

Drugs...an employer's nightmare

Employers are being forced to confront the issue of drugs and alcohol in the workplace as the number of people working 'under the influence' in both blue collar and white collar jobs grows. They are not only entitled - but are legally bound - to monitor drug and alcohol use in order to maintain health and safety standards.

But the area can be fraught with difficulty unless employers have a robust drug and alcohol policy in place, as two recent cases demonstrate.

In the first example, a small business was ordered to pay an employee \$6000 compensation and three months lost salary after the employee was sacked for supplying cannabis to a workmate. The employer dismissed the employee for selling drugs to another employee at work during work time. However, the supply took place outside of the workplace. As the employer had no policy on employees' use of illegal drugs outside work and as there was no evidence the employee's conduct outside of work had any adverse consequences on his work, the employee was deemed to be unjustifiably dismissed.

Of course employers cannot control the activities of staff outside work. However, where the actions of employees outside of the workplace are sufficiently serious, it may be that such action can be treated as requiring disciplinary action, particularly where the conduct goes to the 'suitability' of the employee to continue to do their job.

Another case also highlights the need for caution. An employee who tested positive for drugs several times was dismissed for breach of the drug and alcohol policy. The employee argued



that his infrequent use of marijuana posed little risk to his job. The employer's drug policy provided for professional assessment before any decision regarding dismissal was to be made and the Employment Relations Authority held that a fair and reasonable employer should have followed its own policy and referred the employee for professional assessment. As a result, the man was reinstated to his former position. If the employer had followed its own policy, the outcome could have been different.

The message is clear. Employers should have a robust drug and alcohol policy which sets out procedures if drug testing is required. Even if an employer has grounds for serious misconduct, without such a policy, an employer cannot gather the necessary evidence to address the problem. Currently, provided it is detailed in the policy, the law allows employers to drug test where there is:

- An accident or incident where the person's actions or behaviour indicate drug use; or
- Reasonable cause to suspect an employee is either consuming drugs at work or where their behaviour is symptomatic of drug use (i.e. under the influence).

Employers, however, cannot conduct random drug testing (unless the industry or business is 'safety sensitive'). The definition of a 'safety

sensitive' workplace appears from case law to be surprisingly narrow. So the best way is to implement a clear drug and alcohol policy providing testing as soon as the employer has reasonable grounds to suspect drug use.

Where a drug policy is in place, employers must follow the exact procedures as set out in that policy. If the procedure is not consistent with the policy, there is a risk that as a result of procedural unfairness, the dismissal will be deemed unjustified (despite the fact the employer may have had very strong grounds for the dismissal).

Prescription medication may prompt altered behaviour and a positive drug test. When such a drug test is positive, a second test will usually be conducted to identify exactly what legal or illegal substances are found in the sample. This also helps to ensure that prescription medication is not being abused causing an employee to act in a manner which jeopardises health and safety standards.

Companies have a legitimate interest in taking appropriate action if drug use is adversely affecting the health and safety or performance of an individual or group of the company. The best way in which to manage this issue is to ensure a detailed drug policy is in place and make all employees aware of the policy and the potentially serious repercussions if such policy is breached.

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Minimum wage for sleeping on the job

Employers who require staff to sleep over at a place of work need to ensure that they meet their legal obligations under the Minimum Wage Act.

A recent Employment Court decision suggests that employers may be required to pay their workers minimum wage for each hour spent on a "sleepover" shift. A sleepover shift is where a community service worker sleeps overnight in a domestic group home, so they are effectively on call should their services be required by the residents.

In *Idea Services Ltd v Dickson*, Mr Dickson received a sleepover allowance of \$34 per shift, which lasted from 10pm to 7am. During that period he could do a variety of things such as watch TV, read, study or sleep. He was entitled to an additional payment at an appropriate rate where he was required to carry out work during the sleepover.

The significant finding by the Court was that a "sleepover" can amount to "work" (section 6 of the Minimum Wage Act 1983). In determining whether a sleepover is in fact "work", the considerations are:

- What constraints the employer imposes on the freedom of the employee;
- The nature and extent of responsibility on the employee; and
- The benefit to the employer.

Having concluded that Mr Dickson's sleepover shifts were in fact "work", even if Mr Dickson was not required to carry out any duties, the Court went on to consider whether the employer was meeting its legal obligations under the Minimum Wage Act by paying him a \$34 allowance. The employer argued that Mr Dickson was being paid at least the minimum wage, when his total wages and hours of work were averaged out over his fortnight's pay. The Court rejected this argument, saying that where an employee is paid by the hour, he/she is entitled to be paid not less than the minimum wage for each and every hour worked.

The Court's decision that a sleepover can constitute "work", for which the minimum wage must be paid each hour, significantly affects the obligations of community based service providers and the rights of community service workers and is a helpful clarification of the law.



