

Drugs in the workplace – an escalating problem.

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Introduction:

A recent decision by a member of the Fair Work Commission (F.W.C), that it was “*not unjust or unreasonable*” to require employees to provide oral fluid (saliva) and urine samples as part of a bona-fide workplace drug testing regime, canvassed many issues in regard to this urgent and escalating workplace matter.

Commissioner Cambridge had intervened as a consequence of a dispute notification by the CFMEU, pertaining to the provisions of an enterprise agreement (*CFMEU V Port Kembla Terminal Ltd*).

The union argued that the initiative of the employer in seeking to implement a testing regime [albeit, one that was underpinned by the ‘*Alcohol and Other Drugs Standard*’ (AOD Standard)], particularly in relation to urine sampling “*involved an illegitimate interference with the privacy of an employee.... As urine sampling identified an employee’s historical use of drugs which may bear no relevance to their capacity to safely perform work.*”

For its part, the employer was strongly of the view that the Commission should not interfere with “*the right of the employer to manage its operation in a manner which it believed properly discharged its obligations to provide for a safe workplace.*”

Points of consideration and findings:

The dispute involved a contest about the utilization of urine sampling as part of a workplace drugs regime. The debate focused on whether urine or oral fluid, was the most appropriate method of sampling for workplace drug testing. Expert evidence was led and reference made to recent, significant, cases touching upon the nature, scope and targets for testing.

It has been established by Industrial Tribunals that “*oral fluid testing is more focussed on acute impairedness, whereas urine testing is more likely to uncover patterns of drug use which may lead to levels of impairment and safety concerns.*”

A FWC full bench has determined that “*on the one hand, there is the interest of employees in not having their private behaviour subject to scrutiny by their employers... On the other hand, there is the interest that employers and employees have in ensuring a safe working environment by the taking of all practically available measures to detect and eliminate or manage risks to safety. Both employers and employees....are subject to statutory duties concerning workplace safety, breach of which may result in criminal liability, and employees exposed to the possibility of injury or death if workplace risks to safety are not identified and either removed or controlled.*”

Commissioner Cambridge reinforced this view in finding in favour of the employer’s testing regime; “*.... Any discomfort or embarrassment about providing a urine sample would be of*

negligible consequence if such discomfort or embarrassment avoid death or debilitating injury suffered at work. The balance, in my view, would overwhelmingly favour the benefits of adoption of a superior drug detection and deterrence mechanism for the cost of the discomfort, inconvenience or embarrassment of having to provide a urine specimen...”

In this instance, FWC also took heed of the following points:

- In workplaces where occupational and public safety risks are present, drug and alcohol testing require mechanisms which improve safety for workers and the general public;
- Individuals who attend “*high risk*” workplaces under the influence of drugs or alcohol, at a level of recognised impairment, are likely to endanger the lives of others;
- Drug or alcohol addiction or abuse issues which have been identified through workplace testing, should be recognised as problems that require a treatment program and not necessarily disciplinary action;
- It is unrealistic to attempt to codify workplace drug testing by way of universal rules;
- The particular facts and circumstances of each case of drug detection in the workplace need to be carefully assessed and judged accordingly. This particularly in relation to the detection of the “hangover” effects of drugs like methamphetamine (this being just one example where there is a compelling basis for detecting long-term drug use).

ICE in the working environment:

The Commissioner’s comments coincide with rising concerns about the level and effects of crystallised methamphetamine (ICE) in Australia workplaces. In a recent radio interview the National Secretary of the Construction Division of the CFMEU, Dave Noonan observed that:

“This is one drug that’s changed the game. For people operating dangerous vehicles or machinery, it creates a toxic combination. During the high, users experience a surge of overconfidence and see themselves as invincible. Then the crashing low that follows brings sleep deprivation, blurred vision and fatigue.”

Concurrently, Victoria Police have reported an increase in truck drivers being tested and found to be under the influence of ICE.

Unfortunately experts acknowledge that most drug tests may not capture the full impact of this drug. The problem being that methamphetamine is eliminated from the body much faster than recreational drugs such as cannabis. This means that rostered workers coming back from several days off-duty may be returning ‘clean tests’ and therefore it may be the case that usage of the drug is under-documented.

However, as debated in the case before Commissioner Cambridge, urine, blood and saliva testing can each detect drugs other than alcohol, however, each has its own advantages and disadvantages.

This brings into focus the need to foster a ‘no tolerance’ policy in the workplace; this goes beyond simply introducing a random testing regime for the occasional “*gotcha moment*”, with the intention of building a case for a summary dismissal.

The more profitable approach, in terms of costs and workforce welfare is to create a strong workplace culture ‘*where turning up clean to work isn’t just some rule from on high – but a standard a worker’s peers and colleagues expect and support.*”

Two foundations for such a culture are:

- Education programs underpinning the negative health effects of drugs and alcohol, particularly with reference to the workplace. The provision of training to supervisors, managers and OH & S Representatives in how to recognise signs of intoxication, and how to approach a person affected with drugs and alcohol.
- Development and application of a set of policies designed for the specific needs of your workplace (which may or may not incorporate a drugs testing regime). However, it is strongly recommended, that they should provide counselling and support services for those individuals who acknowledge that they have an addiction problem. Appropriate structures must be put in place, to ensure all stakeholders are aware of who to go to as situations unfold, and who is authorised to act and in what circumstances.

Policies, procedures and structures should be reviewed regularly, particularly in light of new or developing social challenges (such as ICE).

Conclusion:

Drug and alcohol abuse (addiction) is a significant challenge to all workplaces, especially to those delivering water safety education or supervising aquatic facilities, leading outdoor recreation groups, or operating amusement rides. They share many common elements - people (particularly youngsters or the elderly), hazardous environments, complex electrical and or mechanical systems, all requiring a high level of supervision in unusual (challenging) settings. All share the same duty of care.

Drugs & alcohol are not matters of concern only to the operators of airlines, railways, mines or long haulage fleets.

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