

29 factsheet

Drug testing (Part 1)

Although most employers in non-safety critical industries have yet to adopt a strategy of drug testing staff, much uncertainty surrounds the rights of employees who are required to undergo tests. Head of Legal Services at Release, **Niamh Eastwood**, provides a low-down on the law governing drug testing in the workplace.

Is it permissible for employers to drug test their staff?

There is no clear answer to this question and certainly the law has been slow to respond to what is perceived as a growing practice, within the private and public sector, of drug testing in the workplace.

There is certainly no statutory law which explicitly deals with the process of drug testing in the workplace or whether positive tests amount to grounds for dismissal. There is some protection on the recording and retention of information relating to the drug testing of employees provided by the Data Protection Act 1998 (see below). In determining whether or not drug testing in the workplace is permissible, it will be necessary to refer back to an employee's contract. Also most employers will have a drug and alcohol policy which is usually found in the staff handbook. This also forms part of the employee's contract.

Does an employee have a right to refuse a drug test?

Often referred to as the 'carrot and stick' approach, the issue as to whether an employee has a right to refuse a test will very much depend on the

circumstances as to why an employer wants to test. It will also be important to look at an organisation's practices and policies in this area.

Employers cannot physically compel their staff to submit to drug tests. To do so would constitute the criminal offence of assault. However, where a contract of employment allows for random drug testing and an employee refuses to undergo a test, it would be grounds for a disciplinary action based on breach of contract. Depending on the employee's circumstances and the employer's policies, it could even result in dismissal.

Where no contractual right exists to drug test an employee, an employer cannot require them to undergo a test. The exception could be where allegations have arisen in relation to the employee's conduct at work being affected by substance use. In these circumstances an employer could require the employee to undergo a drug test to prove they were not under the influence. Failure to undergo testing might be treated in the same way as a positive test.

The 'carrot and stick' principle also applies to job applicants. Unless a job applicant can be shown to have been discriminated against on the grounds of their race, gender, sexual orientation or disability, an employer is very unlikely to be open to legal challenge for refusing to employ a candidate who tests positive for drugs, or who refuses to take a test, or who has lost a job in the past because of an alcohol or drug problem. Pre-employment, the applicant has no contractual rights, and there is no statutory protection for them either, unless there has been a breach of anti-discrimination law.

Can an employee be dismissed as a result of a positive drug test?

Again this will all come down to what is contained in the employment contract and staff handbook.

In general, employers have wide discretion under contract, to determine what kind of matters will result in disciplinary action and what the sanctions will be. However, if an employer dismisses someone, this may also bring into play the provisions of the Employment Rights Act 1996 and the law protecting employees with at least 12 months' service from unfair dismissal. Anyone who has been employed for less than 12 months cannot bring an action for unfair dismissal.

Employment law experts giving evidence to the Joseph Rowntree Foundation's *Independent Inquiry into Drug Testing in the Workplace* (2005) commented that it is highly unlikely that an Employment Tribunal would feel that a dismissal was unfair if there was evidence that drug or alcohol use affected performance at work, particularly not if there were health and safety considerations.

For a dismissal in these circumstances to be fair, it would probably be necessary to demonstrate some link between an employee's drug and alcohol consumption and their work. In the past, Employment Tribunals have tended to accept whatever employers have told them about what will and will not affect work. It has been common for them to accept justifications for dismissal based on vague claims about the adverse effects of drug use on the organisation's reputation. However, this may be starting to change.

Employers may also run into problems where proper procedures have not been followed in cases resulting in dismissal. An Employment Tribunal may want to know, for example, whether employees were warned of the consequences of drug use and whether the employer followed its own internal rules in the case in question.

NEXT ISSUE: DRUG TESTING (Part 2)