

# 29 factsheet

## Drug testing (Part 2)

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.

### Unfair dismissal cases

Recent case law emerging from the Employment Appeal Tribunal would suggest that there is little tolerance for drug use even where it does not impair on an employee's performance at work:

#### Racal Services v Flockhart

The Employment Appeal Tribunal ruled that the dismissal of a safety critical trackside worker who tested positive for cannabis had been "fair", and that this was the only conclusion open to an Employment Tribunal. In addition, on-duty consumption of drugs or present impairment is likely to constitute a legitimate ground for dismissal even when there are not these kinds of safety considerations.

#### Mathewson v R.B. Wilson Dental Laboratory (1998)

A dental technician purchased some cannabis during his lunch hour for his personal use and was arrested and later fined. He admitted the offence to his employers immediately and was summarily dismissed. There was no suggestion that the employee took cannabis while at work. The tribunal held his dismissal was fair because it fell within the band of reasonable responses and this decision was upheld on appeal.

#### Booth v Southampton Airport Ltd (2002)

An air traffic controller was dismissed for off-duty cannabis use. This was held to be a fair dismissal even though there was no evidence it affected his work in any way. The employer justified the dismissal by referring to the importance of preserving public confidence in the service.

#### O'Flynn v Airlinks The Airport Coach Company (2002)

An employee was dismissed after testing positive for cannabis in a random drug test. She later appealed and the appeal was dismissed as she

agreed she was aware of the company drug and alcohol policy which states inter alia that it is considered gross misconduct to be found with drugs in the system while at work and that random drug testing would take place.

### What legal protection exists for employees?

Arguably if an employer targets employees for drug testing where there is no procedure in place or where there are no grounds for testing, the employee could bring an action under employment law or for breach of contract.

As stated previously the Data Protection Act 1998 does provide some safeguards in relation to both the procedures involved in drug testing and the processing and retention of the data. Part 4 of the Employment Practices Data Protection Code, published by the Information Commissioner's Office in 2004, provides advice on good practice in relation to the collection and handling of information derived from drug and alcohol testing. The guidance advises employers that:

- testing is unlikely to be justified unless it is for health and safety reasons;
- post incident testing, where there is suspicion that drug or alcohol is a factor, is likely to be more justified than random testing;
- the amount of personal information obtained through drug and alcohol testing should be minimal;
- the least intrusive forms of testing should be used;
- workers should be informed what they are being tested for;
- testing should be limited to the periods which the drugs being tested for can have effect;
- random testing should in fact be random not targeted;
- testing should be confined to safety critical posts;

- testing should be designed to ensure safety at work rather than reveal illegal drug use in an employee's private life;
- testing to detect illegal use of drugs would potentially breach the worker's contract of employment and could cause serious damage to the employer's business.

If an employee thinks an employer has breached any element of the Employment Practice Code they can make a complaint to the Information Commissioner's Office via its website at [www.ico.gov.uk](http://www.ico.gov.uk). Alternatively, advice should be sought from an employment solicitor or from ACAS (advisory body providing information and advice on employment matters) [www.acas.org.uk](http://www.acas.org.uk) or 08457 47 47 47.

### Human Rights protection

Article 8 – the right to privacy  
Individuals are entitled to a private life, outside the workplace. This right is recognised by the European Convention on Human Rights ("ECHR"), and was incorporated into domestic law by the Human Rights Act 1998.

The right to privacy protects bodily integrity and requires free and informed consent to drug testing. This could be violated if a blood or other sample was taken under another pretext and subsequently used for drug testing purposes without the consent of the individual.

Article 8 could have implications for the way the law deals with drug testing at work. However, the impact of human rights legislation is still a matter of considerable uncertainty. If drug use did come to be seen as a private matter, the right to private life can still be overridden under Article 8 "in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". This is a significant hurdle to Article 8 being invoked to limit the powers of employers.

There is a further significant restriction. Under the Human Rights Act

1998, the rights contained in the ECHR can only be invoked directly against a "public authority". The applicability of the right to privacy will depend not only on how Article 8 is interpreted, but also on whether or not the employer in question is a public authority. In most cases, this will not be so.

### Do employers have an 'obligation to test'?

There is no direct legal requirement for employers to test employees or job applicants. However, employers have certain legal obligations under health and safety law which may require them to take action to prevent their employees working under the influence of drugs or alcohol. This provides a strong incentive for some employers to introduce drug testing programmes. Legislation which may make employers more inclined to drug test:

- **Health and Safety at Work Act 1974:** creates a statutory duty on the part of employers to protect their employees' health, safety and welfare in the workplace.
- **Management of Health and Safety at Work Regulations 1999:** oblige employers to conduct assessments of health and safety risks to their employees and third parties.
- **Transport and Works Act 1992:** creates a criminal offence for certain workers, including drivers and conductors on buses or trains, to work under the influence of alcohol or drugs. In these circumstances, if the employer has not exercised "due diligence" in ensuring that the employee is not under the influence of alcohol or drugs, he or she is also guilty of a criminal offence.
- **Corporate Manslaughter and Homicide Act 2007:** created the new offence of corporate manslaughter, this means an organisation can be prosecuted for the reckless death of a person where a duty of care exists.

Further, employers who knowingly allow cannabis to be used on their premises may be vulnerable to prosecution under Section 8 of the Misuse of Drugs Act 1971.

### Guidance for Employers

ACAS (Advisory, Conciliation and Arbitration Service – [www.acas.org.uk](http://www.acas.org.uk)) provides excellent guidance for both employers and employees on all issues relating to employment including dealing with drugs and alcohol in the workplace. ACAS guidance is considered to be best practice in the market place.

For many organisations where employees are involved in safety critical work, including driving, then it will be important for the employer to ensure that employees are fit to undertake such tasks. Certainly, drug testing has significantly increased as a method of ensuring employees are 'fit' to work, however the science behind drug testing is not infallible. 'False positives' can result from medication and from cooking ingredients such as hemp oil or seeds – we recently provided evidence to a disciplinary hearing confirming studies that hemp oil can result, in some circumstances, as a positive for cannabis. Other issues can be detection times, cannabis for example can stay in the system for a number of weeks, no one though would say that a person is still under the influence of cannabis seven days after smoking a joint. It is important that organisations that drug test employees understand these complexities.

In our opinion, an employee who tests positive for drugs should not be automatically dismissed. It is clearly detrimental for the employee and can be a negative consequence for the employer who can lose a hard working and committed member of staff.

It is important for employers to have a clear drug policy and should ensure that employment matters involving drugs should be dealt with in a consistent and effective manner. Those employees who may have a drug problem should be supported and given an opportunity to seek help. As ACAS advises:

"Many employers use similar methods to deal with drugs and alcohol abuse... organisations now treat drug and alcohol dependence as an illness and frame policies aimed at rehabilitation".