

GUIDE | *August 2020*

Managing drug and alcohol misuse at work

A guide for employers



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Guide

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1 Introduction

As people professionals, we may at some point in our careers have to handle a situation where an employee is misusing alcohol and/or drugs. Whatever our personal views, it is important that we handle such cases professionally and with integrity – supporting people wherever we can and using external expertise and advice to ensure that there is a fair and unambiguous outcome.

To support staff wellbeing, and in the interests of retaining talent and protecting productivity, employees need to feel able to ask for support and know their employer will provide it. There are many ways an employer can support a staff member and this guide will provide advice on how people professionals can look to provide the necessary support. Even if disciplinary action may be necessary in some circumstances, that support should still be provided. Employers should also take preventative action, ensuring their workplace is not a contributing factor to substance use and misuse. This includes critically assessing the working culture and individuals' job design to ensure they are not, for example, fuelling a drinking culture and that employees aren't considering substance use to fit in or cope with long hours.

Everyone's situation and needs will be different. However, we know that substance misuse is a significant issue in society. The 2018/19 Crime Survey for England and Wales (CSEW) found that 9.4% of adults aged 16 to 59 had taken a controlled drug (as classified under the Misuse of Drugs Act 1971) in the last year (up from 8.3% in the 2015/16 survey), 3.7% had taken a Class A drug in the last year and 5% had taken a drug in the last month. In addition (p12), *'2.4 per cent of all adults aged 16 to 59 years were classed as "frequent" drug users (had taken a drug more than once a month in the last year). This equated to around 811,000 people.'*¹ In terms of the cost to businesses of drug use, the BMA (2016) cites Scottish Government Social Research showing that *'the total cost of absenteeism, lost productivity and lost output associated with illicit drug use in Scotland was estimated at £818.9 million.'*²

Alcohol misuse findings show that an estimated 15% of adults in the UK are classed as high-risk drinkers (based on amount or frequency of consumption), and 2% of people within this category would be considered to have a 'possible dependence'.³

Looking to the workplace, an impact assessment paper on minimum pricing calculated lost productivity due to alcohol in the UK at about £7.3 billion per year.⁴ There is also evidence that people in certain professions and occupations are likely to drink more, with a British Medical Association (BMA) survey showing that, on average, those in professional or managerial roles drink more than those in manual occupations.⁵

When it comes to managing this issue, the CIPD *Drug and Alcohol Misuse Survey* showed that approximately three-quarters of organisations (77%) have a specific policy on drugs and/or alcohol, and around half (51%) say they have a disciplinary procedure for alcohol and/or drug-related incidents/issues.⁶ However, far fewer provide information for employees about sources of support for drug and/or alcohol-related problems (at just 33%). Only 30% provide guidelines for managers on how to deal with disclosure and how to signpost to support, and just 27% give information for employees about disclosing a problem with alcohol and/or drugs.⁷ These findings show that drug and alcohol misuse affects more people than is commonly thought but it is not being adequately managed in the workplace through appropriate support and training.

In addition to these findings, we can expect that there will be a greater need for more preventative action and employer support for drug and alcohol misuse as a result of the COVID-19 pandemic and predicted economic downturn. The widespread uncertainty about people's livelihoods, increased stress and pressure, and feelings of being socially isolated as a result of the 'lockdown' and social distancing measures has led to concern about whether people may be more likely to use alcohol and drugs as a coping mechanism. [Alcohol Change UK](#) warns that, '*in times of stress we can find ourselves drinking more often and more heavily*'.⁸ And [research from Drinkaware](#) published on 15 May 2020 found that a third (36%) of furloughed workers are drinking more since lockdown began, compared with 26% of those working from home as a result of the lockdown and 24% of people overall in the UK average.⁹

This may also be a very difficult time for those in rehabilitation. An article in *The Times* states, '*Addiction rehabilitation services are worried that people may relapse due to the social distancing measures introduced to combat Covid-19*'.¹⁰ In the article, a spokesperson from Narcotics Anonymous talks about how the need to move face-to-face meetings to virtual meetings can be 'daunting' and it may be difficult for some to join the online meetings.

It is therefore essential that employers have support mechanisms in place – for example, line managers and HR feeling capable and confident to discuss sensitive issues with staff and to support them to get the help they need. Employees need to be made aware of what support is available to them, should they need it, including signposting to external professional sources of help.

Given the breadth and necessity of being prepared to handle this issue, this practical guide outlines both the preventative action you can take as an employer as well as how to support and manage employees who are struggling with alcohol and/or drug use.

