



MELBOURNE SYDNEY BRISBANE

# Drug and Alcohol Testing Case Studies

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# Drug and alcohol testing

Key issues employers should consider:

- Type of testing regime – urine v saliva
- What is the key aim of the policy?
- What disciplinary action is appropriate?

# Main areas of disputation

- Need for drug and alcohol testing regime less controversial, particularly in high risk industries
- Type of testing more likely to be disputed
- Whether dismissal warranted where evidence of impairment is absent also likely to be disputed

# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

- Refusal to submit to random urine test
- Employee asserted purpose of policy to measure impairment
- Alleged urine testing not relevant to impairment
- Dismissed due to failure to follow reasonable directive

# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

- Full Bench upheld dismissal
- Discussed relative merits of two tests
- No consensus as to which test preferred

# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

- Level of intrusiveness key issue
- Safe workplace v privacy
- Urine test more intrusive as shows usage over longer period before test – less likely to relate to impairment during work

# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

- Purpose of policy not only to test for impairment
- Purpose includes detection of usage to manage risk to health and safety
- Not FWC's role to determine which method of testing = 'best practice'
- FWC only needs to determine whether direction reasonable



# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

- Direction reasonable as:
  - Accords with Australian Standard and common industry practice
  - Different disciplinary consequences depending on impairment v positive result
  - Employer was bound by contractual obligations to its clients to monitor drug and alcohol use

# Method of testing

*Briggs v AWH Pty Ltd* [2013] FWCFB 3316

Key lessons:

- Purpose of policy to test for impairment and monitor drug and alcohol use for purposes of ensuring safety
- Policy should follow industry practice and Australian Standards
- Consider differentiating between consequences depending on result (i.e. impairment v positive test only)

# Method of testing

## *Endeavour Energy v CEPU* [2012] FWAFB 4998

- Dispute over policy referred to FWA under enterprise agreement dispute resolution clause
- FWA asked to consider whether urine v saliva testing most appropriate
- FWA determined saliva testing appropriate
- Decision result different to *Briggs* as in *Briggs* FWC not required to determine what test preferable

# Method of testing

*Endeavour Energy v CEPU* [2012] FWAFB 4998

- Saliva test preferred as:
  - More aligned with policy aim of detecting impairment
  - Urine testing involves higher level of invasion of privacy

# Method of testing

*Endeavour Energy v CEPU* [2012] FWAFFB 4998

- Saliva test now preferred due to advances in technology
- Employers should review policy periodically to ensure aligned with most current technological advances
- Less intrusive testing methods preferable

# Enforcement of policy

When employee returns positive test:

- Consider whether disciplinary action reasonable in all the circumstances
- Is policy clear and has it been communicated to employees and applied consistently?

# Enforcement of policy

*Daley v GWA Group Ltd t/a Dux Hot Water* [2011]  
FWA 6993

- Random alcohol test
- BAC of 0.076% (acceptable limit 0.02%)
- No previous warnings for drug / alcohol use
- Employee dismissed
- Unfair dismissal claim

# Enforcement of policy

*Daley v GWA Group Ltd t/a Dux Hot Water* [2011]  
FWA 6993

- Dismissal unfair
- Long history of unblemished service
- Age, location, education made it unlikely that could find alternative employment
- Policy contemplated other disciplinary action where positive test before dismissal



# Enforcement of policy

*Day v Sodexo Remote Sites Australia Pty Ltd t/a Sodexo Remote Sites* [2011] FWA 8505

- Employee dismissed following second positive alcohol test in 6 months
- Unfair dismissal application
- Dismissal unfair

# Enforcement of policy

*Day v Sodexo Remote Sites Australia Pty Ltd t/a Sodexo Remote Sites* [2011] FWA 8505

Basis for decision:

- Policy unclear:
  - Several policies applied, interaction uncertain
  - Poorly drafted, key issues (e.g. acceptable level of test) unclear
  - Managers unsure what action policy required

# Enforcement of policy

*Ley v Macmahon Contractors Pty Ltd* [2011] FWA 694

- Similar facts to *Day*
- Dismissal after 2 positive alcohol tests
- Unfair dismissal application
- Dismissal upheld

# Enforcement of policy

*Ley v Macmahon Contractors Pty Ltd* [2011] FWA 694

Basis for decision:

- Warning letter clearly set out consequences of further breach
- Policy and letter drafted clearly and simply
- Employee given chance to improve following first positive test

# Enforcement of policy

## Key learning points:

- Drafting of policy and warning letters should be clear and simple
- One policy only on drug and alcohol testing
- Check all relevant documents are consistent – employment contract, enterprise agreement, code of conduct
- Always consider surrounding circumstances

# Contact Erin Rice if you have any questions



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