



Managing Drug & Alcohol Issues in the Workplace

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Key Topics

- The basis for testing
- Synthetic drugs
- Medicinal Cannabis
- Cannabis Referendum – round 2?



The Basis for Testing



**SAFETY
FIRST**

- **Hand in Hand with Health & Safety**
- **A hazard includes: “a person’s behaviour where that behaviour has the potential to cause death, injury, or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock...that affects a person’s behaviour)”**

Types of Testing

- **Pre-employment testing**
 - Safety sensitive workplaces
- **Reasonable cause testing**
 - Showing signs of being affected by drugs and / or alcohol
 - Involved in a workplace accident
- **Random testing**
 - Only justified in safety sensitive areas
 - Must be genuinely random (can't "randomly" test a particular individual)



Case Law

NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated & Ors v Air New Zealand Limited & Ors [2004] 1 ERNZ 614

- Safety sensitive role
- Consultation = key
- Test results should be scientifically valid
- Employee consent required – but refusal may be treated as failure to follow lawful instructions



Case Law

Electrical Union 2001 Ltd v Mighty Power Ltd [2012] NZERA Auckland 375

- When a workplace, or area of workplace, may be a safety sensitive area
- The decision about safety sensitivity is for Employer to make
- Can distinguish different jobs at same workplace as safety sensitive



Case Law

McLeod v Envirowaste Services Ltd [2016] NZERA Christchurch 103

- ERA will interpret D&A policy against Employer!
- McLeod random tested positive for cannabis
- Testing not carried out as per policy – credibility of test questionable
- Didn't offer rehabilitation – again, didn't follow own policy
- Failure to follow policy meant decision to dismiss was unjustified
- McLeod awarded 34 weeks' wages (\$20,762.60) and \$11,000.00 compensation for hurt and humiliation

Case Law

Eaton v Airport Services (Dunedin) [2017] NZERA Christchurch 224

- Decision illustrated ERA will take strict approach to interpreting policies
- Policy included a number of disciplinary outcomes for “non-negative” results up to and including dismissal
- Positive test different to non-negative test
- Insufficient levels indicated that Eaton not under the influence
- Eaton’s dismissal unfair – awarded lost wages and compensation

Case Law

Lambert v New Zealand Post Ltd [2018] NZERA 198

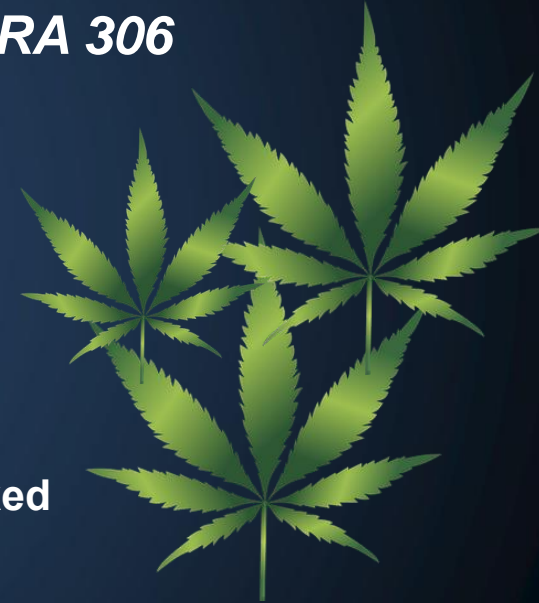
- **Strict interpretation of policy to Employer's advantage**
- **Lambert willing to undergo saliva test – policy required urine test, Lambert refused**
- **ERA found that Lambert's actions amounted to serious misconduct and it was open to a fair and reasonable Employer to dismiss in the circumstances**



Case Law

Syed v Vodafone New Zealand Limited [2019] NZERA 306

- Syed voluntarily disclosed smokes marijuana most days – disciplinary process ensued
- Failed take home test and third party test, dismissed
- No mention of reasonable cause testing in policy, but Authority found that Syed freely consented to testing = justifiably dismissed
- Note: possibly different outcome if didn't disclose he smoked daily or consented to testing



Case Law

A v N [2019] NZEmpC 129

- Ms A began acting inappropriately, short attention span, antagonistic
- Employment Agreement contained a reasonable cause testing clause but not a policy – N sought to implement a policy retrospectively
- A provided Doctor's certificate that drug free but N rejected – A refused further testing
- Court held that:
 1. Drug screen had to occur in accordance with Employer's own policy and required consultation
 2. Employer failed to introduce a testing policy of its own – testing without proper procedures "fraught with difficulty"

Synthetic Drugs

- Often not detected by regular on-site testing
- Best way to identify synthetic users is to send for full lab testing
- Policies should also allow negative samples to be sent for lab testing



Medicinal Cannabis

- Legalised from 1 April 2020
- Barely contains any THC (psychoactive ingredient) which is what testing detects
- Should be declared as prescription medicine
- Needs careful attention – risk to Employers of discrimination



Legalisation of Recreational Cannabis

- **Didn't pass this time, but what about next time?**
- **Government looking at other ways to manage cannabis use**
 - (lessen cannabis related sentences, decriminalise, make medicinal scheme more accessible)
- **If it had been legalised, unlikely to affect workplace drug testing – test for safety, not because illegal!**
- **Likely to be treated like alcohol**



Presence v Impairment

- Currently, no mainstream way in NZ of testing for impairment!
- Just because “present” in system doesn’t mean impaired
- Possible option – adopting limits from Land Transport (Drug Driving) Amendment Bill (similar to drink driving)



Takeaways

- **Policies & procedure**
- **Carefully worded policy**
- **Follow your own policy!**
- **Care selecting type of testing**
- **Be aware: synthetic drugs and medicinal cannabis**



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Questions?



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