While not everyone who uses drugs and/or alcohol will begin to misuse or become dependent on them, it's worth remembering that even infrequent use can impact on the workplace in many ways, including:

- increased absence
- problems with punctuality
- reduced work performance and productivity
- safety risks to the individual and others
- possibility of erratic workplace behaviour (which in some circumstances can lead to increased risk of violence, sexual harassment or aggressive/abusive language)
- adverse impact on company reputation and customer relations
- negative impact on team morale.

However, some people may not show obvious signs of drug or alcohol misuse; that doesn't mean a problem doesn't exist.

It doesn't matter that the use or misuse of drugs and alcohol may occur outside of the workplace; the potential impact on productivity, fellow employees and the workplace means that this is an issue that people professionals need to understand and be prepared to deal with.

Problematic situations can arise from a wide range of substances that can alter people's physiology, mood, behaviour and thinking. The ways in which they do this can differ significantly. Some drugs are legal; others are not. Some people may become addicted or dependent upon certain substances resulting in addiction or dependence, while others will

not. It is essential when dealing with a situation where an employee may have a problem with drugs or alcohol not to assume there is one specific approach or solution. Every case needs to be dealt with individually.

It's also important to note that many workplace incidents relating to drug and alcohol misuse don't involve addiction or dependence and will be one-off incidents. These individual incidents should still be dealt with in a supportive manner, in keeping with the type of inclusive culture you want to foster.

We need to be wary of judging situations based on media stereotypes. The haunted-looking individual injecting heroin into a thigh vein may exist but only forms a small proportion of those with drug and/or alcohol problems. People with drug or alcohol problems come from all demographics, and can be any age, gender, ethnicity or social/economic background. Many people who misuse substances successfully maintain jobs and families and may exhibit few external signs of their problem. This ability to mask the symptoms of their misuse doesn't mean that they don't need support, and it's up to people professionals to educate themselves in order to provide the right support.

This guide is intended to help people professionals to effectively and compassionately respond to situations involving drug and alcohol misuse by:

- outlining the position laid out in UK legislation
- considering the impact on organisations and individuals and why supporting those affected should be more than an afterthought
- advising on what you need to consider when developing a company culture that supports employee wellbeing and how to develop policies, processes and training to align with this
- providing a framework for dealing with specific incidents
- advising on planning inclusive social events (for example Christmas parties)
- helping you to consider when and if drug testing is appropriate
- signposting you to sources of expert advice and support.

To inform the guide, we conducted a survey of 787 HR decision-makers about how they currently support and manage employees in relation to drug and alcohol misuse. The accompanying survey report provides an overview of current employer practice in preventing and managing drug and alcohol misuse at work, highlights where more action is needed and what the findings mean for HR practice.

It's not essential that people professionals become experts in all types of drugs and alcohol (especially as areas such as 'smart drugs' are developing so rapidly), but it is important that they are confident that the culture and policy they have developed supports asking for help to address issues, that they take steps to understand why people may be misusing drugs and/or alcohol, including whether work may be a contributing factor, and that they are able to signpost staff to expert support when needed.

There is a wide variety of support available for individuals with substance misuse problems, including local authority and NHS support services, drug and alcohol charities, mutual aid groups (such as Alcoholics Anonymous), and counselling support. The most helpful form of support will vary from individual to individual and there is no one 'right' way to deal with misuse issues. Employers need to support individuals in whatever approach is seen to be the most effective in their particular situation.

While it's important to have a clear policy and process on managing drug and alcohol misuse, workplaces present valuable opportunities for early detection, intervention and

support, and developing a culture, policy and process that makes the most of these opportunities allows organisations to protect and support their employees and mitigate any risks. It's important that employers consider how they can support an employee, regardless of whether disciplinary action is also being taken.

Note

This guide does not cover dealing with tobacco smoking or other forms of nicotine dependence. This is for two reasons: nicotine, although highly addictive, has few direct negative effects on work performance compared with misuse of alcohol and other drugs, and existing legal prohibitions mean that organisations already have clear guidance on their approach to dealing with smoking at work. More information on legal obligations for employers with regards to smoking is available on the Gov.UK website.

2 The law, drugs and alcohol

In order to understand the legal issues surrounding workplace drug or alcohol use, employers need to understand a disjointed mixture of rules that are derived from two main sources:

- legislation, passed by Parliament
- case law, sometimes known as judicial precedent.

Most of the available legislation in this area deals with drug use at work (for example Misuse of Drugs Act 1971), and comparatively little legislation addresses alcohol use (apart from the rules prohibiting drink driving). By contrast, case law provides considerable guidance on managing employees with alcohol concerns.

The issues arising from the use of both substances in the workplace are also dealt with under general employment provisions aimed at dealing with wider issues, such as duties relating to the health, safety and welfare of employees at work and implied contractual terms, including the term which means that neither employer nor employee will act so as to breach the duty of 'mutual trust and confidence' that exists between them.

