IN THE EMPLOYMENT COURT
AUCKLAND

AC 51/07
ARC 34/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority and for declarations and injunction
BETWEEN	MARITIME UNION OF NEW ZEALAND INC First Plaintiff
AND	HENRY NEE NEE AND HENRY TOLEAFOA Second Plaintiffs
AND	TONY SMART Third Plaintiff
AND	TLNZ LTD First Defendant
AND	TLNZ AUCKLAND LIMITED Second Defendant

Hearing:	5 September 2007 (Heard at Auckland)
Counsel:	Simon Mitchell and Helen White, Counsel for Plaintiffs CH Toogood QC and Nikki Dines, Counsel for Defendants
Judgment:	7 September 2007

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of preliminary issue

[1] The issue now for decision before this case starts on 10 September 2007 is whether several of the defendants' intended witnesses qualify as expert witnesses

able to give opinion evidence and, therefore, the admissibility of some of the evidence intended to be given by those witnesses as signalled in their briefs of evidence that have been exchanged and filed.

[2] As against the need for a very prompt decision to enable accepted expert witnesses to confer before trial, this is the first case in this Court addressing the relevant sections of the Evidence Act 2006 that came into force only about five weeks ago. Counsel have, perhaps not surprisingly, not been able to discover any judgments of other courts delivered since 1 August 2007 in civil litigation dealing with these questions, that might assist me in this case. So the following represents a best attempt to address novel questions in a very short time.

[3] I wish to make clear two important principles applicable to this judgment. The first is that what may be seen as conclusions or remarks that are adverse to witnesses are not made of them personally or professionally. Rather, my unenviable task is to make decisions about the nature of the evidence that such persons are permitted to give by applying rules of law to that evidence. So, for example, although there may be references to persons not being permitted to be expert witnesses, that is not a personal criticism or even true in a non-technical sense: rather, it is a shorthand for whether such persons may give opinion evidence. The second and not unassociated principle is that even if such witnesses are not permitted to give some opinion evidence, none is prevented from giving evidence and explaining, often in the most technical and complex of ways, what they or others did and why, so that the expertise of these people will nevertheless be very valuable to the Court.

Nature of substantive case

[4] The first consideration is to identify the issues for decision by the Court from the pleadings. The defendants are stevedoring companies whose employees work on wharves and cargo ships berthed at them, loading and discharging a range of cargoes although not, at least usually, in standard shipping containers. The defendants also have employees engaged in a range of supporting roles within the waterfront areas with which this case is concerned at the ports of Auckland and Tauranga.

[5] The defendants wish to implement policies addressing drug and alcohol use by their employees and the potential effects on persons and property. These policies include testing and rehabilitative regimes. The plaintiff union, of whom many of the defendants' employees are members, disagrees with the content of these policies and opposes their implementation. It has challenged the lawfulness at employment law of the introduction of the policies on a number of grounds that are reflected in the plaintiffs' separate causes of action set out in their latest statement of claim.

[6] The first cause of action asserts that the employers' relevant past and intended future actions have been and will be in breach of collective employment agreement obligations. These include to act fairly and reasonably towards employees, to maintain a safe and healthy place of work, and not to do anything contrary to the objects of the agreement. More particularly, the obligations breached or apprehended to be breached include that the employer must take all practical steps to provide and maintain for employees a safe working environment and to ensure that employees are not exposed to hazards in or around their workplaces. These obligations also include that the employer is to ensure that there are methods in place for identifying existing and new hazards and shall take all practical steps to minimise or isolate these, if not to eliminate them. Although the collective agreement is said to reserve to the employer the right to make rules and procedures as may be reasonable and not inconsistent with the agreement for the maintenance of good conduct by employees, and that such rules of conduct shall form part of the agreement, the plaintiffs say that the employers' actions have been and will be in breach of those specific requirements set out above.

[7] The plaintiffs' second cause of action is said to be that the first defendant's past and apprehended future actions will be in breach of the statutory good faith obligation not to undermine bargaining for a collective agreement that is under way. The plaintiffs say that by imposing the policy, instead of bargaining about it, the first defendant is undermining the collective bargaining and is in breach of good faith thereby.

[8] The plaintiffs' third cause of action is also in breach of contract and, in particular, it is said that the defendants have failed to consult, or consult adequately, about the introduction of the policy contrary to the collective agreement.

[9] The remedies sought by the plaintiffs include declarations of unlawfulness of the defendants' conduct and a permanent injunction restraining the defendants from implementing the intended policies.

