

**PROMIS**  
**Effective Alcohol**  
**and Drug Policies**

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## **DRUGS AND ALCOHOL - AN ILLNESS OR AN OFFENCE?**

The misuse of alcohol and drugs by employees will frequently coincide with poor work performance, poor attendance or punctuality, acts of misconduct, lack of care for safety.

All of these may justify disciplinary action under Section 98(2) of the Employment Rights Act 1996. Under that Act, dismissal may be justified only if it is for one of the five "potentially fair" reasons. The relevant reasons in connection with drugs and alcohol are "conduct" and "capability". Therefore any disciplinary action taken in connection with alcohol or drugs will be "potentially" fair. The key question is whether the employer acted reasonably in deciding to apply a disciplinary sanction. In deciding this, one of the most important questions is whether the misuse of alcohol and drugs should be regarded as an example of misconduct, or lack of capability.

## **THE DIFFERENCE**

Employment Tribunals will frequently accept a harder line if the incident is properly one of misconduct. Greater tolerance is expected if the matter is truly one of capability -i.e. health.

Where the matter is one of capability, dismissal will almost never be justified following a single incident. Usually the employer will be expected to get specialist medical information before it decides on a course of action.

## **ALCOHOLISM**

Being drunk at work is generally regarded as an example of serious misconduct, and one which may justify dismissal for a single offence, depending on the circumstances and whether there is a well-known written rule making it clear that drunkenness will be treated as gross misconduct.

However, there is increasing authority from Employment Tribunals that alcoholism is to be treated as an illness rather than an incident of misconduct. Some examples:

### Strathclyde Council -v- Syme EAT 233-79

Caretaker dismissed for being drunk at work. Dismissal unfair because the employer failed to get medical evidence. If it had done so, it would have discovered that Mr Syme was suffering from alcoholism and chronic depression, the latter of which was treatable. (But note, the EAT thought dismissal might have been acceptable had the case been one of alcoholism alone, because of the school's duty to pupils.)

### Mather -v- Tayside Council SCOET S-1842-78

An example of alcoholism causing poor attendance. M's absenteeism was treated as misconduct and he was dismissed. Held that the dismissal was unfair. The absences should have been treated as a health problem, and medical evidence as to the likely date of recovery should have been sought before any decision was taken.

Although Tribunal's are increasingly sympathetic to alcoholism, there will still be many occasions when the dismissal of an alcoholic is considered fair. Tribunals seem to make a distinction between types of behaviour caused by alcoholism (poor attendance, lateness, poor work), which are to be treated sympathetically, and alcoholism which causes types of behaviour, which would otherwise be acts of misconduct.

These seem to be treated less favourably. The logic seems to be that if alcoholism is to be treated as an illness, then sympathy should be given to the usual manifestations of illness - usually poor attendance and poor performance, but alcoholism does not justify lack of care for safety, violence, abusive behaviour.

For example:

### Evans -v- Bass North Limited EAT 715-86

E, a chef, and a known alcoholic, threatened a manager while drunk. The Tribunal acknowledged his illness but decided that his dismissal was fair. The same may be true of an employee who undertakes dangerous work knowing that he is drunk, e.g.

### Forthports -v- Lorrimer Court of Session 1992

L drove a crane while drunk. He made clear that he suffered from alcoholism, but the

court held that in the circumstances, the dismissal was justified. On the facts, he must have known he was drunk, and nevertheless undertook dangerous work. (An interesting consideration - what if Mr L had admitted to his employer before his shift started that due to alcoholism he was drunk and unable to work. It is suggested that it would be inappropriate for the employer to dismiss, and the correct response would have been to encourage the employee to get treatment.)

But alcoholism will always need to be taken into account, even if there has been serious misconduct. A failure to at least consider the alcoholism as a mitigating factor will often result in any dismissal being unfair. For example:

### Chamberlain Vinyl Products -v- Patel EAT 796-94

Mr P punched his manager at a party. In mitigation his GP wrote to say that he suffered from depression and had a drink problem. The employer failed to investigate the mitigation further. The dismissal was therefore unfair. (Note in cases such as these, there is likely to be a significant reduction in damages due to contributory conduct.)