Negligence

Under what is known as the common law duty of care, all employers must take reasonable care of employees or they may be able to bring a claim of negligence. If an employer allows an employee to continue to work when under the influence of drugs or alcohol, there is, at the very least, a risk that the duty of care may be breached. The employer may also be vicariously liable for the negligence of the intoxicated employee.

Employees have an individual legal responsibility in relation to their colleagues and their own health and safety and could be sued for negligence along with the employer if they fail to carry out their work with reasonable care due to the influence of drink or drugs and cause damage or injury as a result.

The law is therefore derived from rather piecemeal sources. In addition, some areas of the law can soon become outdated. The main Misuse of Drugs Act 1971 is nearly 50 years old and in that time the nature of drugs available and drug use has changed dramatically. The original legislation was not designed to deal with current levels of use nor the new drugs available and has had to be supplemented regularly to cover new drugs as they evolve. Similarly, the changes and proposed changes to alcohol-related legislation mostly focus on drink driving.

Because the relevant legal provisions need to adapt and can sometimes take time to be updated, employers need to have a sensible workplace drugs and alcohol policy rather than wholly relying on the law. Policies will normally encompass several stages that initially focus on employee protection, prevention, support and early intervention. There also need to be procedures for dealing with more serious aspects arising from substance abuse in the workplace. All employees should be made aware of the employer's policies as well as any disciplinary measures that may need to be taken in cases that cannot be resolved by other means.

Key legislation

The key pieces of legislation relating to drug and alcohol misuse at work are listed below and further detail appears in Appendix 2.

- Misuse of Drugs Act 1971
- Health and Safety at Work etc Act 1974
- Road Traffic Act 1988
- Transport and Works Act 1992
- Railways and Transport Safety Act 2003
- Air Navigation Order 2016
- Employment Rights Act 1996
- Human Rights Act 1998
- Anti-social Behaviour Act 2003
- Equality Act 2010 and Equality Act 2010 (Disability) Regulations 2010
- Psychoactive Substances Act 2016
- Data Protection Act 2018 (and EU General Data Protection Regulation 'GDPR').

Vicarious liability

Common law principles of vicarious liability are often important in the law surrounding alcohol and drugs in the workplace. The legal test for vicarious liability basically means that employers will be liable for wrongful acts of employees that are carried out in the course of employment and sufficiently closely connected with the employment, to justify the imposition of liability.

Employers are therefore exposed to liability when there is an increased risk of inappropriate behaviour and injury from alcohol or drug consumption, for example at an office party. However, the scope of vicarious liability has limits.

The starting point comes from case law in which the House of Lords set out in the case of *Lister v Hesley Hall* [2002] the correct approach to determining liability:

- whether the relationship between the employer and employee is such that the employer can be made vicariously liable; and
- whether or not the conduct of the employee is sufficiently closely related to the relationship that vicarious liability should be imposed. (See *Cox v Ministry of Justice* [2016] and *Mohamud v WM Morrison Supermarkets PLC* [2016].)

For example, in the case of *Bellman v Northampton Recruitment Ltd* (2018) it was held that the employer was vicariously liable for an assault of a senior employee after a Christmas party. The court decided that the connection with employment must be viewed broadly and found the company vicariously liable on the facts – the employee who committed the assault was the managing director and was acting in his managerial role when the incident happened. However, whether or not an employer can be held liable will turn on the particular facts.

Where work-related social events lead to injury or loss, the employer's liability is variable and further examples are given in the case law section.

More information on legislation relating to drug and alcohol misuse and relevant case law can be found in Appendix 2 and Appendix 3.

3 Developing your culture, policy and process

Workplaces present opportunities for early detection, intervention and support with regards to drug and alcohol misuse, and developing a culture, policy and process that makes the most of these opportunities allows organisations to protect their employees and mitigate any risks. Employers should strive to consider how they can support an employee, regardless of whether disciplinary action is also being taken.

The overall aim of a drug/alcohol policy is to develop a supportive workplace with consistent processes that look to assist staff with health and wellbeing issues, while also setting out clear expectations of staff behaviour and the potential consequences for failing to meet these expectations.

However, for a policy and any process to be effective, there has to be a culture that supports the aim of the policy with regards to protecting the health, safety and wellbeing of all employees. We will look at this in more detail below.

There will be instances where disciplinary action is required, but it shouldn't be the default position just because substance use is identified.

Culture

It's vital that organisations that want to take a thorough approach to employee health and wellbeing build a supportive culture that protects the interests of both employees and the organisation, allowing them to offer support for problems associated with drugs and alcohol before they become disciplinary issues.

