MACKINNON & ASSOCIATES

Employment@Work

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Welcome to the December edition of ***Employment@Work.***

For the team at Mackinnon & Associates, 2005 has been a fascinating, exciting and extremely satisfying year.
The dream of establishing a law firm that could genuinely provide clients with leading edge employment law, employee relations and human resource skills, has become a reality, and we've loved every minute of it.
We'd like to take this opportunity to thank you for your support.
We hope you have a wonderful Christmas and a rewarding year ahead.

Don Mackinnon
Principal
Mackinnon & Associates

To Speak or Not to Speak

The Employment Court recently released a landmark decision which effectively places a blanket ban on many forms of communication by employers to employee union members while in bargaining.

You could be forgiven for thinking that as an employer you could communicate with any of your employees, over any matter, at any time. However, a recent Employment Court decision has confirmed that when you are bargaining for a collective agreement, this is simply not the case.
Imagine you are an employer involved in protracted negotiations with a union. You believe a 3% pay increase is the absolute maximum you can afford, however the union is insisting on 7%. You want to explain to your employees why 3% is your top dollar and that if forced to go beyond that, you may have to shut down some parts of your business and redundancies will result. You've told the union this but you believe that information simply isn't getting through to your staff. So you want to tell them yourself.
The bottom line however is you're not allowed to. For, if you communicate this information directly to those of your employees who are members of the union, you will almost certainly be breaking the law.
Section 32(1)(d) of the Employment Relations Act contains significant restrictions on what employers can say to their unionised employees when in bargaining, particularly about the actions of the union and the merits of the positions being taken.
However, employers have previously taken some comfort from section 4(3) of the Act which provides, in essence, that the duty of good faith does not prevent an employer communicating a statement of fact or reasonable opinion to its staff.
That was until the recent decision of *Christchurch City Council v Southern Local*

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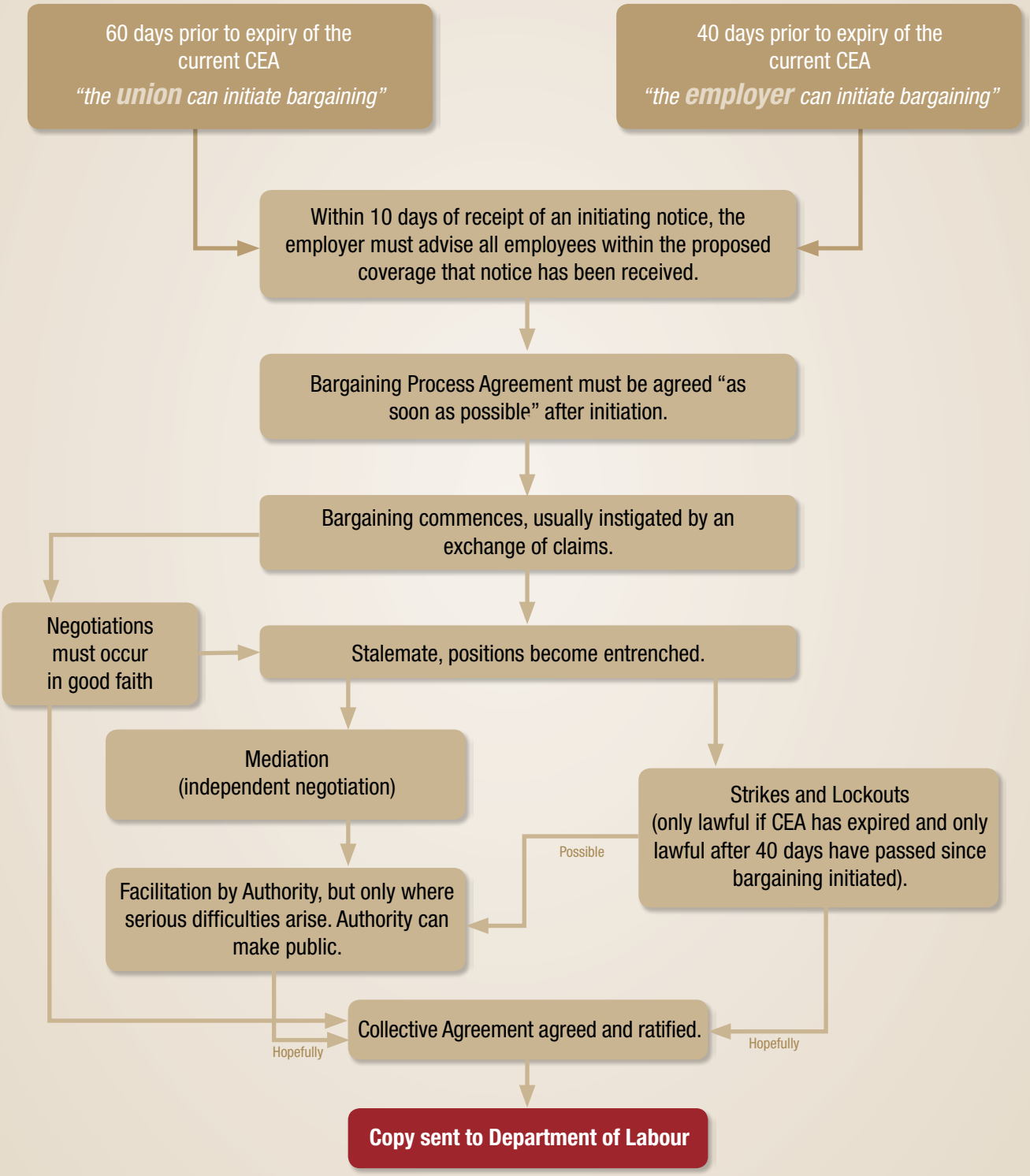
Bargaining