## **OBTAINING HELP FOR ALCOHOLIC EMPLOYEES**

It is now well established as a good practice to encourage an employee to seek assistance if he suffers from alcoholism. This will frequently be required as an alternative to dismissal.

The ACAS Guidebook "Discipline at Work" says this:

"... it is a good practice to encourage an employee to seek assistance if he suffers from alcoholism. This will frequently be required as an alternative to dismissal."

*regardless of status or seniority, who are suffering from alcohol or drug abuse. The aim should be to identify employees affected and encourage them to seek help and treatment. There are a number of symptoms relating to alcohol or drug abuse, including poor performance, changes in personality, irritability, slurred speech, impaired concentration and memory, deterioration in personal hygiene, anxiety and depression. When it is established that an employee is suffering from alcohol or drug abuse, employers should consider whether it is appropriate to treat the problem as a medical rather than a disciplinary matter. In all cases. the employee should be encouraged to seek appropriate medical assistance. "*

Note that even the ACAS guidelines do not require that the employer should provide the assistance, though many good employers will pay for such treatment.

Where an alcoholic employee indicates that he is willing to undertake treatment, this will be a significant mitigating factor when disciplinary action is being considered. However, a refusal to acknowledge the problem or to satisfy the employer that the employee is ready to make serious efforts to address his problem may justify dismissal.

#### Carter -v- Plevshire (unreported 1981)

C was warned that his refusal to get help for his alcoholism might result in dismissal. He continued to refuse to get medical treatment, and gave no indication that he was ready to make a significant effort to overcome his alcoholism. His dismissal was fair.

So the general rule seems to be that though an employer is expected to be tolerant when dealing with alcoholism, there is a balancing responsibility on the employee to help himself. There are also indications from the decided cases that the employer's sympathy need not last forever. A relapse may well justify disciplinary action including dismissal.

#### Barker -v- Tricentrol Cars Limited ET(Leeds) 1980

B was sacked after he left work for a drink. His employer had been sympathetic, and had helped his recovery for 18 months. However, they decided that they could not support him any longer. The dismissal was fair.

Note that the danger of relapse is one that employers should be aware of. Although it is good practice for the employer to provide support and assistance to the employee, it should be made clear in writing at the outset that continued sympathetic treatment will depend on the employee following through any course of medical treatment that is recommended, and that the alcoholism should be brought under control within a reasonable period of time. It is also wise to make clear to the employee that although sympathy will be given to his alcoholism if it results in absence, poor attendance or poor work, drunkenness at work will not be tolerated and will be treated as gross misconduct, notwithstanding the alcoholism.

## **DRINKING AT WORK AS MISCONDUCT**

Drinking at work or being drunk at work will usually be misconduct, and it will be gross misconduct if the employer has made it clear (usually in a written rule) that it will be treated as such.

Even if there is no written rule, drinking or being drunk will usually amount to gross misconduct if there is a safety issue.

Generally, employers have unfettered discretion to make whatever rule they see fit about alcohol. An employer is entitled to go as far as insisting, on pain of dismissal, that alcohol should not be brought onto the premises. If such a rule is applied consistently, and with consideration of mitigating circumstances in each case, resulting dismissals will usually be fair even for a single offence. (Note however, that if an employee is an alcoholic, it will often be unfair to dismiss without getting medical advice first and considering the alcoholism as a mitigating factor.)

If there is no well publicised rule, being drunk at work will rarely justify dismissal for a single offence,

reputation of the employer, the well being of the public, etc.

However, being drunk will usually be serious enough to justify a written warning or a final written warning, even if there is no written rule.

## **ADDICTION TO DRUGS**

The ACAS Handbook (see above) suggests that addiction to alcohol and drugs should be treated alike - as an illness rather than as misconduct.

But Tribunal cases tend to show less tolerance for employees who are users of drugs. There may be a number of reasons for this:-

- Most cases involved soft drugs, which Tribunals tend to regard as non-addictive. Use of soft drugs is often seen as a wilful act rather than an illness.
- There is no doubt that Tribunals are influenced by the illegality of drug use. In particular, an employer must be mindful of the fact that under the Misuse of Drugs Act 1971, the employer commits an offence if it knowingly allows drugs to be used on its premises.
- Possession of drugs on the premises will usually be regarded as more serious than the possession of alcohol, especially if there are young workers at the site.

