

Employment Law Update - Views from the Beech

Is the Authority soft on drugs?

Two recent decisions from the Authority suggest that recreational drug use is acceptable.

McLeod v Transfield Services Limited

Mr McLeod, a “vegetation worker”, was so relaxed he fell out of a tree. His employer, Transfield, following its usual procedure, tested for drugs, and Mr McLeod tested positive for cannabis.

Following a disciplinary investigation, during which Mr McLeod was offered and accepted EAP assistance, Mr McLeod was dismissed for serious misconduct.

Mr McLeod’s employer, Transfield Services, had House Rules which stated drug use or possession at work would be considered serious misconduct. Its Drug and Alcohol Policy stated that a positive test was a violation of the policy. It also mentioned referral for rehabilitation.

The Authority found that Transfield was required to refer Mr McLeod to a substance abuse professional for assessment prior to making any decision to dismiss, and upheld his grievance.

Transfield then argued that Mr McLeod was not entitled to be reinstated to work, or to any damages, as he had contributed wholly to his situation. The Authority disagreed and ordered reinstatement and reimbursement of lost wages, reduced by 50% for Mr McLeod’s actions. There was no compensation for distress.

Transfield then sought to require Mr McLeod to submit to a drug test, prior to recommencing work. The Authority held that as it was not a “new” employment, Mr McLeod was not subject to pre-employment drug testing, although the Authority found that Transfield could require a test under another provision.

Wilkinson v Saxon Appliances Limited

Mr Wilkinson was an appliance technician, who visited clients in a work van. He was also issued with a work cellphone. His phone was changed, and when messages were deleted from his old phone the following voicemail message was found: “*Yeah, hey Corey, it’s Phil um just wondering if you’re able to get any stuff, um give me a call back on this number, right catch ya.*” Saxon concluded the message related to the supply of drugs.

Mr Wilkinson was asked to come to a meeting, but when he asked what it was about he was told to see his manager. At the meeting he was asked about supplying drugs, which he denied. When told Saxon had a voicemail message he admitted selling two “tinnies” of cannabis wrapped in foil.

Mr Wilkinson was then sent a letter inviting him to a formal meeting to discuss his admission he had sold drugs. He was suspended on pay and warned that he might be terminated.

At the meeting Mr Wilkinson said he could not recall whether he sold the tinnies or gave them away. No resolution was reached.

Mr Wilkinson then received a letter terminating his employment for serious misconduct, based on his initial admission of selling the tinnies. The letter mentioned a “*zero tolerance policy*”.

The Authority held that the first meeting was disciplinary in nature. The company already suspected Mr Wilkinson of serious misconduct, but did not warn him or give him the opportunity to be represented.

Nor was Mr Wilkinson given the opportunity to comment on the suspension. The Authority found that this contained an element of predetermination. The Authority also found that the ultimate decision-maker, being the owner of Saxon, took no part in the disciplinary process.

The Authority observed that the employment agreement listed examples of serious misconduct, which included consuming or being affected by drugs while at work or in company vehicles. It found that there was no mention of a “zero tolerance policy”.

The Authority found that Mr Wilkinson had, away from work, sold two tinnies to another employee. Saxons had no policy about drug use outside the workplace, and there was no evidence of adverse consequences on his work. The dismissal was therefore unjustified.

Regarding remedies, Saxon argued no damages should be payable due to Mr Wilkinson’s contributory conduct. The Authority disagreed. Mr Wilkinson was awarded \$6,000 for hurt and humiliation, based on his own evidence, and three months’ lost wages.

What does this mean for employers?

- The Authority can be very legalistic if it chooses. In both cases (which were determined by the same Member) the Member closely scrutinised policies and agreements to see whether the exact misconduct alleged was mentioned as constituting serious misconduct, even where only examples were given.
- Employees are not always culpable for using drugs; in the McLeod case the Authority found the employee only partially culpable, as damages were only reduced by 50%. More significantly, he was reinstated, despite the admission of cannabis use and his subsequent fall from the tree.
- Acts done in an employee’s private life do not necessarily constitute misconduct at work. For an employer to rely on “private acts” those acts must affect the employee’s work or the employer in some way, such as bringing the employer into disrepute.
- Employers should be cautious to warn employees of what is happening and possible consequences at all stages of a process, including the investigation stage. This is particularly so if the Authority takes the view, as it did in the Saxon case, that an employer cannot rely on an admission made without a representative present, thereby adopting a pseudo-criminal procedure.
- If employers wish to rely on policies, such as “zero tolerance” of drugs in the workplace, this must be publicised. This also applies to other policies, such as computer and internet use policies.
- Employers should remember the interface between drug policies and health and safety; drug use can impair safety and employers have a duty to maintain a safe working environment. This is another ground of justification, even if the particular circumstance is not specified in a disciplinary policy.

Minimum Wage increased to \$12.75

In case you missed the announcement, the Government has increased the minimum wage from \$12.50 to \$12.75. The training and new entrants’ minimum wages will increase from \$10 to \$10.20. The new minimum wage rate will come into effect on April 1, 2010.

This newsletter is necessarily of a general nature, and should not be relied upon as a substitute for specific legal advice. Should you wish to discuss anything further, please contact our team:

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