[10] As part of the statutory hearing management process, the parties have filed and served briefs of the evidence of their intended witnesses. The plaintiffs intend calling a number of expert witnesses and there is no challenge at present to their qualification to give opinion evidence as experts or to the admissibility of the contents of their intended evidence. All challenges to the plaintiffs' evidence will be by cross-examination and the tendering of countervailing evidence by the defendants' witnesses at trial.

[11] In this regard, the defendants have briefed a number of witnesses who they say qualify as experts to give opinion evidence. These include Susan Nolan, the Client Development Manager of the Institute of Environmental Science and Research Ltd ("ESR"), Matthew Beattie, the Chief Executive of Instep Ltd, a behavioural healthcare company, and Warren Hamilton, a chartered chemist and forensic toxicologist. It is their intended evidence that is at issue now.

The law of expert evidence

[12] I deal first with the relevant principles concerning expert evidence in the Employment Court and associated questions of evidence admissibility.

[13] Section 189(2) of the Employment Relations Act 2000 is the primary determiner of evidence admissibility in the Employment Court. It provides:

> *The Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.*

[14] Just what amounts to *"strictly legal evidence"* is uncertain but does not need definitive resolution in this case. It was common ground that the law of evidence in New Zealand (*"legal evidence"*) is now largely codified in the Evidence Act 2006. Although the Employment Court is notable 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. They will affect and guide the exercise of the equity and good conscience test under s189(2) of the Employment Relations Act.

[15] More specifically, practice relating to expert witnesses is absent from the Employment Relations Act and the Employment Court Regulations 2000. Through reg 6, however, the relevant provisions of the High Court Rules 1985 are engaged. Rules 330A, 330B, 330C and 330D, dealing with expert witnesses, are applicable, as is Schedule 4 to the High Court Rules. I have already directed that the provisions of these Rules are to be applied to the hearing of this case.

[16] Returning to the question of evidence, a number of sections of the Evidence Act are relevant in determining whether, under s189(2) of the Employment Relations Act, the Court should admit the evidence in contest in this case.

[17] Section 4 (*"Interpretation"*) provides helpful definitions of three words or phrases that are relevant to the issues in this case:

> ***expert*** *means a person who has specialised knowledge or skill based on training, study, or experience*
>
> ***expert evidence*** *means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion*
> …
> ***opinion****, in relation to a statement offered in evidence, means a statement of opinion that tends to prove or disprove a fact*

[18] The purpose of the Evidence Act is set out in s6 as being *"to help secure the just determination of proceedings"* including by:

(a) providing for facts to be established by the application of logical rules; and

…

(c) promoting fairness to parties and witnesses; and

…

(e) avoiding unjustifiable expense and delay; …

[19] The fundamental principle underlying the Evidence Act is set out in s7 headed *"Fundamental principle that relevant evidence admissible"* and which provides:

> *(1) All relevant evidence is admissible in a proceeding except evidence that is—*
> *(a) inadmissible under this Act or any other Act; or*
> *(b) excluded under this Act or any other Act.*
>
> *(2) Evidence that is not relevant is not admissible in a proceeding.*
>
> *(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.*

[20] Having set out the fundamental principle of admissibility of relevant evidence in s7, s8 then provides for general exclusions materially as follows:

> *(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—*
> *(a) have an unfairly prejudicial effect on the proceeding; or*
> *(b) needlessly prolong the proceeding.*

[21] Section 14 allows a court to admit evidence about which there may be a question of admissibility, if evidence is later offered which establishes that admissibility.

[22] Coming to expert opinion evidence, s23 provides simply that *"A statement of an opinion is not admissible in a proceeding, except as provided by section 24 or 25"*.

[23] Section 24 deals generally with admissibility of opinions and provides:

> *A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.*

[24] Section 25 deals with opinion evidence of experts and is materially as follows:

> *(1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.*
>
> *(2) An opinion by an expert is not inadmissible simply because it is about—*
> *(a) an ultimate issue to be determined in a proceeding; or*
> *(b) a matter of common knowledge.*
>
> *(3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.*
>
> …

[25] Section 26 deals with the conduct of experts in civil proceedings and requires such witnesses to conduct themselves, when preparing and giving expert evidence, in accordance with the applicable rules of court that I have already noted are applicable to this case. These are rules 330A and following of, and Schedule 4 to, the High Court Rules.

