

ALCOHOL ABUSE IN THE WORKPLACE: LEGAL PERSPECTIVES

Delivered by

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INTRODUCTION

- 4 out of 10 employers see alcohol as a significant driver of lost productivity.
- The government estimates that alcohol misuse costs the English economy £7.3 billion p/a.
- Employees who misuse alcohol may be two to three times more likely to be involved in workplace accidents.

INTRODUCTION

During this presentation I will cover:

- Employers' legal obligations
- Signs of alcohol abuse at work
- Managing alcohol abuse as a health issue
- Managing alcohol abuse as a conduct issue
- Disability discrimination issues
- Drug and alcohol testing
- Data protection issues

HEALTH AND SAFETY OBLIGATIONS

- Common law duty to take reasonable care for the safety of their employees, and statutory duty to ensure the health, safety & welfare of employees

SIGNS OF ALCOHOL ABUSE

- Absenteeism
- Erratic performance
- Reduced productivity
- Increased complaints
- Patterns of depression/fatigue (especially after the weekend)
- Unusual irritability or depression
- Sudden mood swings

SIGNS OF ALCOHOL ABUSE

- Dishonesty/theft
- Deterioration in relationships with colleagues
- Poor timekeeping
- Smelling of alcohol
- Missing appointments
- Neglecting appearance
- Involvement in accidents

UNFAIR DISMISSAL

- Employees who have at least two years' continuous service have the right not to be unfairly dismissed.
- There are five potentially fair reasons for dismissal.
- Capability and conduct are both potentially fair reasons.
- The employer must act reasonably in treating that reason as a sufficient reason to dismiss.

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

- Capability is a potentially fair reason for dismissal.

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

The following factors are relevant in determining whether it is reasonable to dismiss on health grounds:

- Nature of the illness
- Prospect of employee returning to work/likelihood of illness recurring
- The need to have someone doing the work

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

- Effect of absences on rest of the workforce
- Extent to which employee has been made aware of the position
- Employee's length of service

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

The following factors are relevant in deciding how long an employer is expected to wait:

- Availability & cost of temporary cover
- Whether the employee has exhausted his sick pay
- Administrative cost of keeping the employee on the books
- Size of the organisation

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

Before an employee is dismissed on the ground of ill-health:

- The employee should be consulted; and
- Steps should be taken to discover the true medical position.

MANAGING ALCOHOL ABUSE AS A HEALTH ISSUE

Practical tips

- Refer employee to his GP
- Provide contact details of organisations that can help
- Make it clear that the employee needs to engage with treatment
- Agree a course of action
- Employee should be given time off if necessary
- Regular meetings to monitor progress

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

- Misconduct is a potentially fair reason for dismissal.

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

Factors relevant to whether a dismissal for alcohol abuse is reasonable:

- whether alcohol abuse was on or off duty
- any health and safety issues
- contact with children/young people
- potential impact on employer's reputation/business

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

Factors relevant to whether a dismissal for alcohol abuse is reasonable:

- whether employee's actions were illegal
- wording of any substance misuse policy
- any mitigating factors

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

Martin v British Railways Board:

- An employee whose eyes were glazed and speech was slurred claimed that he has not drunk, but was suffering from hypertension.
- The dismissal was unfair, as the employer had failed to investigate the employee's claims.

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

McElroy v Cambridgeshire Community Services NHS

Trust:

The employee's dismissal was unfair because:

- (1) A reasonable employer would not have concluded the employee was unfit for duty.
- (2) The failure to attend an occupational health appointment was not put to the employee in advance of the disciplinary hearing.

MANAGING ALCOHOL ABUSE AS A CONDUCT ISSUE

Sinclair v Wandsworth Council:

The employee's dismissal was unfair because:

- (1) The employer had not given a copy of its drug & alcohol policy to the employee or his managers.
- (2) The employer had not made it clear to the employee exactly what he needed to do.

DISABILITY DISCRIMINATION

An employee is disabled for the purposes of protection under the Equality Act 2010 if:

- He has a physical or mental impairment;
- The impairment has a substantial adverse effect on the employee's day-to-day activities; and
- The effects are long term.

DISABILITY DISCRIMINATION

- Addiction to alcohol, nicotine or any other substance is expressly stated not to be an impairment for the purposes of the Equality Act.
- “Addiction” includes a dependency, however the exclusion does not apply if the addiction is the result of the administration of medically prescribed drugs or treatment.

DISABILITY DISCRIMINATION

It has been held that depression caused by alcohol abuse was not prevented from being a disability.

“Guidance on matters to be taken into account in determining questions relating to the definition of disability” produced by the Office for Disability, states that liver damage caused by alcohol dependency will count as an impairment.

TESTING FOR DRUGS & ALCOHOL

Nichols v Network Rail Infrastructure Ltd:

Dismissal of employee who failed an alcohol test was unfair as the employer had failed to carry out a sufficient investigation or exercise its discretion.

DATA PROTECTION ISSUES

- The GDPR & Data Protection Act 2018 came into force on 25 May 2018.
- Data relating to health is “special category data”.
- The processing of special category data is permitted for carrying out employment law rights & obligations, to the extent authorised by the laws of the relevant member state.

DATA PROTECTION ISSUES

- The processing of special category data for employment law purposes is authorised in the UK if it is necessary for employment law purposes, & the employer has a policy in place & complies with certain safeguards.
- The safeguards include a requirement for the employer to retain a copy of its Data Protection Policy & a record of its processing activities.

DATA PROTECTION ISSUES

- The Information Commissioners Office's Employment Practices Code states that employers should inform employees which drugs they are being tested for, ensure random testing is genuinely random, only test workers if it is appropriate, & suggests that post-incident testing is more likely to be justified.

SUMMARY

During this presentation I have covered:

- Employers' legal obligations
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CONCLUSION

- Employers should be proactive about managing alcohol abuse in the workplace.
- Employers will sometimes have a choice as to how to manage an alcohol-related situation, and should carefully consider all the circumstances before deciding how to proceed.
- In many cases it will be crucial for the employer to seek advice from an occupational health professional.

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