Sour aftertaste over dismissal

It is no use crying over spilt milk, or in this case bitter tasting coffee that causes you to lose your job. An American female receptionist was fired for (among other things) refusing to make and serve coffee to her male supervisors.

Ms K was hired as a receptionist for a large manufacturer of rubber tiles. Her formal title was "receptionist/data entry". It was explained to Ms K in her interview that the supervisors would expect the receptionist to sometimes get them coffee, although this was not part of the official job description.

During the six weeks of Ms K's employment, she agreed to bring coffee to the male supervisors on a few occasions. However, she found their requests demeaning and embarrassing because the requests "reinforced outdated gender stereotypes". She was also annoyed that on three separate occasions someone had entered a reminder in her electronic calendar that coffee was due at 3pm.

After five and a half weeks of employment, Ms K had enough. One of her supervisors asked her to bring him a coffee, and she refused. The supervisor wrote an email to Ms K later in the day explaining that one of her many responsibilities as a receptionist was to make and get coffee for the supervisors and that responsibility was not open for debate. Ms K received her supervisor's email the following morning and replied that she did not have a problem getting coffee for guests or clients, but she did not want to make and serve the supervisors coffee every day.

Ms K was fired nine minutes later. One week earlier, the supervisors had discussed dismissing Ms K because she failed to pass on important phone calls, placed wrong pricing labels on customer packages, improperly packed parcels and did not offer coffee to office guests. Ms K's email that stated she would not bring coffee to the supervisors was the last straw.

Ms K brought her grievance to a United States Federal District Court alleging she was the subject of sexual harassment and gender discrimination. The court held that the act of getting coffee could not establish a discriminatory intent, unless there were indicators of sexism. In Ms K's situation, there were no indicators of sexism.

Neither was there evidence that Ms K was treated differently because of her gender.

The court concluded by noting that while the behaviour of Ms K's supervisors may have been rude or undesirable, the supervisors' actions did not amount to sexual harassment or gender discrimination.

In New Zealand, the Human Rights Act 1993 governs harassment and discrimination issues. The tests for harassment and discrimination under that Act and also under the Civil Rights Act 1964 (US) are not identical. Still, the outcome of this case would be similar in New Zealand because Ms K experienced no direct or environmental harassment, and she received no less favourable treatment than any similarly situated employees or previous receptionists.

While the decision may have been hard to swallow, Ms K was clearly not fulfilling the expected job criteria.

How far is too far?

What are an employer's protections when a worker leaves and sets up in competition?

The restrictions on a former employee in these situations centre on the obligations which are implied in the employment relationship, and the express contractual terms of the agreement.

Obligations concern the employee's duties of confidentiality, good faith and fidelity. All employees are under a general obligation not to disclose confidential information during their employment. When an employee leaves, the restriction is altered slightly so that the former staff member cannot use information which is deemed as a trade secret.

It is difficult to define what information will be considered a trade secret. There are three main factors which are commonly looked at by a court when making its decision:

- (1) Whether the employee held a high-ranking position and regularly handled sensitive information;
- (2) Whether the employee ought to have known that the information was highly confidential; and
- (3) Whether the information was isolated from other information which was not highly confidential.

Common examples of information which is con-

sidered a trade secret include customer and client lists, pricing plans and accounting documentation.

The main limitation of the confidentiality obligation is that it does not restrict the industry or location in which the individual can work and the former employer's clients which the individual can solicit and accept work from. To gain further protection, an employer needs an express restraint of trade clause in any employment agreement.

When used correctly, a restraint of trade clause is effective in limiting a former staff member's post-employment conduct. However, it must be reasonable in order to be enforceable, and the key point for employers to note is that all former employees have the right to ply their trade and earn a living.

When determining what is reasonable, the initial test is that the employer must show that they have a legitimate interest which they are trying to protect. This is often their client base. Other factors which are often taken into account are duration and scope of the restraint. A reasonable duration for a restraint is often assessed as being 3-6 months, but can be 6-12 months for senior employees. Scope is generally determined by:

- (1) Location. It will only be reasonable to apply



restrictions in the area in which the employer operates; and

- (2) Clients who the individual cannot accept work from - generally those they had contact with in the past 12 months of their employment.

Ultimately, if a court decides that a restraint of trade clause is unreasonable, it can vary the terms to make it more reasonable.

Restraint of trade clauses are potentially very beneficial in protecting a business' legitimate commercial interests, and their use in employment agreements should be encouraged. However, any employer should put proper thought into what they are trying to protect at the outset and tailor their standard restraint of trade clause for each employee.

Government caught in balancing act

The Government is looking at changes to the personal grievance system to address issues such as costs, fairness, remedies and the 90-day trial period.