[26] In some, perhaps most, ways, the new statutory position accords with that which has been reached in this Court about expert opinion evidence and perhaps even in many respects in other courts of civil jurisdiction in recent times. The provisions of the Evidence Act at issue in this case cannot be described as revolutionary: rather, they reflect and confirm modern developed practice. Asher J so noted in *Diagnostic Medlab Limited v Auckland District Health Board & Ors* HC AK CIV-2006-404-4724 5 December 2006.

[27] Although in a statutory proceeding that has come to the Court through the Employment Relations Authority, both the questions at issue and the adversarial contest, especially between expert witnesses, makes this a case that would not be out

of place in a civil courtroom in one of the courts of ordinary jurisdiction. So seen, the Court should consider carefully, and be influenced by, the general law of evidence in exercising its broad discretionary jurisdiction under s189(2) of the Employment Relations Act. That is especially so in respect of the philosophy behind the Evidence Act's particular provisions. These underpinnings or rationale include that the Court may be likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or ascertaining any fact that is of consequence to its determination: s25(1). Ultimately, however, it is the equity and good conscience test in s189(2) of the Employment Relations Act that must determine admissibility of evidence.

The grounds for the plaintiffs' objections

[28] These may be summarised as follows:

- The impugned witnesses propose to give opinion evidence about matters outside their expertise.

- The impugned witnesses propose to give evidence about the ultimate issues for decision by the Court.

- The impugned witnesses all advocate for a position and do not give evidence of an expert nature that is detached and balanced.

- Ms Nolan and Mr Beattie lack the necessary independence to be experts, each having a financial interest in the outcome of the proceeding.

- Ms Nolan has been involved extensively in the preparation of the policy in dispute and was a key protagonist in its creation so that she lacks the necessary independence to provide expert opinion evidence.

[29] I deal with each of these grounds of objection first as matters of principle before moving to apply them to the particular intended evidence of each witness.

Opinion evidence beyond expertise

[30] In determining this question under s189(2), I propose to follow the relevant provisions in the Evidence Act. Section 25(3) affects the question of evidence outside an expert's expertise. It provides that if an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if the fact is or will be proved or judicially noticed in the proceeding. My attention was not drawn to independent, admissible evidence as contemplated by the section.

[31] As already noted, "*expert evidence"* is defined as the evidence of an expert (a person who has specialised knowledge or skill based on training, study or experience) based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion. It is axiomatic that qualification under the Evidence Act as an expert witness does not allow the giving of opinion evidence beyond the parameters of that expertise. I venture to suggest that that has always been the law and applying this principle subsequently in this judgment will be by determining whether identified pieces of evidence fall within or outside the established expertise of a witness.

Ultimate issue

[32] Again in this regard, I propose to determine the question under s189(2) primarily by following the provisions of the Evidence Act. Section 3 defines the relevance of evidence as being whether it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding. That may be what is described as the ultimate issue but is also broader and less than ultimate. The *"Opinion rule"* under s23 is that a statement of opinion is not admissible except as provided by s24 or s25. Rather than focusing on whether the opinion evidence goes to the ultimate issue, the statutory test under s25(1) is whether the fact-finder is likely

to obtain substantial help from the opinion in understanding other evidence or in ascertaining any fact that is of consequence to the determination of the proceeding. That may be seen to include what is traditionally described as the ultimate issue but also more. Section 25(2) addresses and determines the point made by Mr Mitchell by providing that an opinion by an expert is not inadmissible simply because it is about an ultimate issue to be determined in the proceeding. Ultimate issues are now no different to others when it comes to opinion evidence on them. This is the approach I will apply under s189(2) of the Employment Relations Act.

[33] More fundamentally and decisively, it is really an identification of what is the real issue in each cause of action that will determine whether any witness can give opinion evidence about this. As can be seen from my earlier summary of the substantive case, set out in paragraphs [4] to [8] inclusive, most if not all of the ultimate issues are questions of law and fact, either about the interpretation and application of collective employment agreements, or statutory provisions. Those are matters that this Court is both well versed in determining and, I suggest, best placed to decide. I am unlikely to obtain substantial help from the opinion of witnesses in making these ultimate determinations. I may, however, obtain substantial help from the opinions of experts to ascertain facts that are of consequence to the determination of some of the causes of action and, therefore, the proceeding and, in particular, what I will describe as scientific questions in issue as opposed to ones of law or even employment practice.

