testing of employees not covered by the CA. This circumstance suggests the issue is not so pressing as to require a prompt imposition of an implied term.

[177] In summary, we are not satisfied that the high threshold for implication of the term sought is met.

Result

[178] The challenge is dismissed.

[179] We reserve costs, which should be discussed between the parties in the first instance. It is our provisional view that these should be considered on a 2B basis. If the parties are unable to reach agreement, application may be made within 21 days, with a response given in a like period.

B A Corkill
for the full Court

Judgment signed at 12.45 pm on 11 May 2022

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[37] Health and Safety at Work Act 2015, ss 56 – 61.