



cullings

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cullings is the newsletter of
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Employer found liable for flawed drug testing procedures

Drug and alcohol use by employees in the workplace can open up a Pandora's box of associated employment issues for employers. The employer has to balance their obligation to provide all their employees with a healthy and safe workplace with their obligation to treat those whom they suspect to be involved in drug or alcohol use fairly and in good faith. Not fulfilling the latter obligation can lead to severe consequences, as a Napier-based employer recently discovered.

Baked at work?

Leigh Hayllar and Andre Matene both worked as bakers for Goodtime Food Company Limited, a Napier-based bakery. Both men admitted to using cannabis in the past and both had failed an initial drugs test. Both men were dismissed by Goodtime after having failed a second drugs test. Both men sought compensation, claiming to have been unjustifiably dismissed.

The men had signed individual employment agreements with Goodtime which contained a provision enabling reasonable cause drug testing. These provided that Goodtime employees could be compelled to take a drugs test if their appearance, actions or behaviour indicated that they might be affected by drugs.

Significantly, Goodtime operated a Drug & Alcohol policy, which offered employees who were found to be taking drugs the opportunity to enter into a Drug Rehabilitation Programme. Employees who elected to complete rehabilitation were required to sign a Rehabilitation Contract with Goodtime. Both Mr Hayllar and Mr Matene signed these rehabilitation contracts, which provided that if they returned a positive drugs test result **after** the completion of the rehab then they could face dismissal.

The follow-up drugs tests

Mr Hayllar was asked by Phil Pollett, the managing director of Goodtime, to take a second drugs test after he tripped over a loose tile that was protruding from the bakery floor. Mr Pollett took the view that Mr Hayllar's fall was caused by drug consumption. Mr Hayllar's second drugs test returned a positive result and after a truncated disciplinary process, he was dismissed.

Mr Matene was asked to undertake a second drugs test after Mr Pollett claimed to have smelt cannabis on him at a staff social function, two weeks earlier. Mr Pollett claimed that he had reason to believe that Mr Matene was continuing to take drugs and that this was affecting his ability to perform his bakery duties. Because the second drugs test confirmed the presence of cannabis in his system, Mr Matene was also summarily dismissed.

The decision

Judge Ward focused on two substantial procedural defects made by Goodtime. He noted that drug testing policies need to be interpreted and applied strictly. He found that Goodtime had failed to comply with the terms of its own Drug and Alcohol Policy. The policy dictated that employees who failed an initial drugs tests were required to be suspended from work (on full pay) until it was determined



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whether they should return to work. Goodtime had instructed them to return to work immediately. Goodtime breached their good faith obligations as an employer by misleading the men into believing that their rehabilitation results didn't matter because they could return to work straight away.

Goodtime also lacked the authority to dismiss the men based upon the results of their second tests. The clause in Goodtime's drug policy which addressed follow-up testing explicitly stated that dismissal could only result if a second positive test was returned **outside** the rehabilitation period. Both men were still participating in the rehabilitation programme when they were ordered to take a second drugs test, which was inherently unfair to them and jeopardised their chances of becoming fully rehabilitated.

The Judge also found that Goodtime had acted contrary to the reasonable cause drug testing provisions in the employment agreements. Reasonable cause could only exist if something occurred which indicated that the employee's ability to work effectively and safely was compromised. Mr Pollett asserted that Mr Hayllar stumbled over the floor tile due to drug consumption and that Mr Matene smelt of cannabis at the staff function. A fair and reasonable employer would not "jump to conclusions" and assume that these incidents were due to cannabis use. Nor would they commission what was in essence a random drugs test.

Mr Hayllar was awarded three months worth of lost wages and awarded \$3,000 compensation for hurt and humiliation. Mr Matene was awarded five months worth of lost wages and awarded \$1,000 for hurt and humiliation.

What can employers learn from this?

Employers need to take care when drafting or implementing drug testing policies. Providing drug-affected employees with the opportunity of participating in drug rehabilitation programmes, whilst a noble and commendable concept, can lead to difficulties if the rehabilitation is not conducted exactly as it is described in the policy. Employers should consider whether they want to encourage rehabilitation programmes or whether they want a clause providing for a more blanket ban on drug-use which affects the employees' work ability.

Perhaps some old lessons need to be reinforced in light of this case. Employers should apply their policies exactly as they are written and should not deviate from them.

Employees should be dealt with reasonably and in good faith, even where the employer is investigating them for potential disciplinary breaches. In an ideal world, substance abuse by employees would not be an issue but given that this state of utopia does not exist, employers need to be aware of how to deal with such matters.

Can I make my employees take a drugs test?

If an employer wants to require an employee to undergo compulsory drug testing then it must have a robust clause in the employee's employment agreement which is reasonable and that does not contravene any protections which are provided to the employee in any other relevant laws. In the absence of a specific clause permitting drug testing the employer would need to obtain the informed consent of the employee in order to carry out the testing.

When drafting a drug testing clause, employers should take into account the following factors:

- The industry the employer operates in and whether the work of the employee impacts upon the safety of others- if it does then it is easier to justify drug testing;
- The employees' rights under the Privacy Act when considering how the results of drugs tests are collated and who is made privy to the results; and
- That the employees are not being unlawfully discriminated against under the Human Rights Act.

Panel for External Legal Services to Government

Cullen – The Employment Law Firm is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

Welcome Jeremy

Jeremy Ansell joined **Cullen – The Employment Law Firm** in September 2012, having graduated from Victoria University with a Bachelor of Law and a Bachelor of Arts in May 2012.