Partiality and expert witnesses as advocates

[34] This is the most difficult issue thrown up by this case at this stage. It is in the nature of expert evidence that it will support the position of the party calling it and so in that sense might be capable of being seen as advocating for a position. In an adversarial system, especially one where the Court does not control absolutely what evidence is called or adduce its own expert evidence, it is uncommon for parties to adduce evidence, including expert evidence, that contains even elements favourable to an opponent's case. Mr Mitchell's argument for evidence that is only *"detached and balanced"* does not address adequately the realities of such litigation. Although

expert evidence must be prepared and presented in accordance with applicable rules of court relating to the conduct of experts (as must happen in this case), there is no requirement that such expert evidence should not be persuasive or even strongly persuasive. Rather, the impact of such expert evidence can be blunted or even eliminated by combinations of effective cross-examination and contrary expert evidence.

[35] The presence of a conflict of interest does not disqualify automatically an expert. Rather, the question is whether the expert's opinion is independent both of the parties and of the pressures of the litigation: *Toth v Jarman* [2006] 4 All ER 1276. This follows earlier authority including *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81-82.

[36] However, what is described by counsel for the plaintiffs as *"expert advocacy"* does raise serious issues about the intended evidence of some witnesses.

[37] Elements of the code of conduct for expert witnesses set out in Schedule 4 to the High Court Rules that are incorporated into rules of evidence by s26(1) of the Evidence Act, include:

> ***1*** *An expert witness has an overriding duty to assist the Court <u>impartially</u> on relevant matters within the expert's area of expertise.*
>
> ***2*** *An expert witness is not an <u>advocate</u> for the party who engages the witness*
>
> (my emphasis)

[38] It is true, as Mr Toogood submitted, that the statutory definitions of expert and expert evidence do not require the witness to be independent. But that absence of restriction does not determine conclusively the argument raised by Mr Mitchell of partiality and advocacy.

[39] So there must be a dividing line drawn between persuasive/party-supportive opinion evidence (admissible) and opinion evidence that is partial and/or amounts to advocacy for the party calling it (inadmissible).

Vested interests of expert witnesses

[40] I use that term not in the technical, legal, property law sense but in the now widespread and quite different popular sense, meaning that the intended expert witnesses have gained financially already from the subject matter of the proceeding and/or stand to gain further if the defendants succeed, and to lose if the defendants fail.

[41] Other cases and the evidence here establish, or will establish, that workplace drug and alcohol testing and rehabilitation, and other programmes associated with it, are a relatively new but rapidly expanding commercial enterprise in New Zealand. There is active marketing of these services. They are promoted as, and need to be, both legally compliant and scientifically sound not only to expand into untapped portions of the market but also to retain business generally and market share with competitors in particular. There are real and substantial economic and professional implications from the outcome of cases such as this that go well beyond the immediate parties or even their particular industries. It is no exaggeration to say that the outcome may allow the industry to expand or force it to contract if reliance by some witnesses on the outcomes of earlier cases is anything to go by.

[42] The case is, in one sense, a test case in that it is one of very few where workplace drug and alcohol policy testing has been challenged in litigation.

[43] Many expert witnesses in other disciplines give opinion evidence in return only for their proper professional fees for doing so. No one could suggest ulterior motives for the opinions so put forward. Neither the Evidence Act nor the relevant High Court Rules address, as a matter of qualification of expertise or admissibility of evidence, considerations such as whether the outcome of the case will or will not enable the expert witness to reinforce or pursue a commercial opportunity. These issues being real, however, I consider they are properly components of the partiality/advocacy tests set out above.

Proposed evidence of Susan Nolan

[44] The plaintiffs' principal attack is directed to the evidence of Ms Nolan and it is necessary to analyse its nature and foundation by reference to the principal brief of her evidence.

[45] Salient features of Ms Nolan's intended evidence include that she is the Client Development Manager of ESR and has been so for about the last 12 years. From 1971 until 1995 Ms Nolan was a forensic toxicologist and illicit drugs specialist, reaching the position of Managing Scientist with ESR and its predecessor, DSIR Chemistry. Her academic qualifications include the degree of Master of Science, majoring in Biochemistry. She is a member of the New Zealand Institute of Chemistry, the Australian/New Zealand Forensic Science Society and The International Association of Forensic Toxicologists. Ms Nolan also holds positions with a number of drug testing and standards bodies including membership of the joint Australian/New Zealand Standards Technical Committee CH-036 responsible for preparing the joint standard AS/NZS 4308:2001 *Procedures for the collection, detection and quantitation of drugs of use in urine* and its predecessor.

[46] In her marketing and business development role for ESR, Ms Nolan has actively assisted New Zealand companies to develop and implement drug and alcohol policies and programmes and has been involved in the education of managers and staff in the implementation of testing procedures. Her company currently has about 800 client organisations involved in these programmes. Ms Nolan is frequently engaged by companies and other corporate organisations for policy advice.

