
Covid 19 Employment Law Series
II: The drugs won't work: drug consumption
by employees and working from home



Gareth Price, 27.3.20

Introduction

1. The outbreak of Covid 19 in the UK has resulted in Government enforced shut-downs of many businesses and will cause innumerable employees to take extended time away from the workplace. During this time, many employees will be expected to work from home. Not being physically in the workplace can lead to a relaxation of standards.
2. Many companies have policies on drug and alcohol consumption by their employees. For the vast majority of businesses, simply the awareness of such policies (as well as some common sense and social norms) will be enough to avoid needing to investigate employees' use of such substances. However, when that doesn't suffice, determining when an employee's use should give rise to disciplinary proceedings is very difficult.
3. This article aims to explore the principal areas of difficulty and give guidance to practitioners faced with them. It is hopefully applicable generally, but may be of particular interest to employers at this turbulent time in the national workforce.

Health and Safety

4. Employers have obligations to ensure the health and safety of their employees (see e.g. HSWA 1974). Failure to meet these obligations can give rise to criminal penalty. Drug and alcohol policies seek to help to meet these obligations and safety-critical workplaces will be particularly keen to ensure that it does not permit employees on site whose judgment may be impaired.

Consequently, it is likely that any carefully drafted substance misuse policy will have as a principal aim the safety of all employees whilst work.

5. This concern may be lessened by home working in general. However, remote involvement of employees in safety critical issues could in fact heighten the concern as there will be less opportunity for an impairment to be detected. The standards expected by the employer must be clear to its employees.

Employee Health, Disability and Support

6. Dependency on alcohol or drugs is an illness. Despite this, addiction is not an impairment under the Equality Act 2010.¹ If, however, that dependency gives rise to symptoms or a condition that does amount to a physical or mental impairment (e.g. liver cirrhosis) then an employee could qualify as disabled. Equally, the use of drugs or alcohol may have arisen *because* of an underlying condition (e.g. medicinal cannabis for combat chemotherapy side-effects).
7. A properly drafted substance misuse policy would therefore include express guidance on support that can be afforded to employees and how the effects arising from misuse could be treated like other health matters within the workforce.
8. Further, employers of course owe particular duties to employees that are disabled for the purposes of the Equality Act 2010. Under s.20, if a provision, criterion or practice puts a disabled employee at a substantial disadvantage compared to someone not so disabled, then reasonable adjustments must be made.
9. A disabled employee that consumes a drug (even if prescribed) may be less able to comply with a substance use policy. Rigid, equal application to all could constitute disability discrimination. Consequently, it will often be important for an employer to distinguish its treatment of employees under any policy depending on whether the drug use is linked to a disability.

¹ Equality Act 2010 (Disability) Regulations 2010; unless arising from medically prescribed drugs or other medical treatment

10. For business that retain employees during the current shut-downs/interruptions, stress arising from the lack of work or cash-flow issues must be considered. Turning to substances may be an effort at coping.

Conduct or capability?

11. After determining whether the employee in question is disabled and so whether the use of any drugs must be seen in light of Equality Act 2010 obligations, the next question for an employer faced with an employee suspected of being under the influence of drugs or alcohol is to determine whether the issue is one of conduct or capability. If the employee is forthcoming and the use arises in the context of dependency, it is likely that an employer will be expected to approach the issue on capability grounds.
12. If the reverse is true (as may be a more common scenario under the present situation), then it may be appropriate for the employer to proceed with its disciplinary policy. In those circumstances, questions of what is consumed, when is it consumed and how impairment can be determined arise.

Legality

13. Whether the substance is a banned substance is relevant to disciplinary action.
14. In *Asda Stores Ltd v Coughlan*,² an employee found with a small amount of cannabis in a locker at work was summarily dismissed. The ET's finding that the dismissal was unfair was overturned on appeal. There had been no procedural failings and "*[d]ismissal for a single act of gross misconduct involving the acquisition and possession of unlawful drugs on the Respondent's premises plainly and unarguably fell within the range of reasonable responses...*".
15. Though only brief set out, it is apparent that the employee had some medical condition (as did his partner). It may have been that the cannabis was obtained with that condition in mind. The

² UKEAT/0453/10

EAT made clear that the employer had expressly considered the personal mitigation advanced by the employee and balanced that against its disciplinary decision.

Outside work?