2005 has been a huge year for employers who were involved in collective bargaining and 2006 is unlikely to be any different. We've received many queries about how the bargaining process is meant to work, so set out below is a flowchart of what should take place and when.



To Speak or Not to Speak continued...

Government Officers Union Inc, 7/9/05 Colgan J, Travis J, Shaw J, CC 12/05, where the Employment Court held:

> *"Section 32(1)(d)(ii) requires that parties must not directly or indirectly bargain about terms and conditions of employment with other than representatives unless there is agreement allowing this. We hold that this amounts to a legislative ban on collective bargaining by either party with anyone other than the employee's union or the employer's representative".*

The Court looked at whether various communications made by the Council to its employees (some which it had discussed with the union beforehand, and others which it had not) breached section 32.
It also considered whether the Council had breached the bargaining process agreement which had earlier been agreed upon by the Council and union and which set out how the bargaining was to occur.
The union believed the communications contained inaccurate information, false representations and breached both the Act and the bargaining process agreement. It objected not just to the content of the statements, but to any direct communication by the Council to its members. The Council on the other hand believed it was merely providing factual information that did not undermine the union or the bargaining in any way.
In essence, the Court found that the Council's communications to its unionised staff were designed to influence the bargaining and therefore breached not only section 32, but also the bargaining process agreement.
In reaching its decision, the Court looked at the intent of Parliament which was that any attempts at bargaining directly with unionised employees was prohibited.

> *"We hold that … Parliament intended that whether or not attempting to persuade employees is held to be undermining of a union's authority, any attempts at bargaining directly or indirectly with employees is prohibited".*

As for the wider implications of their decision, the Employment Court was loath to give general guidance, but did state the restrictions set out in section 32 can be avoided if the issue of communication is clearly provided for in the bargaining process agreement.
That is probably the key message for employers to take away from the decision. **As soon as possible after the initiation of bargaining, it is crucial to negotiate a bargaining process agreement which gives you some ability to communicate messages to your staff** (usually after prior consultation with the union).
If that proves impossible to achieve, some employers are going to find themselves effectively sidelined from communicating at all with staff whilst bargaining. If an employer believes a union is misleading its employees, it can seek an order that the union has breached its obligations of good faith, but the time and expense involved in getting such an order is unlikely to make that an attractive option.
Freedom of speech is a valued right of all individuals. Many employers are likely to wonder where their right to freedom of speech disappeared to.

Are Your Workers Positive?

Drug use is a much talked about subject at present and for many employers, the issue is fast becoming one that they can't ignore.

A fundamental question every employer has to ask is; could drugs be jeopardizing the safety of my employees in the workplace? Under the Health and Safety in Employment Act, employers are obliged to ensure the safety of all persons in the workplace and eliminate or minimize hazards. In many work places, employers are now facing up to the fact that "drugs" are now listed as a specific hazard. Recent trends show a staggering 50% increase in the number of companies which have committed to formal drug testing. One of the most prominent drug testing providers, Environmental Science & Research (ESR) now has more than 600 companies on its books, and carried out 24,000 drug tests last year alone.

So when can an employer drug test its employees?

Under the Privacy Act, employers can only collect personal information for a lawful purpose and where it is necessary to obtain such information for that purpose. For some employer's, ensuring an employee is not affected by illicit drugs or alcohol may be vital to safety and therefore collecting that information will be lawful and necessary. Safety sensitive roles such as drivers, pilots and machinery operators stand out in this respect. But for other roles, (such as clerical, administration and sales) drug testing may well be "unnecessary" from a safety perspective and hence unlawful.

