

Introduction

The management of drugs and alcohol in workplaces is not only an important health and safety issue for industry sectors such as construction and forestry, but is important for all workplaces.

Most businesses will have some part of their operations that are safety sensitive, for example the operation of machinery and vehicles. And even if physical health and safety might not be impacted by employees being at work under the influence of drink or drugs, businesses can be affected in other ways. Work mistakes made by impaired employees can be costly and an employer's reputation can be harmed.

At the same time as the 2020 election, New Zealand is conducting a referendum on the legalisation of cannabis. If that drug is legalised as a result of the referendum, the issue of drugs in the workplace can be expected to be accentuated. Having a Drug and Alcohol policy is highly recommended as part of the overall strategy for managing this issue.

Recent case

A case just decided in the Employment Relations Authority which involved an alcohol affected employee highlights the importance not only of having a clear workplace Drug and Alcohol policy, but also strictly following the required procedure when testing for alcohol or drugs.

The case of *Foster v Modec* involved the dismissal of Mr. Foster for breaching Modec's policies following a series of breath alcohol tests that were administered in connection with his employment as a Deck Operator on facilities located offshore in the Maari oilfield off Tarinaki.

Various policies, including a Workplace Drug and Alcohol policy, formed part of Mr Foster's terms and conditions of employment. Under the policy, employees could be required to undergo testing for prohibited substances before transferring to offshore facilities. The testing was undertaken by the entity that operated the helicopter used for transporting workers to the offshore facilities. An initial breath test detected alcohol, which resulted in Mr Foster undertaking a first screening test. This recorded a reading of 80 mcg/L (micrograms per litre) of breath. Under the helicopter operator's procedure this result would not prohibit passengers from boarding the helicopter.

The person undertaking the test detected a strong smell of alcohol on Mr Foster's breath and he was requested to take another test. He gave written consent for a confirmation test to be undertaken. Initially the breathalyser that was used gave an "error" message. It was turned off and then back on again at which point it recorded a reading of 110 mcg/L. A further test was undertaken using a different machine and that also reflected a level of 110 mcg/L.

A short time later yet another test was undertaken. This recorded Mr Foster's breath alcohol content at 70 mcg/L. At this point Mr Foster's evidence was that he was told to suit up in preparation for travel. He had been led to believe that the threshold for a positive alcohol test was 100 mcg/litre.

Shortly after that, Mr Foster was informed that he was not permitted to board the flight and he was told by Modec's country operations manager that the mobile testing unit of TDDA, an independent testing agency, would be arriving soon to undertake tests. That agency performed an initial test resulting in a reading of 20 mcg/L, followed approximately 30 minutes later by a confirmation test recording a "negative" result. In spite of this, Mr Foster was directed not to fly to the Maari facility.

Modec conducted a number of meetings with Mr Foster as part of an employment investigation and disciplinary process. In the course of those investigations, Mr Foster admitted that he had consumed alcohol on the weekend preceding the testing.

Understandably Mr Foster queried why his breath alcohol results had risen during the testing process, which had been conducted over a relatively short period. On enquiry with TDDA, Modec had been told that these fluctuations were not unusual and would be reflective of the metabolising of the alcohol in Mr Foster's system. Mr Foster also asked why the independent testing agency's results were not considered definitive.

In the end Modec dismissed Mr Foster relying on its zero tolerance policy towards alcohol and the confirmation tests taken by the helicopter operator of 110mcg/L. Modec also relied on breach of its rules relating to driving while being "under the influence of alcohol". This was in reference to Mr Foster's travel from home to the heliport that day.

In the case Mr Foster argued that the confirmation test relied on by Modec should not have been taken where there were no grounds for him to have given that test. He also raised the fact that there were doubts about the reliability of several of the test results and that issue had not been sufficiently investigated by Modec.

Modec relied on the fact that it had no control of the procedure that was undertaken by the helicopter operator. It said that Mr Foster had consented to the confirmation test relied on. Modec said that Mr Foster wasn't disadvantaged because he was aware of its zero tolerance policy to alcohol and the breach occurred in a safety sensitive area, which the heliport was defined as under the policy.

The Employment Relations Authority concluded that Mr Foster's dismissal was unjustifiable. Although the pre-flight alcohol screening was conducted by the helicopter operator, the Authority concluded the alcohol screening needed to conform to Modec's policies. The policy contemplated at least one prior initial test being conducted before a confirmation breath alcohol test could be embarked upon and only in circumstances where the initial test showed the threshold limit had been exceeded.

The policy did not specify what the threshold limit was and there was a lack of clarity around which of two possible threshold levels applied, either 0 mgm/L or 100 mcg/L. This led the Authority to say that it was difficult to conclude that a fair and reasonable employer could impose a testing regime with a corresponding sanction of potential dismissal if the breach of its standards occurred, without first ensuring the standard was clear and certain. So it concluded that the grounds required for the next confirmation test (being the ones relied on) weren't met.

There was also nothing in Modec's procedure which permitted the helicopter operator to perform a confirmation test. The Authority concluded that Modec could not reasonably rely on the test results to find that Mr Foster had breached its drug and alcohol procedure or the rule relating to driving a vehicle while affected by alcohol.

The Authority looked at the effect of Mr Foster's consent to the helicopter operator conducting the test that was relied upon and the acknowledgement in the consent document he signed that a positive test result was likely to lead to disciplinary action including dismissal. The finding was the consent had not been given on an informed basis. Also, it could not be construed as providing permission to alter or exceed Modec's existing procedures. The Authority put some weight on the fact that Mr Foster had not been informed he was not obliged to agree to additional testing and in fact had been informed in the consent document itself that a refusal to agree to the additional testing could be taken into account in any employment investigation or enquiry.

Because the procedure used by the helicopter operator to obtain the confirmation test results did not comply with Modec's procedure, and the consent that was relied on was not an informed consent, Modec did not have grounds to take disciplinary action.

The Authority said that an employer is expected to act in accordance with its policies and a failure to do so is not the action of a fair and reasonable employer in all the circumstances. The Authority declined Mr Foster's reinstatement remedy. This was primarily because the owner of the facilities on which Mr Foster performed his role, was not his employer and it had given notice to Modec that because of its own strict policy regarding alcohol, Mr Foster would not be permitted on its property or work sites in any capacity until further notice. Mr Foster ended up being awarded \$21,505.13 in lost wages and \$14,000 as compensation for distress.

Conclusion

The take-out from this case is the importance of having a drug and alcohol policy that is clear in terms of the testing levels that will apply and the procedures that will be followed. The case also shows that a failure to strictly comply with a drug and alcohol policy can invalidate a dismissal even where there is evidence of alcohol or drugs in an employee's system, but that evidence has not been obtained in accordance with the policy.

If you need help putting in place an effective drug and alcohol policy, or need advice in dealing with issues in this area, please contact us.