

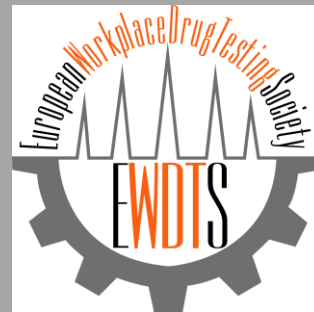


Challenging Aspects of Policies

EWDTS 8th Symposium on
Workplace Drug Testing
Vienna, September 2013

Lindsay Hadfield

Policy and Education Services





Challenging Aspects of Policies

- Consultation phase
- Implementation
- Employment Tribunals





The consultation phase – the challenges:

WHY?

The need for a policy

The need for testing





The consultation phase – more challenges:

WHAT? WHO? HOW? WHEN?

Human Rights Act

Support (education, information, where to get help)

Who will be tested and how and when





Consultation phase – response to the challenges:

DEBATE

CONSULT

BE HONEST

→ AGREEMENT





Policy implementation

At this point people start taking notice of the policy, and reading it closely.

WHAT IF?





WHAT IF?

- Someone refuses to be tested
- There is no senior manager on site
- The individual insists on driving home
- The individual admits they have a problem
- There is an anonymous tip-off
- The individual has reached the end of their shift time
- The individual requires hospital treatment
- Manager is accused of victimisation



WHAT IF?

- Someone refuses to be tested
- There is no senior manager on site
- The individual insists on driving home
- The individual admits they have a problem
- There is an anonymous tip off
- The individual has reached the end of their shift time
- The individual requires hospital treatment
- Manager is accused of victimisation

Answered by standard management practice and existing company rules



What do the words mean?

Challenges:

- Impairment / under the influence
- At work (site, vehicles, meal breaks, on-call, field based)
- Illegal drugs ('legal' highs, different jurisdictions)
- Consequences of a positive result

Avoid ambiguity:

- Drug free workplace (medicines)
- Unsatisfactory screening result
- Enhanced testing





Disciplinary investigation after a positive result

- Passive inhalation
- Spiked food or drink
- Breath test device unreliable
- Collection /analysis does not comply with appropriate external standards (EWDTS,UKAS)
- Collection procedures not followed
- Company procedures not followed
- Company procedures not applied fairly

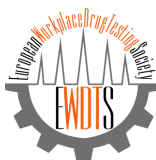




It's all gone wrong – Employment Tribunal findings

An Employment Tribunal may question:

- was this a first offence?
- what action has been taken in similar circumstances in the past?
- was the misconduct during or outside working hours?
- was the misconduct on or off business premises?
- would remedial help or therapy be a reasonable alternative to dismissal?
- does the misuse affect work performance?
- is the employee engaged on safety critical duties?
- should a medical report be obtained?
- are there personal circumstances to be taken into account eg bereavement
- would demotion or a sideways move be an alternative to dismissal?
- is there any suggestion that workplace stress is a factor in the misuse?



It's all gone wrong – Employment Tribunal findings

An Employment Tribunal may question:

- was this a first offence?
- what action has been taken in similar circumstances in the past?
- was the misconduct during or outside working hours?
- was the misconduct on or off business premises?
- would remedial help or therapy be a reasonable alternative to dismissal?
- does the misuse affect work performance?
- is the employee engaged on some critical duties?
- should a medical report be obtained?
- are there personal circumstances to be taken into account eg bereavement?
- would demotion or a sideways move be an alternative to dismissal?
- is there any suggestion that workplace stress is a factor in the misuse?

**Proportional?
Reasonable?
Consistent?
Alternatives?**



*Bedford v H Young Holdings plc t/a Animal
ET/3102295/09*

Background:

- Concerns about alcohol and drug abuse on site
- September – ‘zero tolerance’ policy introduced;
- February – email announcing drug testing
- queried right to test, admitted cannabis use. Subsequently refused random test, suspended, disciplinary hearing; outcome: dismissed

23 February

24 February

27 February

11 March

Tribunal found:

- No consultation on testing
- No information on testing
- No support offered after admission of cannabis use
- Dismissal was unfair, company’s behaviour unreasonable.





Cosgrove v Kuehne and Nagel Ltd
ET/1200413/2012

Background:

- Policy only allows for post accident testing.
- Test was as result of anonymous information, following a complaint of harassment by the individual. No concern over behaviour or performance.
- Positive for cannabis; individual suspended; admitted use on previous weekend. Dismissed for 'being under the influence of drugs at work'

Employment tribunal upheld unfair dismissal claim. The employer had NOT:

- set out the exact nature of the accusations in advance of disciplinary hearing;
- taken steps to clarify the identity of the anonymous source;
- explored in the disciplinary hearing what the positive test meant and how cannabis taken several days earlier affects an individual.