There are certain aspects of organisational culture that impact the perception and attitude to substance misuse; you should consider each of these aspects to ensure that they align with the culture you are trying to create and that they are supported by your policy and process.

Entertaining clients

- Does your organisation use corporate entertaining or socialising as part of doing business?
- Is there an expectation or has it become the 'norm' that alcohol will be involved?

Working hours

- Is there an expectation that staff will work prolonged and extended hours for periods in order to fulfil organisational objectives? For example, are teams regularly working late into the evening or the early hours to complete a 'deal'? If so, is there a possibility that they might misuse certain substances (for example amphetamines) to allow them to stay awake and focused?
- What are the demands of the roles? Is it a particularly pressured environment or do people often find the job stressful?
- When people are working from home (particularly in light of the COVID-19 pandemic), do they feel able to maintain a healthy work-life balance and have enough 'distance' from their work?

Social events

- Do a significant number of social occasions take place in a pub or bar? The CIPD survey found that 25% of employers agree that some people don't go to social events because of the expectation to consume alcohol.¹¹
- Are work events inclusive of employees from different national, religious or ethnic groups who may have different attitudes to alcohol? Are there alcohol-free options for employees who may have a substance abuse problem, those who are driving or for those who simply choose not to drink?
- Is there an aspect of peer pressure at social events? Thirty-three per cent of people reported that their co-workers pressured them to drink more than they intended at work events.¹² You might consider pointing people to the advice provided by [Drinkaware](#) on avoiding peer pressure.
- Is it common knowledge that achieving promotion requires joining the after-working-hours pub group attended by managers?
- Should you consider providing a fixed number of drinks (for example by issuing vouchers or tokens) at company events, rather than having a free or cash bar?
- How are employee wellbeing considerations factored into the planning of events?

A social event like a Christmas party can be a good opportunity to bring people together, boost morale and thank staff for their contribution during the year. However, you need to get the balance right between allowing people to have fun, while also looking after their wellbeing. Employers should remind staff about what is acceptable and unacceptable behaviour before the event, including communicating the organisation's policies on dignity and respect and on alcohol and drug misuse.

Employers have a duty of care to employees and should consider this when planning any event, from thinking about employee safety to ensuring enough soft drinks are available. It's also important to consider how inclusive event plans are. It can even be a good opportunity for employers to think more creatively about the kind of event to have and when and where to hold it.

Offering support

It's vital that any support you offer is aligned with your overall approach to health and safety and employee wellbeing. Treating drug and alcohol issues 'differently' from other areas of health and wellbeing is likely to create a discord between the two. By clearly communicating the support on offer, employees will be encouraged to disclose any problems, meaning people professionals can work on preventing/addressing issues rather than waiting to take disciplinary action if any incidents occur. You can refer to our survey data to find out about the type of support other organisations offer.

Larger organisations may already have potential sources of support in place, such as occupational health, employee assistance programmes, health insurance or benefit plans, or access to specialist counselling or support services. It's important to also make sure staff are aware of what resources they can access for support with drug and alcohol problems specifically. A smaller organisation may need to find sources of support as and when they are needed (see Appendix 1 for a list of organisations that provide specialist advice) and they may not be able to afford to provide certain types of support (for example occupational health). In this situation you need to look at what you can provide and how much specialist support may be required. Smaller organisations should also consider other forms of support that are not expensive and are relatively easy to implement, such as allowing flexible working to attend appointments.

Be realistic about the support you can offer and look to balance the individual's needs with the impact their issue is having on the organisation and its operations or services.

Developing your policy

It is important to remember that any policy can only give information about your general approach and should avoid being too prescriptive and inflexible. Substance misuse issues will be different in every individual situation, and your response will need to reflect this. Nevertheless, a clear policy is important to make employees aware of how you will approach an issue and the types of support they can expect, as well as clarifying the types of behaviour that may result in more serious action being taken by the employer.

Aligning policy and culture

To adequately support the culture you want to build, you will need to ensure that any policy is consistent with, and applicable to, that culture.

If, at present, your organisational culture is not what you want, you can develop a policy that challenges this and sets out the aim for the culture and the behaviour that will be acceptable in this type of culture. Reviewing your policy offers the opportunity to assess whether the existing corporate culture reinforces or undermines the purpose of the substance abuse policy you are trying to develop.

To develop a policy that is consistent with your cultural aims and organisational needs, consider the following areas.

