

The uppers and downers of workplace testing

Kate Minett and Fudia Smartt consider the arguments for and against screening employees for illegal drug use



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There are conflicting reports on whether drug testing in the workplace is becoming more frequent. Release, an organisation that focuses on drugs, the law and human rights, reported a fourfold increase in calls to its drugs team about problems with workplace testing in the first three months of 2009 compared with the same period in 2008. On the other hand, the TUC has recently indicated that there is no real evidence that drug testing is becoming commonplace in British workplaces, other than perhaps in safety-critical areas, such as transport and energy, or after an incident.

What cannot be denied is that the use of illegal drugs in British society is widespread. The 2008 British Crime Survey showed that 5.3% of the working-age population uses illegal drugs regularly. However, it is not clear whether the percentage of people who are actually in work and regularly use illegal drugs is higher or lower than this. Meanwhile, there is anecdotal evidence of aggressive marketing campaigns by various US-based drug-testing companies.

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Types of testing

Drug testing is usually carried out on one of the following bases:

- pre-employment drug testing of potential employees as a condition of taking them on;
- random drug testing of employees at random or regular intervals; and
- post-incident drug testing of an employee after a specific workplace incident or accident.

In terms of post-incident testing, some employers automatically carry this out after any incident, and others do so only if it is suspected that drugs may have played a role. An employer might, for instance, carry out post-incident drug testing so that, in the event of a positive result, it can try to avoid liability.

Mechanics of testing

Often, drug tests do not involve checking for the presence of drugs in the body, as most drugs break down quickly. Instead, most tests look for the chemicals which remain in the system after the drug breaks down. These chemicals are called metabolites and can be found, for instance, in hair, sweat, saliva, urine or blood.

The extent to which metabolites can be tested for depends on the substance taken and the type of sample used in the test.

Illegality

The Misuse of Drugs Act 1971 (MDA) is the principal legislation covering drugs-related offences in the UK. The MDA provides that production, possession and/or supply of a controlled substance are offences, except in

specific circumstances (for example, where a drug has been prescribed by a doctor). It is also an offence under the MDA for someone to knowingly permit production, supply and/or use of controlled drugs on their premises.

Evidently, an employee who uses illegal drugs in the workplace will be committing a criminal offence, as will an employer who knowingly permits this. Employment tribunal decisions indicate that dismissal will be a reasonable response to drug use at work provided, as held in *Templeton v Freight and Repair Service (Taunton) Ltd* [1985], the employer follows the proper procedure first.

However, where an employee uses drugs outside of work, and does not attend work under the

serious safety risks. However, the level of risk posed in other environments, such as an office, is less clear. Indeed, research carried out by the Health and Safety Executive in 2004 was unable to show a direct link between workplace accidents and drug use alone, although this may reflect a relatively low number of employees who attend work under the influence of drugs.

Nonetheless, employers will have a much stronger case for justifying drug testing in cases where any impairment of employee performance would compromise the safety of employees or service users.

Assault

Particular care should be taken not to force employees to provide a sample,

balanced against an employee's right to privacy. Article 8 of the Human Rights Act 1998 (HRA) states that everyone has the right to respect for their private and family life. Any infringement of that right must be a proportionate means of achieving a legitimate aim. For example, random drug testing of train drivers is justifiable because guarding the safety of rail passengers is a legitimate aim and, given the terrible consequences that an accident could have, proportionate. Although it precedes the introduction of the HRA, the Employment Appeal Tribunal's decision in *Roberts v British Railways Board* [1997] reflects this reasoning by finding that the dismissal of a railway network employee, following a positive random drug test, was fair. However, randomly testing all of a railway company's office workers is unlikely to be justifiable.

Employers should also be mindful of employees' right to privacy in the practical implementation of a drug-testing programme. This is particularly relevant to the argument put forward by some employers that urine samples can only be taken with someone else in the room to ensure that the sample is not diluted or substituted. The TUC condemns this requirement as 'unreasonable and a breach of human rights'. Before implementing such an invasive measure, employers should consider whether there is a serious risk of the sample being

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influence of drugs, the situation is less straightforward. The extent to which an employer will be justified in taking any action over an employee's activities outside work will depend on the facts of the case and myriad legal considerations.

Health and safety

Under the Health and Safety at Work etc Act 1974, employers have a general duty to ensure, as far as reasonably practicable, employees' health, safety and welfare at work. If an employee is under the influence of drugs at work, and places other employees at risk as a result, the employer could be liable to prosecution if it allows the employee to continue working.

The risk presented by an employee who might be under the influence of drugs will depend on the role performed and the drug taken.

It should be noted that it is an offence under the Transport and Works Act 1992 for certain workers to be unfit through use of drink or drugs on specified transport systems. In addition, the Road Traffic Act 1988 outlaws driving a motor vehicle when unfit to do so through drugs or drink.

In transport and other heavy industries, it is clear that being under the influence of drugs at work causes

as to do so could constitute assault occasioning actual bodily harm under the Offences Against the Person Act 1861 and common law assault and battery.