A review is timely. This is an area of the law where there has been a great deal of tinkering in recent years, and until relatively recently there has been a high degree of uncertainty surrounding the application of the law.

FAIRNESS - FORM OVER SUBSTANCE?

There is a perception among employers that the personal grievance provisions are tipped in favour of employees, with form over substance emphasised. It is fair to say that employers are held to a high standard when it comes to the procedural steps required to show that their actions are fair and reasonable. That said, statistics from the Employment Relations Authority indicate that outcomes from Employment Relations Authority proceedings are fairly balanced between employers and employees. This perhaps does not take into account the fact that the vast proportion of personal grievance claims are resolved and settled before an Employment Relations Authority hearing.

COST OF PERSONAL GRIEVANCES

A common complaint from employers is that personal grievances can be expensive to resolve. This is not only in terms of compensation paid to employees as a result of successful personal grievance claims, but also the legal costs incurred and the management time and energy spent dealing with these issues. Even where an employer successfully defends a personal grievance, significant costs can be incurred, most of which cannot be recovered.

The commercial reality for many employers is that it is often easier

and cheaper to "pay off" an employee instead of addressing a personal grievance claim. However, this was a feature of the previous personal grievance legislation - and indeed, litigation generally.

From an employee's perspective, the prospect of spending thousands of dollars on representation to pursue a claim against an employer with significantly more resources can be daunting and can mean that potentially genuine claims are not pursued.

REMEDIES

The Government is reviewing whether reinstatement should remain as the primary remedy under the legislation. Reinstatement is rarely sought and awarded even more infrequently. There is also a perception among employers that the threat of a reinstatement application is sometimes used as a negotiating tool to obtain an increased settlement payment, when there is no real intention to pursue the remedy.

90 DAY TRIAL PERIOD

One year after its introduction, the "90 day trial period" legislation is being reviewed. The legislation enables small employers (those with fewer than 20 staff) to dismiss new employees within the first 90 days, without fear of an unjustified dismissal personal grievance.

The Government is considering whether to extend the trial period to include employers with between 20 and 49 employees. It is also considering whether the trial period should be extended further than the current 90 days for small businesses.

In undertaking a review of the personal grievance system, there is no question that the Government has its work cut out for it, as balancing employers' and employees' competing interests will be no easy feat.



Act quickly to avoid problems

Sorting out poor performance in the workplace calls for quick action to stop the problem escalating.

Most employers have to deal with issues of poor performance in their workplace at some point. Dealing with these issues can be frustrating and challenging but it is important to address them promptly and fairly. If left alone, chances are the problem will only get worse.

It is often tempting to try and sidestep the issue by ignoring it or reallocating duties to more capable members of the team. But this is rarely effective and instead tends to delay and ultimately exacerbate the issue.

Failing to deal with a performance issue in the workplace can have several adverse effects on the business. Other staff have to pick up the slack and it also sends a message that poor performance is tolerated. The employer often feels frustrated that they are overpaying a staff member for a role they are not fulfilling. Worse still, taking duties away from an employee without explanation can leave them feeling undermined and expose a company to legal claims.

Where there is concern with an employee's performance, this should be identified and communicated clearly. An employee can reasonably expect that if they are not given any feedback about their performance, things are going well. Yet this is not always the case. Employers are sometimes too busy to deal with the issue, don't know how to handle the situation or are nervous about a personal grievance being raised.

By talking to an employee early, the employer may find that the employee did not understand the job properly, or needs more training or mentoring in specific areas. Other times, a sudden change in poor performance could be the result of personal problems or health issues. These matters can often be resolved quickly and informally without the need for disciplinary action.

Small employers, with fewer than 20 workers, should include a "90 Day Trial Period" in all employment agreements for new staff. This enables an employer



to dismiss an employee without risk of a personal grievance if they do not meet performance standards or are not a good fit within the organisation.

For larger employers, or where there are issues with long standing employees, following a fair process over a number of weeks is crucial. This will ensure, as far as possible, that the employee is given a real opportunity to improve. It will also help minimise the risk of a successful personal grievance, if performance does not improve and the employee is ultimately dismissed.

If an informal approach doesn't work, a more formal process may be necessary. This involves meeting with the employee to discuss specific performance concerns and providing an opportunity for explanation. Employees can be represented at any stage of this process. Performance expectations should be clear, reasonable and, where possible, measurable. Where issues have been identified, it is important to regularly monitor and review matters. Generally speaking, at least two formal performance warnings, with a fair period of time between them to give the opportunity to improve will be required before any dismissal can be justified.

Dealing with performance issues does need careful handling. However, proactive, early management can prevent problems from getting worse and contribute to a more productive workplace.

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