Business environment

What goods and/or services does your organisation provide? Your approach to drugs and alcohol will depend in part on this. Consider the following areas:

- Does your organisation provide safety-critical services to the public, such as public transport?
- Does it make or do anything where errors could have a significant detrimental effect on individuals or the wider public (for example lorry driving; nuclear industry; pharmaceutical or chemical manufacturing)?
- Is it involved in providing direct services to vulnerable individuals, for example childcare, hospitals, care homes?
- Does it have a public reputation for, or expectation of, certain standards of behaviour (for example the public sector, charities, legal or accountancy professions)?
- Does it explicitly market itself or its products to particular groups or 'demographics', such as students or 'alternative'/unconventional lifestyles (such as music, clubbing, and so on), where attitudes to drug-taking or alcohol consumption may be more tolerant?

- Is it directly involved in the production, distribution or retail of products that can be misused (such as breweries, pubs and clubs, cigarette manufacturing)? Does this mean that your policy needs to recognise that staff may be more likely to encounter such substances in the workplace, and your approach should therefore reflect this?

When developing your policy, you need to ensure that your message is consistent with the business environment as well as any legal obligations with regards to any safety-critical services you provide (for example public transport). Consider the potential consequences for your organisation if someone has a drug or alcohol problem and how you can balance that with the goods and/or services your organisation provides.

Area of operations

If your company trades, or has business locations, outside the UK, it is important to remember that a policy that is specific to UK staff may not be appropriate in other countries. Take advice from experts within other jurisdictions rather than simply trying to amend a policy designed for the UK.

International and regional differences in law relating to alcohol and drug use in the workplace

The levels and types of drugs used vary greatly worldwide, and very different regulations cover the use of alcohol and drugs in the workplace. In some countries, the approach is more authoritative and disciplinary in nature. In other cases, the approach does not exist at all. The conditions under which workplace testing can take place and access to results also vary widely.

Some examples of the differences are given below, but these are merely examples and specific legal advice should always be sought:

- **Ireland:** the Irish Health and Safety Authority publishes voluntary guidelines on intoxicant testing at work. There are a number of collective agreements relating to testing procedures, mainly in the transport and defence sectors. There is the Safety, Health and Welfare at Work Act 2005, which does not compel employers to test for drugs and alcohol at the workplace, but if the contract of employment provides for drug testing during the course of employment, the employees must submit to testing. There is no statutory obligation to carry out pre-employment testing.
- **Finland:** has a set of general guidelines for prevention but no specific legislation.
- **Norway and Portugal:** have no general legislation to prohibit or limit the use of alcohol and drugs at work.
- **Italy:** regional agreements specify categories of worker considered at risk and set out a series of preventive measures.
- **Spain:** some communities have developed general preventative approaches to alcohol and drug use at the workplace.
- **Belgium, Denmark and Germany:** regulate alcohol and drug consumption at work mostly based on collective agreements between employers' organisations and trade unions, and so on, rather than purely imposed government measures.
- **United States:** the United States has the fewest workers' rights, meaning employers can end many employment relationships without cause. There is also more pre-employment, post-incident and random drug testing, giving employers wide powers to conduct tests.

Key points to include in your policy

Once you have assessed the broader issues around culture and business environment, you need to decide whether to include the following points in your policy.

Rules on alcohol consumption

It's key that any rules laid out in your policy reflect the culture you want to build. Think about and make clear your stance on the following points:

- Is alcohol consumption completely banned in work? If so, what happens in the context of Christmas/retirement/other parties? What about entertaining clients or at out-of-hours networking events? What about during breaks?
- Are there any safety reasons meaning that the company needs to impose rules about drinking outside work (for example drivers being forbidden to drink for a defined period before starting a shift)?
- Consider also how this links in with other existing policies.

To find out more about how other employers have approached rules on consumption of alcohol, refer to our survey report.

Reporting processes

If an employee needs to make the organisation aware of a problem, who do they speak to? Is there a named individual within HR? Should they approach their line manager? How confidential can/should the information be kept?

You should clarify the process for both an employee disclosing their own problem and an employee raising a concern about a colleague. Will the process be the same?

It's important to provide this information to encourage employees to seek help.

Support on offer

It is good practice to outline any employee assistance programmes or other sources of support that are on offer, and how employees can access these. Consider clarifying whether use of these support programmes is anonymous. You may also want to list other sources of support that employees could approach (for example GP, specialist charities). A list of relevant organisations is included in Appendix 1.

Time off for support

Depending on the individual case, can you be flexible around working hours, for example if someone has regular appointments with a drug worker, counsellor or health professional or to attend mutual aid meetings (mutual aid being a blanket term for support services like AA)?

Impact on work

If you become aware that an employee may be taking drugs 'socially' (for example takes the occasional ecstasy tablet at the weekend) but there is no evidence that it is impacting on their work, what is your response? How would you deal with 'gossip' in the organisation in such a situation? What if the individual 'boasts' about taking drugs outside work? At what point does an employee's behaviour outside work become your issue? What if there are pictures posted on social media that could bring the organisation into disrepute? You need to make clear when you would begin to take action.