Right to a private life

Even where drug testing is carried out for safety reasons, the extent to which it confers real safety benefits has to be

Implementing a drug-testing programme

Employers who wish to implement a drug-testing programme should ensure that:

- They fully consider and meet the requirements of all the relevant legislation (see main article).
- They carry out a documented risk and impact assessment.
- Employees consent, ideally contractually, to every testing procedure.
- Testing is carried out as part of a comprehensive drug (and alcohol) policy, which employees are made aware of. The policy should clearly set out any disciplinary action, including dismissal, that the employer will take if an employee is found to be under the influence of drugs, or taking drugs at work, or is convicted of a drugs-related offence.
- There is a procedure for identifying and handling incorrect positive test results and positive tests for prescription drugs.
- Any laboratory or agent that conducts an analysis on the employer's behalf is accredited by the UK Accreditation Services and complies with the International Standard for Laboratories (ISO 17025).

tampered with and whether a less intrusive test can be used.

'Public authorities' (a term defined widely in the HRA) are required to act in accordance with the rights set out in the HRA, which is directly applicable against them. Although private sector employers are not directly bound to act in accordance with the HRA, they should still be aware of its requirements. This is because tribunals are required to read and give effect to legislation, so far as possible, in accordance with the HRA.

Data protection

Information about an individual's health, which would include drug use, is defined as 'sensitive personal data' under the Data Protection Act 1998 (DPA). As a result, any drug testing and the storage and treatment of any personal data gathered as a result of the testing must, in addition to meeting normal data protection requirements, meet the higher threshold that applies to processing of sensitive personal data. The DPA provides that sensitive personal data can only be processed if at least one of the conditions in Schedule 3 of the DPA is met, which includes the employee having given explicit consent to the processing.

The Employment Practices Code, which sets out the Information Commissioner's recommendations on how to meet the legal requirements of the DPA, gives specific guidance on drug testing. It indicates, for instance, that:

- random drug testing is unlikely to be justified unless it is for health and safety reasons;
- criteria used for selecting workers for drug testing should be justified, properly documented and adhered to;
- employees should know what substances they are being tested for and the possible consequences of being tested;
- the amount of personal information obtained through drug testing should be minimised; and
- test results and related information should be kept secure.

The Employment Practices Code also states that, with certain exceptions,

it will rarely be justifiable for an employer to carry out drug tests solely to reveal illegal drugs use by employees in their private lives. However, for many employers, the illegality of drug use is a secondary concern to the health and safety issues.

Drugs-related dismissals

Dismissals based on a positive drugs test could, depending on the circumstances, fall inside the following potentially fair reasons for dismissal under ss98(1) and (2) of the Employment Rights Act 1996 (ERA): capability, conduct, breach of a statutory restriction and/or some other substantial reason.

Before relying on one of these reasons for dismissal, the employer

should properly consider the wider circumstances and any mitigating factors, which will show whether (for the purposes of s98(4) of the ERA) it acted reasonably in treating its reason to dismiss the employee as a sufficient one. The employer should also ensure that the dismissal is fair at a procedural level.

To reduce the risk of an unfair dismissal finding, the employer should:

- have a clear policy (which employees are made aware of) that a positive test result will lead to summary dismissal;
- gain employee consent to drug testing; and
- ensure there is clear evidence that drug (or alcohol) use has impaired the employee's performance at work and/or put the safety of colleagues or members of the public at risk.

The importance of a clear drug-testing policy can be seen in cases like *O'Flynn v Airlinks the Airport Coach Co Ltd* [2002]. This confirms that an employer is more likely to be able to establish that a drugs-related dismissal is fair where it can show that there was a drug-testing

policy in place and employees were aware of its contents.

Care should also be taken to ensure that there is no basis for an employee to argue that a significant reason for the dismissal was discriminatory under the Equality Act 2010, or that the dismissal was an act of retaliation for having made a protected disclosure under the Public Interest Disclosure Act 1998.

Employers should be aware that some prescription drugs can give positive results in certain drug tests. An individual may be taking a prescribed drug to treat a condition that falls within the definition of a disability under the Equality Act. An employee who is dismissed after testing positive for drugs in these circumstances would

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be likely to have a claim for disability discrimination.

To test or not to test

The TUC argue that drug testing does not 'address the real issue, which is the ability of the worker to function safely'. It is true that many other factors, including tiredness, illness, stress and the use of alcohol or medicines can impair an employee's performance. Arguably, illegal drug use is a less widespread cause of impairment than these other factors. Despite this, employers in specific industries will be justified in seeking to carry out random drug testing to ensure that employee and public safety is not put at risk. However, before doing so, they should ensure that they fully understand the legal considerations and risks involved in random drug testing in the workplace. ■

O'Flynn v Airlinks the Airport Coach Co Ltd
[2002] EAT/0269/01

Roberts v British Railways Board
UKEAT 648_96_1601

Templeton v Freight and Repair Service (Taunton) Ltd
Case no 21126/85