[47] Ms Nolan has also published papers in the field of illicit drugs and toxicology and presented papers at relevant forensic conferences including on the topics of drugs and alcohol in workplaces.

[48] I accept that Ms Nolan will establish in evidence that she has specialised knowledge or skill based on training, study, and experience and in this respect qualifies statutorily as an expert witness. That is, however, only part of the requisite test permitting her to give opinion evidence in this case. I must also be satisfied that she will conduct herself, in preparing and giving her evidence, in accordance with Schedule 4 to the High Court Rules and s26(1) of the Evidence Act that I have adopted as part of the relevant test under s189(2) of the Employment Relations Act. Ms Nolan has not yet produced to the Court a statement under r330A(2) of the High Court Rules as I have directed to be done by any witnesses held out as experts in this proceeding although this may, of course, be given orally from the witness box and I assume would be. On those assumptions, I must also be satisfied that Ms Nolan's evidence will fulfil her *"overriding duty to assist the Court impartially on relevant matters within [her] area of expertise"* and that she is not thereby an advocate for the defendants: Schedule 4 paragraphs 1 and 2.

[49] ESR, for which Ms Nolan works, is a Crown company that operates on a commercial model, that is it competes or competes potentially with other private sector enterprises that undertake the same sort of work. The following account of Ms Nolan's intended evidence addresses only those parts of it that the plaintiffs say disqualify her from giving expert evidence and/or will be inadmissible. Other substantial portions of her intended evidence are uncontroversial for the purposes of this challenge.

[50] Ms Nolan will give evidence that over the last five years ESR has conducted 1,765 drug tests for New Zealand port companies and for the defendant companies that she describes as TLNZ/Toll Owens. She does not differentiate between those separate entities but says that the drug testing was a mix of pre-employment, internal transfer, post accident/incident, reasonable cause, random and post-rehabilitation testing. Her evidence will be that the overall *"positive strike rate"* of these tests was 9 percent with the positive strike rate for TLNZ/Toll Owens being 10 percent.

[51] The evidence will establish that Ms Nolan was involved actively in the design and content of the defendants' policy. As TLNZ's Christopher Tootill will say, Ms

Nolan was contacted on numerous occasions for professional advice. She appraised and advised against policy changes suggested by the first plaintiff during consultation phases.

[52] Ms Nolan's evidence will be that in about October 2005 her company, ESR, was engaged by Toll Owens Ltd to advise on the development and implementation of a drugs and alcohol policy applicable to employees at TLNZ port sites. This engagement of ESR appears to have come about after it had assisted another company in the Toll group, a railway operator, with development of policies and procedures and had conducted extensive training and education programmes for that entity in 2004.

[53] Ms Nolan was asked by TLNZ first to review its draft drugs and alcohol policy and to provide advice on an implementation programme. Her evidence will be that she did so including suggesting changes to the draft policy that was then modified in line with her suggestions. It was then assessed by her as being *"a robust and sound initial draft Policy comparable with industry standards and other New Zealand company policies (which did not include random testing)"*. Ms Nolan describes the draft policy as containing *"all the elements of a comprehensive "non random testing" Policy including a prime focus on training and education, testing (pre-employment, post accident/incident, reasonable cause,) and generous employee assistance rehabilitation which employees could access voluntarily or after returning a positive result"*. In this respect I understand Ms Nolan to be assessing the quality of much of her own work by what would be opinion evidence.

[54] Ms Nolan will also say that she advised the defendant companies to establish a relationship with a drug and alcohol rehabilitation provider to provide the counselling and rehabilitation requirements described in the draft policy *"and to partner with me in the managers' educational programme"* that she describes. She will say that the defendants followed her advice.

[55] Ms Nolan will say that she was involved in a consultative process that included managers, unions and delegates, and other staff during which information was

provided about the draft policy and an opportunity to make comments and give feedback before the policy was finalised. She describes in some detail what are called the interactive workshop/seminars in which she took a leading role, along with another intended expert witness for the defendants, Matthew Beattie, the Chief Executive Officer of Instep Ltd. Ms Nolan will describe the feedback from the seminars she organised and conducted as being generally positive and will say that both ESR and Instep received many praiseworthy comments after these workshops, with many staff claiming this was the best training they had ever attended, not only from a workplace perspective but also because they could apply the knowledge to their social and family environments. ESR has also provided the defendants with pre-employment urine drug testing in accordance with the relevant standard.