Unpublished tribunal finding:

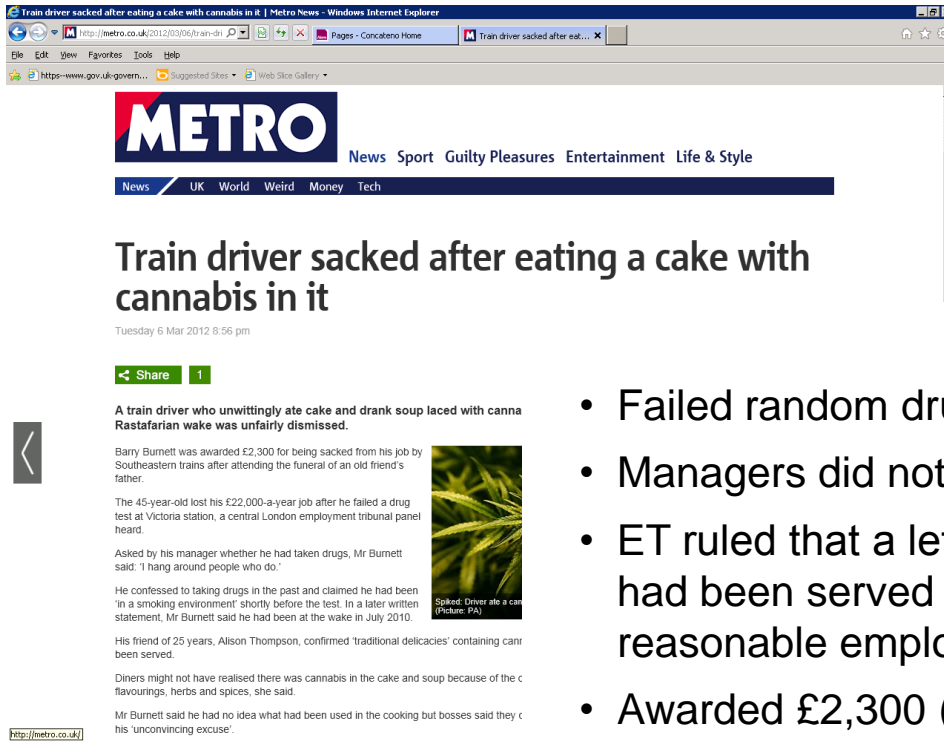
Background:

- Policy states must not turn up 'unfit' to work; must not use drugs or alcohol at work; positive test would result in disciplinary procedures.
- Random test. Admitted smoking joint the previous evening. Suspended pending drug test result; positive result - dismissed for failing to comply with policy.

Tribunal found:

- Policy was not clear on what is and is not prohibited
- Policy did not make it clear that a positive result was gross misconduct
- Disciplinary investigation did not consider question of impairment





Policy:
based on UK Rail industry
standard established in 1992

- Failed random drug test – dismissed
- Managers did not take explanations seriously
- ET ruled that a letter confirming that ‘traditional delicacies’ had been served at a Rastafarian funeral meant that "no reasonable employer" could reject the claims completely.
- Awarded £2,300 (dismissal from £22,000pa job)



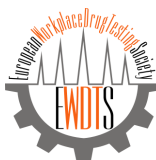
Menshisteab v First South Yorkshire Ltd
ET/2801306/09

Background:

- policy well established, including random testing – ‘khat’ in drug test panel
- Bus driver selected for random test – admitted khat use before test – offered help
- Selected again for random test – positive for cannabis – use denied at first, because of fear of company’s reaction. Dismissed – Gross Misconduct.

Tribunal upheld dismissal

- Previous experience with khat showed company would be sympathetic
- Although reason for dismissal was different to reason for disciplinary proceedings this inconsistency was not unfair.





Shepherd v Prismo Road Markings Ltd
ET/2403360/09

Background:

- Policy available on intranet, included random testing
- Positive for cannabis but claimed passive inhalation

Tribunal upheld dismissal

- company had carried out proper investigation to establish passive inhalation claim not justified
- Given nature of job and business dismissal was reasonable





Conclusions:

Consultation: Encourage challenges!

- Build confidence in purpose and objectives of policy
- Develop understanding of the policy, and the wording

- Cross reference other company policies
eg H&S, Sickness absence, Code of Conduct,
Disciplinary and Grievance procedures

- Service provider is good source of advice





Conclusions:

Implementation: Anticipate challenges

- Provide line managers and employee representatives with information and support on the practical aspects of the policy:
 - basis for selection for testing (with cause and random)
 - test process
 - disciplinary investigations and meetings
 - treat every disciplinary process as unique

- Build in regular reviews and publicity





Conclusions:

Consultation: Encourage challenges

Implementation: Anticipate challenges

successful **Tribunal** challenges will be limited





Thank you!

EWDTs 8th Symposium on
Workplace Drug Testing
Vienna, September 2013

lindsay.hadfield@alere.com