Nevertheless it is likely that even if there is a written prohibition against the use of drugs at work, dismissal may be unfair if the problem caused is one of poor attendance, lateness or unreliability caused by a drug addiction. In these cases, medical evidence may have to be sought. Even if there is no addiction as such, bear in mind that drug use may be linked to clinical depression, which is an illness, and may well be a disability under the Disability Discrimination Act 1996.

## **POSSESSION OF DRUGS AT WORK**

Using drugs at work will usually amount to gross misconduct, even if only "soft" drugs are involved.

Possession of soft drugs at work will not necessarily be misconduct at all, unless there is a written rule, which makes it such. The key issue is whether there was any evidence that the employee was planning to use the drug or supply it to colleagues. (See for example, *Moyes -v- Payles* DIY ET 1985 - a dismissal for possession of cannabis at work was unfair, because there was no evidence of use or an intention to supply.)

But the situation would be very different if there is a rule against drug possession, or if the drugs involved are "hard" drugs.

## **USE OF DRINK AND DRUGS OUTSIDE WORK**

This will very rarely justify disciplinary action of any kind, unless there is evidence of impact on the employee's duties.

Very rarely, action may be justified if there are important safety implications.

In *Booth -v- Southampton Airport* ET 1987, an employee, who had always given good service, was dismissed for using cannabis in his spare time. He was an air traffic controller, and even the risk of drug misuse was enough to justify dismissal.

Drug use at company functions may justify dismissal even if there has been no written warning in the past. See, for example, *Nicholson -v- Focus* DIY IDS Brief 1997. Use of cannabis at a staff party, partly paid for with company money, was sufficient to justify dismissal even though it was off the premises. The Tribunal was influenced by the seniority of the employee involved and the fact that young workers were present. Nevertheless, there is little doubt that dismissal in these circumstances was "near the line". Employers are advised to have a written rule prohibiting drug use at such events.

There is a contrast with cases involving drunkenness at work functions. Here, if an employer has sanctioned drinking then it appears it must accept a lower standard of behaviour. (e.g. Williams -v- Whitbread Plc -employees dismissed following fighting after hours on a residential course. Dismissal was fair in the circumstances, but only just –the employer lost at first instance before an ET. )

Very rarely, disciplinary action may be justified in respect of activities outside work if the reputation of the employer is at risk or if young people will come into contact with a drug user. For example, Tabor - v- Mid Glamorgan CC - a teacher with many years good service was convicted of cannabis possession. His dismissal was fair because of his regular contact with children. NB -this is an extreme case. For most employees, possession of soft drugs offences would not justify any disciplinary action, much less dismissal.

## **DRUG AND ALCOHOL SCREENING**

The legal implications of screening depends on when it takes place, and whether it is contractual. There is no legal right to require screening, and therefore the consent of the employee is required.

The easiest time to screen is at the recruitment stage. Here, employees are likely to give consent, knowing that a refusal will mean that their application will go no further. An employer is entitled to refuse employment on the grounds that a prospective employee failed a screening. If the job offer is made before the results of the screening are known, be careful to make the job offer conditional upon completion of a satisfactory screening test.

The situation is different where employees are already engaged. Here, introducing screening will probably amount to a breach of contract unless employees agree to undergo screening. A refusal to undergo screening by an employee will not amount to misconduct, and an employer could only apply disciplinary action for refusal if there was very powerful evidence of a very serious safety consideration.

It should be noted that even if screening is undertaken, and employees are found to be users of illegal drugs, this does not mean that disciplinary action may follow. In the vast majority of cases, the employer would not be able to take any action based upon its findings. Any attempt to apply a disciplinary sanction would fall foul of unfair dismissal legislation. (Note that no such legislation exists in the United States - this may explain why screening has become popular there but remains rare here.)

If screening is introduced, it is important to make clear that undergoing screening is a contractual requirement, and that refusal will be treated as a disciplinary offence.