[56] Ms Nolan proposes to give evidence about ports as *"safety-sensitive workplaces"* and about the tasks that employees perform there being *"safety critical"*. She proposes telling the Court: *"Any person who works on (or has access to) a port also should be considered as being in a "safety-sensitive" occupation"*.

[57] In her brief of evidence Ms Nolan will give her opinion that the defendants' drugs and alcohol policy on which she has given advice, and in the development of which she has participated, *"is of a high quality, and is comparable with "non random testing" policies and procedures both in New Zealand and internationally which are compliant with the "best practice" model for safety sensitive industries"*. These complimentary opinions will extend to *"a generous commitment to rehabilitation"*, compliance with the current standards, and opinions on the non-invasiveness of its method of urine collection.

[58] Ms Nolan proposes to give evidence about the appropriateness of the application of the policy to all TLNZ staff irrespective of their positions related to the safety-sensitive areas in which they work or may be present.

[59] Ms Nolan proposes to give her opinion on the generosity of the rehabilitation components of the policy and concludes this part of her evidence by stating: *"A considerable amount of resources have been committed to training and educating*

managers, union delegates and staff in workshops and seminars conducted by professionals in this field".

[60] Although without apparent reference to studies or other research data, Ms Nolan intends to say that *"Testing acts as a powerful deterrent to drug use and therefore achieves demand reduction, …"*.

[61] In summary, Ms Nolan says, relevant to this application, that the defendants' policy is *"reasonable and complies with AS/NZS 4308"*.

[62] Addressing directly in her evidence what she describes as *"conflict of interest"* allegations, Ms Nolan says that her company, ESR, has been involved in developing and implementing *"legally robust policies and procedures which comply with best practices (NZ and Internationally), for hundreds of companies in New Zealand. ESR is considered to be New Zealand's leading expert in this field and will only provide testing services to companies that have "Best Practice" protocols"*.

[63] Ms Nolan says that as a member of the relevant standards committee, she is involved in *"mentoring companies who wish to utilise "onsite" urine screening options when the revised Standard is released. Realistically this activity could be seen as a threat to the screening component of ESR's current business"*.

[64] Mr Toogood points to Ms Nolan's intended evidence that she is a member of the committee reviewing the urine testing standard (AS/NZS 4308:1997) and is involved in *"mentoring"* companies wishing to use on-site urine screening. He says these activities may affect adversely ESR's laboratory testing of urine samples. Counsel also notes that ESR charges more for confirmatory tests for oral fluid tests than it does for urine tests and so it might be said that it will be to that company's advantage, and therefore Ms Nolan's as its marketing and development manager, to favour saliva tests. That does not, however, answer fully what I have described as the vested interest objection which is broader than dealing simply with current products and processes.

[65] There are substantial parts of her intended evidence to which objection cannot be taken. These include her descriptions of her extensive involvement in the development of its policies and programmes by the defendant companies. Nor can there be any challenge to Ms Nolan's comprehensive description of ESR's testing methodology and its application in this case to the defendants' intended procedures.

[66] Where, however, Ms Nolan intends to give opinion evidence about the quality of a policy in the development of which she has been significantly instrumental, I conclude that her evidence as currently drafted will not meet the conduct test under s26(1) of the Evidence Act and Schedule 4 to the High Court Rules that I find applicable to these proceedings by applying s189(2) of the Employment Relations Act. I am not satisfied that Ms Nolan is not an advocate for the defendants or that her intended opinion evidence is impartial. She does not qualify as an expert witness for the purposes of giving such opinion evidence.

[67] Areas of Ms Nolan's intended evidence upon which I conclude she may not give her opinion include:

- whether the testing procedures in the policy are reasonable;
- whether the policy is reasonable;
- whether ports are safety-sensitive areas; and
- whether the introduction of the policy is likely to assist in reducing or minimising health and safety risks.

Evidence of Warren Hamilton

[68] Mr Mitchell for the plaintiffs submits that Mr Hamilton's intended evidence goes beyond his field of expertise. Mr Hamilton holds the degree of Bachelor of Science with Honours in Organic Chemistry from the University of Queensland,

Australia. He also holds ad hoc passes at high distinction level in pharmacokinetics (the study of the absorption, distribution and elimination of drugs in humans) at the School of Medicine within the Department of Pharmacy, University of Queensland. Mr Hamilton is a chartered chemist within The Royal Australian Chemical Institute and a member of The International Association of Forensic Toxicologists. He has long experience initially in food and other manufactured product pharmacology and, since 1985, in the forensic area analysing drug seizures. For the last 11 years he has worked within the Queensland Health Department including as supervising scientist in charge of the forensic toxicology laboratory with responsibility for 18 professional staff. He therefore deposes to being "*completely familiar with all aspects of drug testing in human biological specimens for forensic purposes*".