Testing

You should outline your approach to drug and alcohol testing. This is covered in section 5 of this guide.

Consequences

Clearly outline the consequences of breaching the rules outlined in this policy, including the possibility of dismissal.

Moving to disciplinary processes

You need to clarify at what point you move from supporting an employee dealing with an issue, to a more punitive/disciplinary approach.

Legal drugs

If the issue is related to legal drugs – for example dependence on prescription painkillers – will your approach vary?

Other factors

If there are a number of related issues – for example drug misuse combined with mental health problems or financial issues – how will you respond? Consider how you would deal with such issues if there was no drug element.

Type of employment

If the individual with an issue is a contractor/freelancer, or someone on a zero-hours contract, will you respond in the same way? If not, what will your approach be? What is the justification for such differences?

The policy should apply to alcohol and illegal drugs, and consideration should also be given to including prescription and over-the-counter medications that may affect performance.

Implementing the policy

You need to make sure that your policy is consistent with other organisational policies on:

- managing sickness and absence
- health and safety
- wellbeing
- timekeeping and attendance
- performance management
- disciplinary procedures.

Consultation

Once the first draft of the policy has been agreed, it should be presented to the board of directors, unions (if recognised) and other employee representatives. This would enable any unforeseen difficulties to be aired and hopefully resolved. The draft should also explain how the policy will be communicated to employees, what training is required for employees, and how any related procedures and organisational practices that require amending will be conducted.

Communicating the policy

Communication will raise the general awareness and interest in the issue and engender an empathetic positive approach to colleagues with drug and alcohol-related problems.

Communication should focus on three main areas:

- why alcohol and drugs should not be brought into the workplace and the potential adverse effect on employees, customers and the public
- the existence and the operation of the organisation's policy
- the support on offer to employees and the advantages of seeking help and gaining access to support and treatment.

You will need to consider how to communicate your policy to staff. You may have a standard approach for this; however, possibilities to consider might include: writing to all staff enclosing a hard copy of the policy, uploading it to an intranet, promoting it in an employee newsletter/magazine or emailing staff to draw their attention to it. You could also consider workshops, team briefings, seminars for staff drawing their attention to the policy, highlighting any new requirements and ensuring they understand it.

You will also need to consider whether you need a record of acceptance or acknowledgement of the policy from staff. This could be an automated process if you are uploading it to an intranet site or it could require a physical signature. You need a realistic and pragmatic approach to this – the less effort required from staff to acknowledge the policy, the more you are likely to get it.

You should also ensure that as part of the process for taking on new permanent, agency or temporary workers, they are given a copy of the policy as part of any induction they receive upon arrival.

While communicating the policy it is advisable to promote the sources of support on offer and how to disclose a drug or alcohol issue to contribute to the creation of a supportive and inclusive culture where employees feel more comfortable to discuss any issues they may be facing.

Reviewing the policy

You should also review your policy on a regular basis, to take account of issues such as:

- changes in the law, drug policy or expert advice
- changes in availability and types of substances on the market
- changes to the organisation – for example, if the management structure altered, would you need to change the roles or level of management responsible for making decisions under the policy? If you opened an office abroad, your policy would need to be adapted to fit both local context and UK considerations
- how effectively it has worked in practice (for example, if an employee has had to leave the business – see below). If the aim of the policy is to build an inclusive and supportive workplace, has it helped you to achieve this? If not, what may need to be amended? If you decide to use drug testing, does it work? Does testing need a separate policy or should it be part of the overall approach? (See later section for more information.)

Training

A key part of implementing your policy is giving employees and line managers the knowledge and skills they need to handle any situations that may occur. However, the CIPD *Drug and Alcohol Misuse Survey* found that too few employers provide training to line managers on either recognising signs of stress (38%), recognising the symptoms of drug and alcohol problems (26%), or on how to manage and support employees more generally (32%). And yet the HR professionals surveyed rated training to help line managers recognise the symptoms of drug and alcohol problems as the most effective method to help prevent misuse, closely followed by improving management practice on how to manage and support employees in general.¹³

It's likely that line managers won't have a great deal of expertise in supporting employees with drug/alcohol issues, so it is worth looking at specialist training and communication to cover:

- ways to avoid developing a drink/drugs culture (for example planning inclusive social events, monitoring stress levels and workloads)

- how to identify possible problems
- the wide variety of drugs and the different problems they can cause
- the best ways to support individuals with different types of drug or alcohol issues
- how to maintain positive relationships within a work team, while also ensuring confidentiality
- dealing with concerns or queries from other employees.