## **DRAFTING DRUG AND ALCOHOL POLICIES**

There is no legal requirement to have a written drug or alcohol policy. Nevertheless, it is wise to have a brief written policy which is provided to employees. In particular, it is useful to state that being drunk at work or being under the influence of drugs at work will be treated as gross misconduct. It is also useful to state (if necessary) that possession of drugs or alcohol at work will also be treated as gross misconduct. Consider making a rule that use or possession of drugs at company functions will also be treated as gross misconduct. Also consider reminding employees that high standards of behaviour are expected even at company functions at which alcohol is served.

It is very useful to provide that an employee must undertake medical tests if there is reason to believe that poor performance is related to drug or alcohol misuse, and to provide that a failure to undergo such treatment will be treated as misconduct.

Consider providing a power of suspension in the event that an employee is found to have illegal drugs in his system, or if he admits to a serious drug or alcohol problem.

Although reference to medical assistance and counselling might be made, be careful not to make a promise that such treatment will be available. There is an increasing tendency to regard policy

to contractual counselling or medical assistance. (e.g. see *Villella -v- MFI IRLR 1999* - Court of Appeal). Here, a summary document setting out a company's policy regarding its PHI scheme was found to be contractual. Therefore the company was bound to continue to offer benefits equal to the scheme, even though the employee involved ceased to be eligible under the scheme. This case is a timely reminder that policy documents can often create contractual rights. Be careful not to create a contractual right which goes further than you really intended.

## **ALCOHOL AND DRUG ABUSE POLICY**

### **Alcohol**

The Company's policy is to forbid the consumption of alcohol on the Company's premises.

Any employee who is found consuming alcohol on the Company's premises or is found to be intoxicated at work will face disciplinary action on the ground of gross misconduct under the Company's disciplinary procedure.

Health Checks are in force to establish whether there are any alcohol or drug problems.

All prospective employees will be asked as a condition of any offer of employment to undergo a medical examination which will seek to determine whether the prospective employee has taken a controlled drug or has an alcohol abuse problem.

A refusal to give consent to such an examination or a refusal to undergo the screening will result in the immediate withdrawal of any offer made.

### **Drugs**

The possession, use or distribution of drugs for non-medical purposes on Company premises is strictly forbidden.

If you are prescribed drugs by your doctor which may affect your ability to perform your work you should discuss the problem with your Manager.

If the Company suspects there has been a breach of the prohibition of substances, or your work performance or conduct has been impaired through substance abuse, the Company reserves the right to require you to undergo a medical examination to determine the cause of the problem.

If you refuse to undergo a medical examination in such circumstances your refusal will constitute gross misconduct in accordance with the Company's disciplinary procedure.

If, having undergone a medical examination, it is confirmed that you have been positively tested for a controlled drug, or you admit there is a problem, the Company reserves the right to suspend you from your employment to allow the Company to decide whether to deal with the matter under the terms of the Company's disciplinary procedure or to require you to undergo treatment and rehabilitation.

If you are offered rehabilitation the Company will determine in consultation with its medical advisor an appropriate period of time during which you will be required to undergo medical treatment. During the period of rehabilitation the Company will determine whether you are fit to return to work. If you are not judged fit to return to work you will take [unpaid leave] [leave of absence under the Company's sick leave scheme].

If at any time you disobey an instruction given to you by the Company with regard to the rehabilitation or suffer a relapse during or following treatment the Company reserves the right to withdraw support and to proceed to deal with the matter under the terms of the Company's disciplinary procedure.

On your return to work after having been declared fit for work by the Company's medical advisor, should there be any recurrence of the original problem or your performance has been impaired by the

under the Company's disciplinary procedure.

The Company reserves the right to search you or any of your property held on the Company premises at any time if there are reasonable grounds to believe that the prohibition on substances is being or has been infringed. The search will be carried out in accordance with the Company rules with regard to searches.

If you refuse to comply with these search procedures, your refusal will normally be treated as amounting to gross misconduct and it will entitle the Company to take disciplinary action.

The Company reserves the right to inform the police of any suspicions it may have with regard to the use of controlled drugs by its employees on the Company's premises.

The PROMIS Recovery Centre can also provide up-to-date advice on:

- Health and Safety Regulations
- Legal Responsibilities
- Good Company Practice
- Disciplinary Procedures in cases of addiction