

The significantly increased fines and potential [jail terms](#) for employers under the *Work Health and Safety Act 2012* have refocused employer's attention on the often controversial issue of drug and alcohol testing onsite.

Under the *Work Health and Safety Act 2012* (SA) a person conducting a business or undertaking has a [primary duty of care](#) to ensure so far as is reasonably practicable the health and safety of workers. In a high risk work environment, this extends to taking reasonably practicable steps to ensure that health and safety is not affected by person(s) who are impaired, including by intoxication or drugs (whether lawful or otherwise).

Drug testing has been a controversial feature of such safety systems. Drug testing tests for the presence of a particular substance in the body but not for actual impairment. There is no reliable, objective, scientific test for impairment placing employers in a difficult situation. This debate is compounded because different tests have different detection windows. Urine testing can detect drugs still in the system after they have ceased to have an effect, whereas in some cases saliva testing will not detect drugs in the system even though a person is still impaired by the substance.

The Fair Work Commission makes a statement

A Full Bench of the Fair Work Commission has recently made a clear [statement](#) in relation to drug testing policies in the context of high risk environments. In this case, the applicant had tested positive to the presence of drugs (cannabis) through a urine test. The Commission held:

(T)he issue in this case was not Mr Sharp's "out of hours" conduct in smoking cannabis, but rather that he attended for work ... with a level of cannabinoids that was above (and very significantly above) the permitted threshold. That was "at work" conduct ... (A) critical consideration in assessing whether a dismissal in these types of circumstances was unfair is the fact that there is currently no direct scientific test for impairment arising from the use of cannabis ... Apart from reliance upon the employee's own explanation about the matter, which will probably not be verifiable, the employer will therefore not be in a position properly to assess whether the employee is impaired ... and therefore represents a threat to safety. For that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable. Likewise, depending on all the circumstances, it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair (footnotes omitted)

This case provides guidance for employers in relation to drug testing regimes. Relevantly – at least in the context of high risk work – the Commission has made it clear that misconduct in the form of presenting for work with the substances present in the system (as compared to being under the influence of the substance) can be a valid reason to dismiss.

However, in order for this to be enforceable, it is crucial that the drug testing policy reflects the important distinction between the presence of a substance and being under the influence of it. Employers should ensure they assess their policies to ensure that they appropriately reflect this.

The Full Federal Court has recently [upheld](#) a dismissal on a similar basis.

No automatic dismissal

Although a breach of a policy may give grounds for dismissal, it does not mean that an employee can be automatically dismissed simply for failing a test. Employers must consider all of the relevant circumstances and afford procedural fairness to an employee during the process.

Fair Work Lawyers recommend employers seek legal advice immediately upon becoming aware that an employee has failed a drug test. If dismissal is a potential outcome, the employee should be promptly suspended, with pay, pending investigation and disciplinary proceedings. If dismissal is not being considered, an employee should not be permitted to return to work or operate a vehicle until an appropriate clearance has been received.

Implementing a testing regime

The Federal Court has already [held](#) that unless there is an express prohibition (such as in an enterprise agreement), an employer is permitted to introduce a drug and alcohol testing regime.

However, employers who wish to implement a testing regime should ensure that they have an appropriately drafted policy in place along with a reasonable strategy for implementing the policy, including appropriate consultation, training and documentation.

Need more information

If you would like to discuss implementing a testing regime or any aspect of modifying an existing a scheme, please contact the team at Fair Work Lawyers.



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The information contained in this publication is general in nature and does not constitute legal advice. Employers should seek legal advice in relation to their circumstances including, without limitation, drafting, implementing and enforcing a drug and alcohol testing policy.
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