16. It will be relevant whether any (mis)use of drugs or alcohol occurred in or out of work hours, or on or outside work premises.
17. In *McElroy v Cambridgeshire Community Services NHS Trust*,³ an employee was found to have been unfairly dismissed when he attended at work smelling of alcohol. Consumption was admitted, and certainly took place outside of work hours. The company's substance misuse policy was considered by the employer prior to dismissal. That policy focused on the impact that any misuse had on the employee's fitness to work. The ET found that there was no evidence that the employee was unfit and that dismissal for a single attendance smelling of alcohol in such circumstances was not within the range of reasonable responses.
18. It may be that such cases will be viewed in a similar light to other cases involving disciplining employees for activity outside of work hours or off work premises. For instance, the Acas Code of Practice on Disciplinary and Grievance Procedures states:
19. *"If an employee is charged with, or convicted of, a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers".*⁴
20. In *Serco Limited v Redfearn*, the Court of Appeal commented, obiter, that dismissal for holding political views that were unacceptable to one's employer would unlikely be fair grounds for dismissal.⁵
21. Therefore, whether the activity of the employee constitutes a criminal offence, or is merely morally at odds with an employer's stated ethos, such activity is unlikely, in and of itself, to be

³ ET/3400622/14

⁴ Paragraph 31

⁵ [2006] EWCA Civ 659, para 10

grounds for discipline. The activity must in some way impinge upon, or impair, the employment relationship.

Drug Testing

22. Enforcement of a drugs and alcohol policy can pose further difficulties. If an employee, suspected of being impaired or known to be using drugs, admits the same, the employer can (usually) confidently proceed to determining what action it should take. If it is denied, the employer may wish to undertake 'with cause' testing. For some safety critical positions, an employer may wish to impose randomised or obligatory testing irrespective of cause to seek to ensure impairment is avoided.
23. In the current climate, employers may wish to test employees returning from time off following self-isolation or downturn in work.
24. However, testing employees for drugs raises several issues.
25. HSE guidance suggests safety critical occupations may justify testing, but also expresses caution as to the aims of such testing and the retention of information.⁶ Similarly, obtaining such information will give rise to obligations under the General Data Protection Regulation.⁷ For public bodies,⁸ the Human Rights Act 1998 affords protection of privacy to employees and drug testing likely engages relevant Convention rights. If that is to be done outside of the workplace, that is particularly likely to engage Article 8 rights to private life. If a policy is introduced, existing employees' contracts would likely require amendment by consent of those employees.
26. In *Chivas Brothers Limited v. Christiansen*,⁹ an ET found that an employee, disabled by reason of mental impairment and who was dismissed after refusing to undergo a drug test, had been discriminated against.
27. The request to undergo the test was pursuant to its policy that provided for 'with cause' testing "where management has grounds to believe or suspect that an employee is or may be under the influence of alcohol or illegal drugs...". Refusal to undergo the test was expressly stated to

⁶ Health and Safety Executive: Managing drug and alcohol misuse at work

⁷ GDPR, Article 4.

⁸ And, by application of s.3 HRA, probably private employers, *X v. Y* [2004] EWCA Civ 662

⁹ UKEATS/0017/16/JW

be a ground for summary dismissal. A principal aim of testing was to maintain a safe work environment.

28. The dismissal was found to be unfavourable treatment arising in consequence of the employee's disability. The Respondent advanced a justification defence under s.15(1)(b) Equality Act 2010. The need for a safe working environment was accepted to be a legitimate aim. However, the means adopted by the Respondent were not proportionate. Key to that finding was evidence that the employee did not pose a risk to the health and safety of the workplace. That finding was not overturned on appeal.

29. In *Racal Services Ltd v. Flockhart*,¹⁰ a railway technician tested positive for cannabis following a drug test on return to work from extended sick leave. The employee advanced two possible explanations (passive inhalation or spiking by a partner). The Respondent nonetheless dismissed the employee pursuant to its policy. The ET found the blanket application of the policy to be unfair and found for the Claimant. On appeal the EAT, concluding that the ET had impermissibly substituted itself for the Respondent, held:

"We, for our part, would have great hesitation in thinking that a policy, such as that which the employer had here should, in every circumstance, automatically be applied and that indeed a reasonable employer would so act. However, we find it difficult to think, having taken account of all the facts and matters recited in the Tribunal's Decision, that a decision to dismiss would be outside the band of responses which a reasonable employer might have to the particular circumstances."

30. Therefore, where the policy is aimed at ensuring a safe working environment, it is important that the point of the testing, and any decisions taken in light of the results, is rationally connected to the initial aim. At the same time, if an employer has grounds following a test to reasonably conclude that an employee is in breach of a policy, it is unlikely that the sanction it chooses to impose will be interfered with.

¹⁰ UKEAT/701/00

Conclusion

31. We are in unprecedented times for the national workforce. Employers will want to take steps now to ensure that their substance use policies adequately account for a workforce that may be required to self-isolate or undertake remote working.
32. Where the use is linked to a disability, the approach required will be different to that of an employee engaging in a one-off act of misuse on 'company time'.
33. When the nation regains some normality, the issues explored above will remain. Careful thought must therefore go into how and why the business regulates use of drugs and alcohol by its employees.

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