[69] Since 1999 Mr Hamilton has been in business on his own account with a company called Rapidtox Pty Ltd which sells on-site drug testing devices, provides advice and laboratory results interpretation and expert witness services to large Australian companies in the mining industry as well as government departments at a State and Federal level. Mr Hamilton lists his academic and professional publications and has appeared as a scientific expert witness in various Australian courts. I accept that in general terms he will qualify himself as an expert witness in his field.

[70] The intended evidence to which the plaintiffs object is at paragraphs 55, 56 and 62 of his witness statement. First, the plaintiffs submit that Mr Hamilton does not qualify as an expert witness in this proceeding, not only because "*little is known about [him]*" and "*He does not provide evidence as to his independence*", but primarily because of his commercial involvement in on-site workplace drug testing. A further criticism of Mr Hamilton's evidence is that he does not state whether he favours urine testing or whether his company provides saliva testing as well. There is nothing in these objections and I reject them.

[71] Moving to the more serious claim of opinion evidence outside his field of expertise, these fall under a general heading "*TLNZ'S TESTING DEVICES AND PROCEDURES*". After having described the intended policy and procedures as

being reasonable and within industry standards (except that they would contravene the standard in Australia by not including random testing), Mr Hamilton considers that the policy is *"very fair to workers"*. His evidence then deals in general terms with the circumstances in which workers are drug users before moving on to comments about the efficacy of rehabilitation. This is where the challenge arises. Mr Hamilton intends to say that *"For early intervention and rehabilitation to work effectively, the user needs to be identified using a methodology which is capable of detecting drug use over a medium period. It is no use using oral fluids for drug testing unless the detection period is at least 24 hours, and current on-site devices lack the sensitivity to reach that duration. As a result, urine is the preferred specimen for on-site testing in any rehabilitation procedure"*.

[72] Then, at paragraph 56, Mr Hamilton intends to give evidence that urine testing is medically non-invasive and *"… is also not invasive of personal privacy under TLNZ's Policy and Procedure, as the individual is not witnessed providing the sample"*.

[73] Finally, at paragraph 62 of his intended evidence Mr Hamilton intends to compare the use of oral fluid testing by Police in the state of Victoria to workplace testing and to say that the former is inappropriate to the latter *"as it would no doubt be considered draconian in nature and would require possible legislation"*. Mr Hamilton deposes that AS4760 should be followed if oral fluids testing is pursued.

[74] Dealing first with the objection to the intended evidence at paragraph 55, I am not satisfied at this stage that it can be said with sufficient certainty that this intended evidence is outside Mr Hamilton's sphere of expertise that he ought not be permitted to give these opinions. Pursuant to s14 of the Evidence Act, I propose to allow the evidence to be led with the plaintiff being able either to renew its application for inadmissibility after cross-examination or to address me on the weight it should be given.

[75] I conclude, as to paragraph 56, that Mr Hamilton's expertise does not extend to giving opinion evidence of any greater weight than that of any other person about the

invasive or personal privacy elements of urine testing. These are inherently personal views and probably held to a greater or lesser extent by everyone involved in the case and many others. While Mr Hamilton is entitled to express his personal view of the invasiveness of urine testing and of privacy issues surrounding it, so too are other witnesses and such evidence will be received as a statement of personal views but not the opinion of an expert in that field. What is meant by "*invasive*" is not clear and may be susceptible to several different interpretations. Ultimately, neither the case nor any significant aspect will turn upon what that word means or upon its meaning as a single meaning can be discerned.

[76] As to the intended evidence in paragraph 62, I consider that any impropriety is minimal and can best be dealt with by allocating appropriate weight to the evidence if it is crucial to the decision of the case.

Intended evidence of Matthew Beattie

[77] The challenges to this evidence include that some of it is outside the witness's area of expertise but also, more fundamentally, Mr Beattie does not appear to propose to give evidence of training or qualifications in areas of toxicology or psychology. Although, in the latter regard, Mr Mitchell accepts that Mr Beattie's company, Instep, makes arrangements with psychologists, counsellors and treatment centres for rehabilitation purposes, counsel submits that Mr Beattie himself does not have expertise in these fields.