This type of awareness training can also be offered to all staff and could be included in induction. It would not be expected that line managers and colleagues would assume an expert role (that would be left to professionals in the field), but raising awareness of the issues will play a key part in building a supportive culture.

See Appendix 1 for a list of organisations that provide specialist advice.

This could be covered within any broader health/wellbeing training. Other training, such as in communication skills or managing difficult situations, may also be useful when dealing with drug or alcohol problems. Employers need to be proactive in telling staff and new starters that they will be supportive and sensitive to disclosures of addiction or misuse, so it should be made part of induction training and staff handbooks. These sources of information and support should be widely available to all staff.

Given the very wide nature of drug and alcohol issues, you may want to focus on specific areas that are of most concern to your organisation, for example the growing use of 'smart' drugs. Smart drugs may be taken to be able to focus for extended periods of time or to be able to work long hours. The aspects of the work, working environment or organisation culture and expectations meaning people feel they need to take smart drugs should be addressed as a matter of urgency. An employee's wellbeing should be the top priority.

Managers also need to be aware that, no matter what your policy and how well they are trained, employees are still adults who can make wrong decisions and so situations of misuse may still arise. These will need to be dealt with (informally and perhaps formally), so HR will need to have processes in place to do this and managers will need to be trained accordingly.

As well as training (which could be forgotten if managers don't have to deal with this issue regularly), you may want to create some 'on-demand' resources for line managers to refer to and ensure that they know who the key points of contact are in HR.

4 Dealing with incidents and disclosure

Once steps have been taken to implement the type of supportive and inclusive culture you want to build in your organisation, it's also vital that you are prepared to put the process outlined in your policy into action – in a way that reflects your cultural aims and your responsibility to protect the health and safety of your employees and the reputation of the organisation.

In this section we'll give advice on handling different situations when drug and/or alcohol misuse comes to light and how to support employees and line managers in dealing with these situations.

When an employee discloses they may have a problem

An employee might approach you (or their line manager) and make you aware that they have a problem with drugs or alcohol. First of all, in that moment you (or the line manager) should thank them for their disclosure and assure them that the organisation will support them in getting help. You should then:

- Treat the matter in a non-judgemental and confidential way.
- Offer the support of occupational health and your employee assistance programme (if you have them). If you don't offer these resources, point them towards resources offered by their local community substance misuse provider or charities such as AA, NA, Drinkaware or FRANK.
- If the person has already contacted specialist agencies for support, identify how the company can accommodate them (for example what time off might be needed).
- Consider any health and safety implications – are there any aspects of their role that may put them or others at risk?
- If you do need to make adjustments to a role, or prevent them from working, will this be treated in the same way as any other health issue? Should you treat the situation as one of medical suspension? If the individual is signed off by a doctor or a substance misuse professional, how will your approach be consistent with your normal sickness absence procedures?
- Remind the employee of what is laid out in your drug and alcohol policy, and that if they attend work under the influence of drugs or alcohol, this could become a disciplinary matter. You may wish to document any conversations.
- Ensure that only those who need to be aware of the employee's situation are informed.
- Review the working practices and culture in the organisation to ensure that the issue doesn't stem from stress.

If a new starter, or interviewee, discloses that they have had a substance misuse problem in the past

There is no legal requirement for an individual to disclose to you that they are in recovery. If a new starter does inform you of this, it is worth having a confidential discussion with them about the situation. You should follow similar steps to the above – remind the individual of what is in your drugs/alcohol policy and make them aware of what (if any) support your organisation offers. You may want to carry out a specific risk assessment depending on their role and, as above, ensure only those who need to be aware of the employee's situation are informed. You may also want to find out what support they currently have (such as a key worker). You should also review the working practices and culture in that team to ensure that the role won't cause unnecessary stress.

If someone disclosed this information during a recruitment interview, you should consider this from a health and safety perspective. If the individual meets all the specifications for the role, and would otherwise be an appropriate candidate, you may want to have a further confidential discussion with them along similar lines to the above before making an offer.

If an individual relapses while in recovery, you should follow the same process when dealing with other incidents.

Advising line managers on what to do

If an employee discloses an issue to their line manager, the manager should be advised to:

- ensure that it is kept confidential and not discussed with anyone other than the HR team
- tell the individual that there may be a need to make others aware in general terms (for example their own boss)
- make a clear note of the conversation and the nature of the issue discussed
- take action immediately if there are safety-critical issues (for example driving)
- not attempt to fix the issues themselves but to encourage the individual to contact an assistance service (like those listed in Appendix 1).

