

## Employment Law Plus

- Practical and commercial solutions to HR challenges

## Employment Law Plus

- Drug and alcohol policies and right of search
- For South Oxon HR Network 16 April 2015

**What are the risks to the business associated with alcohol and drugs?**

**What should your drug and alcohol policy try to stop happening?**

## **What should your drug and alcohol policy try to stop happening?**

- Possession of drugs or alcohol?
- Consumption of drugs or alcohol?
- Being under the influence of drugs or alcohol?
- When?
- Where?

## *Liberty Living v Reid*

- Disc Policy: Gross misconduct to be under influence of alcohol in working hours
- Alcohol Policy: Prohibited consuming alcohol while performing company business or in the workplace. Not say would be gross misconduct

## *Liberty Living v Reid*

- Drunk pint of lager shandy off work premises during working hours
- Dismissed
- Not aware of alcohol policy

## ***Dairy Produce Packers v Beverstock***

- B dismissed for drinking in pub when should have been working
- Others who had been drinking in working hours had not been dismissed
- Company said this was because others had drunk on their premises



## ***Dairy Produce Packers v Beverstock***

- Unfair dismissal because company had not made different penalties clear in policy

## How would your policy deal with

- Drinking alcohol at a staff social event
- Drinking alcohol with clients while entertaining them
- Having a bottle of wine with food in a supermarket bag

**You suspect that your employee is under the influence of alcohol at work in breach of your policy**

- What can you do about it?
- What legal issues are there?

## Dealing with suspicion of alcohol influence

- Ask him/her to walk following a straight line on the ground?
- Confront employee with suspicion?
- Address it as a performance issue?
- Get permission to write to GP for medical report?
- Require the employee to take a breathalyser or blood test?

## **Dealing with suspicion of alcohol influence**

- Can you send the employee home without pay?

## **Drug/alcohol testing**

- Human Rights Act
- Data Protection Act
- Employer duty of trust and confidence

## Drug/alcohol testing - HRA

- Interference with private life
  - Invasive
  - Tests could show up other things like pregnancy
  - Tests can show up activity in private life which no impact on work
- Necessary to achieve legitimate aim
  - What aim would be the most likely to justify testing?

## **Drug/alcohol testing - HRA**

- Unlikely that testing employee in safety critical position would be an unjustified invasion of privacy



## Drug/alcohol testing - DPA

- Covers electronic data or hard copy in very structured filing system
- Sensitive personal data
- Particular processing pre conditions for sensitive data:
  - Explicit consent
  - Necessary to enable employer to meet legal obligations like H&S

## Drug/alcohol testing - DPA

- IC Code of Practice
- Sensitive personal data
- Particular processing pre conditions for sensitive data:
  - Explicit consent: needs to be freely given based on proper information
  - Necessary to enable employer to meet legal obligations like H&S

## Drug/alcohol testing - DPA

- Impact assessment
  - Legal duty to process information about workers' health  
OR
  - The benefits gained justify the privacy intrusion: needs to be proportionate response to problem. Must consider:
    - Purpose
    - Adverse impact
    - Alternatives: Triggered by cause not random? Limit data collected?

Unlikely to be justified unless for H&S reasons

## Drug/alcohol testing – DPA

- Unlikely to be justified unless for H&S reasons
- Incident where reasonable suspicion of drug/alcohol use more likely to be justified than random testing

## Drug/alcohol testing - DPA

- General DPA obligations
  - Make workers aware that testing may take place and in what circumstances; what info will be collected; what it will be used for; what the possible consequences are – what is the blood alcohol level which is unacceptable?
  - Accurate data: need sufficient technical accuracy to rely on it; interpretation of results by suitably qualified person
  - Keep results confidential
  - Keep for limited period of time

## **Drug/alcohol testing - DPA**

- Unfair to say it is random testing if isn't
- If it is random, make it genuinely random
- If not random, tell workers the criteria to be used
- Testing everyone not justified if only limited workers are in H&S critical roles
- Give worker duplicate sample so they can have it tested

## **Drug/alcohol testing – Trust & confidence**

- Contractual terms or for cause
- Risk: (unfair) constructive dismissal
- Follow DPA guidelines!

## **Drug/alcohol testing – Refusal to take test**

- Can you dismiss for the refusal?



## Drug/alcohol testing – Refusal to take test

### *Bedford v H Young Holdings ET*

- Employer introduced policy for alcohol and drug testing and stated positive results or refusal to be tested would lead to disciplinary action up to dismissal
- B refused to take test and disputed er's right to test
- B dismissed

## Drug/alcohol testing – Refusal to take test

### *Bedford v H Young Holdings ET*

- Employer had not consulted on introduction of new policy
- Employer not address B's concerns about legality of test
- Dismissal unfair

Is alcoholism a conduct issue or a medical (performance issue)?

## **Strathclyde Regional Council v Syme**

- S, a school cleaner, dismissed for being drunk at work
- Held: problem should have been treated as medical issue because related to underlying bipolar issue. Dismissal unfair.
- (Otherwise, may have been fair given employer's duties to pupils and staff)

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- Over the counter or prescribed medication
- Duty to report colleagues
- Recognising dependency primarily as medical problem
- Contractual right to transfer staff
- Performance meeting

## Right of search

- What issues are the same as for alcohol and drug testing?
- So what would it be sensible to do?

## Right of search

- Of person/desk/locker/bags?
- What is the aim?
- Same sex if personal
- Will it be random or for cause?
- In way to avoid embarrassment or distress or cultural sensitivities
- Keep note of any reasons given objecting to search
- Proper consideration to reasons for any refusal
- Make employees aware of right to but implications of refusing
- Clear policy for stealing
- Allow to be accompanied
- Document results
- Restrict to what necessary

**Ensure contract reflect any rights the company is trying to give itself under the policy**



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