[78] Although Mr Mitchell acknowledges that Mr Beattie proposes to say that the evidence he gives is based on his experience, and an expert can so qualify himself, the evidence does not set out the nature of that experience or why it qualifies him to give expert evidence. Mr Mitchell is at pains to acknowledge that Mr Beattie can give evidence about the services Instep provides under the policy but this cannot be regarded as expert evidence.

[79] Mr Beattie's "*Profile*" states that he holds the degree of Masters of Arts with Honours, a graduate diploma that is not more precisely described, and he is, I infer,

an Associate/Fellow of the New Zealand Institute of Management. Mr Beattie's academic qualifications are in human resources, industrial and organisational psychology and in international relations and strategic studies. His experience includes senior military command experience in New Zealand and overseas and operational and diplomatic appointments. He says that his company provides behavioural healthcare services on contract to about 100 companies and organisations "*covering approximately 500,000 lives*". These services include, among others, alcohol and drug-free workplace programmes. Mr Beattie says that many of his call centre's 50 daily inquiries are about alcohol and/or drug referrals. He says that his strengths are in training, systems design and programme installation. He says that in the last calendar year he delivered training to more than 3,100 employees, managers, supervisors and union delegates in hands-on workshops on alcohol and drug awareness for employees and skills training for managers, supervisors and union delegates. Much of this training has been in conjunction with ESR. Mr Beattie has written both within New Zealand and internationally in human resources and health and safety magazines.

[80] The parts of Mr Beattie's intended evidence that are challenged are as follows: At paragraph 5 he attaches a paper written by him and updated recently (July 2007) entitled *Implementing Effective Alcohol and Drug Programmes in New Zealand Businesses.* This addresses the workplace model which Mr Beattie says is the foundation of the defendants' drug and alcohol policy, a model originally developed by the forestry industry, ESR and Instep in 2000 as the basis for an effective intervention in workplaces wishing to address alcohol and drug concerns. He says that the model was examined and endorsed by this Court in its judgment in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614. Mr Beattie says, albeit anecdotally, that the model has been found to be effective if all its elements are introduced and implemented within a company's environment. He says that his company, Instep, will only work with organisations that utilise all aspects of the model including its four key components, clear and well-defined policies and procedures, a comprehensive education and training programme, a testing or peer support programme, and an

employee assistance programme or alcohol and drug rehabilitation support and case management.

[81] Next, at paragraph 8 of his evidence Mr Beattie proposes to give opinion evidence about impairment and the relationship of a workplace drug and alcohol programme with impairment from drug or alcohol use. I do not consider that he purports to rely on expert opinion evidence in this regard. The statements in the paragraph seem to me to be notorious and self-evident.

[82] At paragraph 11 under the heading "*Rehabilitation*" Mr Beattie comments on the adoption of a peer support programme in preference to a drug testing component within a policy. I consider that this proposed evidence, to the extent that it is opinion evidence, is within his expertise gained from experience and cannot be objected to fairly.

[83] Next, at paragraph 12(a) to (h) Mr Beattie proposes to comment critically on the evidence to be adduced for the plaintiffs from Professor Ian McCormick. As already noted, neither Professor McCormick's expertise nor admissibility of his opinion evidence is challenged. I have significant, but as yet insufficient, doubts about Mr Beattie's expertise to give critical opinion evidence to refute Professor McCormick but that should, on balance, go to weight after all the evidence is in.

[84] Finally, Mr Beattie's ability to give opinion evidence as an expert is challenged in the same manner as was the partiality of Ms Nolan. Mr Mitchell submits that it is clear that Mr Beattie's company, Instep, is the preferred rehabilitation provider for ESR and it is likely that a significant number of drug and alcohol policies provide that Instep will be their rehabilitation provider. Mr Mitchell submits that Mr Beattie, like Ms Nolan, has a considerable stake in the outcome of the proceeding. Although counsel acknowledges that unlike Ms Nolan, Mr Beattie was not a protagonist in the creation of the policy, it is clear that he and his business will be affected significantly by the outcome and counsel says that he lacks the necessary independence to be an expert witness in the matter.

[85] I conclude that Mr Beattie and some of his evidence are at risk of failing to meet the statutorily required impartiality of an expert witness or, put another way and to adopt another test, of being seen as advocacy for the defendants who have engaged him. There is, however, insufficient material before me to reach that conclusion. This is therefore an appropriate instance in which to admit Mr Beattie's evidence provisionally under s14 of the Evidence Act and to reserve the question of the admissibility of the challenged parts of it until he has been cross-examined.

GL Colgan
Chief Judge

Judgment signed at 11 am on Friday 7 September 2007