

## **REPORTING FOR DUTY WHILE UNDER THE INFLUENCE OF ALCOHOL**

It is not uncommon for employees to report for duty while under the influence of alcohol. In dealing with this issue, employers should distinguish between three situations: employees who are under the influence of alcohol when reporting for duty (i.e. intoxicated); those who consume alcohol while on duty; and those who have a blood-alcohol level in excess of the legal driving limit when reporting for duty.

Whether or not alcohol related transgressions justify dismissal depends not only on the nature of the transgression, but also on the circumstances of each case. These include the type of business conducted by the employer, the position or function of the employee and the provisions of the employer's disciplinary code or policy. For example, consumption of alcohol while at work and on duty is normally regarded as a serious offence, which may result in dismissal. Yet there may be mitigating factors, e.g. alcohol dependency, that necessitates corrective discipline rather than dismissal. On the other hand, an employee who is caught reporting for duty while under the influence of alcohol probably would ordinarily not deserve dismissal for a first transgression. Nevertheless, if the person also behaves in a manner that causes harm to others, dismissal may well be warranted.

Employers must also distinguish between employees who are under the influence of alcohol (i.e. intoxicated) and those who simply have a blood-alcohol level above a certain limit, usually the legal limit for driving different types of vehicle. The fact that someone's blood alcohol level exceeds the legal limit does not of itself mean that the person is necessarily under the influence. A company driver who is caught driving a company vehicle or machinery while over the legal limit certainly should be disciplined and may, in appropriate circumstances, also be dismissed. However, the allegation against the person should be that he/she allegedly drove a vehicle, or operated a machine, with too high a blood-alcohol level, not that he/she was under the influence. The latter allegation can only stick where there is evidence of alcohol in the employee's system (e.g. through observation, or a test) and evidence that the person's behaviour or performance was affected as a result.

Merely smelling of alcohol, while not actually being under the influence thereof, is not as a general rule regarded as a disciplinary offence, unless, once again, the employer's disciplinary code or policy stipulates otherwise, or the person is, for example, required to interact with other people (customers, students, colleagues etc) on a daily and regular basis. The employer will have to clearly stipulate that smelling of alcohol is not permitted and spell out a possible sanction in its disciplinary code.

An important question is how employers can establish whether an employee is under the influence of alcohol (intoxicated) or whether there is alcohol in the employee's blood, although he/she is not necessarily intoxicated? There are three ways in which to do this, i.e. subject an employee to a breathalyser test; subject an employee to a blood test; or conduct a visual observation of the employee in the presence of a witness. While an observation does not require the employee's consent, testing him or her does. If provided for in the employer's disciplinary code, the refusal to undergo a test when there is a reasonable suspicion that a person may have consumed alcohol may in itself constitute a disciplinary transgression. However, even in the absence of such a provision, an employee's refusal to undergo a test when there are clear signs of the possible presence of alcohol may be used in evidence against the

employee, although it would not give rise to a separate disciplinary transgression. Obviously, any test offered or conducted must be done by someone with appropriate training and using the correct technology.

Employers should therefore ensure that their disciplinary codes make specific provision for all the scenarios discussed in this article. Employers should furthermore ensure that their contracts of employment with all employees have a clause stipulating that employees are under an obligation to submit to testing if reasonably required to do so, and that failure to do so will constitute a disciplinary transgression. Tests must be conducted by persons who are appropriately qualified and equipment must be up-to-date and calibrated, where relevant.

*July 2010*

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