So what type of testing can occur?

1. Pre-employment

Some employers will have the right to require job candidates to undergo a drug test before offering them particular jobs. The role will usually need to be in the "safety sensitive" category to justify such intervention. Anecdotal evidence suggests the failure rate for pre-employment testing in many industries is alarmingly high. This has a flow on effect for smaller employers who haven't introduced a drug testing regime. Those employers run the risk of being saddled with applicants who have failed tests with their larger competitors. Accordingly, many

story continued overleaf->

Are Your Workers Positive? continued...

smaller companies are also starting pre-employment testing.

2. Post-accident

Like pre-employment testing, it is also becoming increasingly common to test for the presence of drugs following work related accidents. This should only occur if a reasonable assessment suggests there is sufficient reason to do so.

After several incidents late September, post accident testing has gained media attention in the truck driving industry. A New Zealand Road Transport Association representative was recently quoted in the Waikato Times saying that truck drivers using drugs and getting behind the wheel was "unacceptable". He referred to one incident of a driver who had deserted his truck on the side of the road with its hazard lights flashing. On searching the truck, police found cannabis, a meth pipe and used meth bags.

A concerning statistic is, that of those people tested after workplace accidents, ERS found that 18% tested positive. Again, anecdotally, some employers are claiming they have seen noticeable changes since implementing post-accident drug tests and that the rate of workplace accidents has dropped significantly.

3. Reasonable Cause

Drug testing may also be justified when an employer has reasonable cause for believing that an employee is unable to perform their duties properly, or with due care for the safety of themselves or others. Reasonable cause may be met when an employee's behaviour is erratic, highly out of character, or when there are demonstrable changes in personality, mood swings, persistent inattention or similarly abnormal behaviour.

4. Random Testing

In rare circumstances, random drug testing may be necessary and justified. However, such testing is very intrusive, is not common and should generally be limited to those industries with identifiable extreme safety sensitive roles.

Introducing a Testing Policy

This is not to say that all employers need a drug testing policy. The risk of safety being genuinely compromised should be carefully considered and if necessary, a policy should only be implemented after full consultation with staff and any representative union. If a policy is developed, it is vital for employers to provide all employees and potential candidates with a copy of the policy outlining not only when drug testing may take place, but also how it will be carried out.

The testing procedure itself should be undertaken by qualified independent personnel, and treated with the strictest confidence. Any information collected must only be used to determine that employee's fitness for work or whether there has been a breach of the Company's drug and alcohol policy (which could in turn, result in disciplinary action).

Of course, an employee's use of drugs in the workplace may be a symptom of more serious problems. While every case needs to be considered separately, a positive drug test should sometimes be followed up with rehabilitative support rather than dismissal. This could sometimes mean removing an employee from their current safety sensitive duties until they produce a negative result.

Summary

The key message for employers is that drugs in the workplace are like any other hazard and cannot be ignored. Not all employers need a testing regime, but as testing becomes more widely accepted, it is likely the number of work places which are testing will continue to grow (provided there is justification on health and safety grounds). Before taking any action, it is important that every employer carries out an assessment of the safety risk and decide whether or not such a policy is necessary. If it is, those employers should act now.

How to find us

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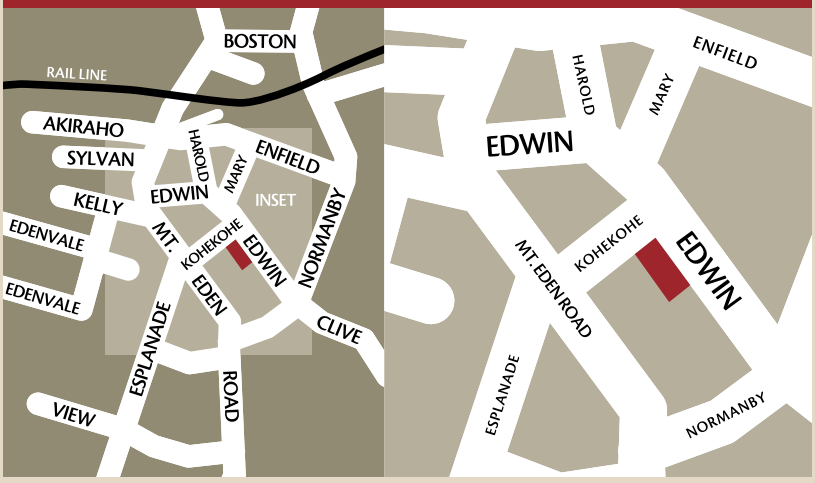

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