

Defending the use of a drug and alcohol policy

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A recent decision of Fair Work Australia has highlighted the importance of employers implementing appropriate drug and alcohol policies and testing regimes. In finding that an employee was unfairly dismissed for a breach of such a policy, Fair Work Australia has also reiterated the importance of ensuring procedural fairness when dismissing an employee for such a breach.

What happened?

In the case, the employee, employed as a heavy vehicle driver, logged into his shift smelling of alcohol, acting unsteady and slurring his words. Upon noticing the employee's obvious impairment, the employer immediately sent the employee home and, later that day, decided to terminate his employment for serious misconduct (although the decision was not communicated to the employee). The decision to terminate the employee's employment was made without conducting any drug or alcohol testing, and was based on the assumption that the employee was obviously impaired by alcohol.

When the employee attended work for his next rostered shift two days later, he was informed that his employment was terminated. The employee subsequently applied to Fair Work Australia for an unfair dismissal remedy.

What happened at Fair Work Australia?

The employee gave evidence that the night before the incident, he had attended his local hotel and had three or four pots (schooners) of heavy beer and a meal. He said that he had not had a drink after 8.00 pm and that if he appeared under the influence of alcohol, it was because he was tired, it was very early in the morning and he was suffering from fatigue due to working long hours.

Although the employee denied attending for work under the influence of alcohol, Fair Work Australia found that the employer had a valid reason for terminating the employee's employment, namely that the employee attended for work with alcohol on his breath and intended to drive a vehicle with a Blood Alcohol Content level greater than 0.00%.

Despite finding there was a valid reason to dismiss the employee however, Fair Work Australia held that the dismissal was unfair as it was procedurally deficient. Specifically, the employee was not given the opportunity to respond to the allegations before a decision was made to terminate his employment, and was not afforded the opportunity to undertake a drug and alcohol test in order to defend himself. As a result, the employee was awarded \$10,360 in compensation.

Key lessons for employers

This decision is yet another reminder that the existence of seemingly compelling grounds for the termination of an employee's employment does not override the requirement to afford the employee procedural fairness.

This decision is also a reminder for employers to consider implementing, and to ensure adherence to, appropriate policies regarding alcohol and drug testing.

If an employer wishes to implement drug and alcohol policies and procedures, it is critical to ensure that the policies and procedures are tailored to meet the requirements of the employer's business whilst balancing these requirements against privacy concerns of employees. At a minimum, employers should ensure that any such policies address the following considerations:

- **the method of testing that will be employed**
will the employer use urine testing, saliva testing, breathalyser testing or some other method?
- **how the testing will be administered**
will the testing be random, scheduled or for cause?
- **who will administer the testing**
does the employer have the resources to conduct the testing in house, or will it be outsourced?
- **whether the regime will focus on rehabilitation or punishment**
is the policy designed to punish non-compliance, or to address risks?
- **the consequences of refusing or failing to submit to a test**
will the employee be suspended or disciplined, or will a refusal be deemed to be a failure?
- **the consequences of breaching the policy**
will the employee be suspended or disciplined, or will the employer implement rehabilitative action?
- **the employer's obligations under specific legislation**
employers in certain industries, such as mining, rail, aviation and road transport may have specific legislative obligations with which they must comply.