When an employee attends work clearly under the influence of drugs or alcohol

An employee might attend work clearly under the influence of alcohol or other substances, or might even be caught drinking or taking drugs. It may be that the incident clearly falls under gross misconduct (for example an individual becomes involved in a physical fight) or it may be that it is harder to assess this. For example, if an employee who was normally quiet and reserved returned from a lunch talking much more volubly, dropping things and appearing unco-ordinated, and generally behaving in an uncharacteristic way, it would not be an unreasonable assumption that they had been drinking. Whether this particular situation would be classed as gross misconduct would depend on your policy and a proper investigation. You can see section 5 on testing for more information on what to do if testing is required under your policy.

Even where an incident clearly falls under your process for dealing with gross misconduct, you must still make sure that you follow your own disciplinary procedure. The employer must have reasonable grounds for believing that the employee was guilty of the conduct in question and have carried out as much investigation as was reasonable in the circumstances.

Remember that suspension is a precautionary measure, so the individual will remain on full pay (unless there is a clear contractual right to suspend without pay).

Advising line managers on what to do

If a line manager reasonably believes that an employee is under the influence of drugs or alcohol, they should consider sending the employee home or suspending them based on what is outlined in your policy. Irrespective of any disciplinary action that may follow, the individual is likely to be a safety risk either to themselves or others. While some managers may wish to contact more senior management or HR, dealing with an urgent situation like this should be within the authority and capability of line managers, so you should provide training and guidance on how best to manage the situation.

Line managers should consider whether any additional steps need to be taken to support the individual. If under the influence of drugs/alcohol, they should not drive, so organise a taxi to take them home. Line managers should not attempt to prevent an employee from driving (for example by physically stopping them) as this could put them at risk. If necessary, contact the police. Consider whether the person's emergency contact needs to be alerted.

Once the immediate issue has been resolved, advice from HR should be sought as soon as possible on next steps. Part of this would be to look at the working practices and culture in that team to ensure that work stress isn't contributing to the problem.

Think about contacting the employee (by email or by telephone) to confirm their suspension; you may find that if they are under the influence, they don't remember all of the details.

You suspect that the employee is misusing drugs or alcohol outside of work

You or colleagues may suspect that an individual is misusing drugs or alcohol outside work, even if there is no suggestion that the employee is doing so in the workplace. If your organisation uses drug testing (see section 5), you may be made aware of a positive result that requires you to act; otherwise it may be that you or your employees notice signs which concern you about the employee's wellbeing.

In this situation, it can be difficult to challenge an individual, as these signs may be caused by any number of things – for example, a mental health problem – so do not assume these behaviours are related to substance use or misuse. However, if you have concerns, either about the individual's work or their general wellbeing, it is important to raise them.

Some things to bear in mind:

- Be clear that although the manager will aim to ensure that the conversation will be confidential, some degree of information-sharing is likely to be necessary.
- Use open, non-judgemental questions to start the conversation. For example, 'You've looked very tired over the last few days. How are you feeling?' may elicit more of a response than 'Is everything alright?' (to which a person may just say 'yes').
- Stress that the intention is to try to support the person.
- Focus the discussion on specific examples of concerning behaviour (unkempt dress, changing attitude, deterioration in punctuality, and so on).
- Don't make assumptions or accuse the individual. There may be a whole variety of reasons why the individual's behaviour has changed (unrelated to drugs/alcohol). If you want to help the individual, they need to be able to trust you, not be made to feel defensive.
- The individual must not feel under pressure or judged. Use the terms 'problem with alcohol' rather than 'alcoholic' or 'alcoholism'; or phrases like 'frequent/excessive alcohol use' or 'frequent use of drugs' or 'misuse of drugs' rather than 'addiction' or 'addict'.

If the person is prepared to discuss the situation with you, proceed as if they had disclosed the issue to you. If they deny there is an issue, or are not prepared to discuss it with you, you may need to keep a 'watching brief' on their behaviour over a period of time (which may be as short as a couple of weeks) to see if the problematic behaviours continue. It may be worth making a short note in their personal file to record the fact that you have raised the issue and recording the person's response. Line managers will need to play a key part in this, but it will be down to each individual situation as to how much information you need to make them aware of. If things do not improve, you may want to retry the approach above, although you may need to consider starting your disciplinary or performance management/capability procedures.

It's often the case that a person with a real or perceived problem may become the source of gossip or rumour. Sometimes this may be the first way you become aware of an issue.

It is important to ensure that you respond to any concerns, while at the same time ensure that the individual's situation is kept confidential and that gossip – which can become exaggerated or ill-founded – is not allowed to persist.

You may also become aware of photos or posts on social media platforms that could potentially bring the organisation into disrepute. In this case you will have to follow the action laid out in your social media and drugs and alcohol policies. In the case of suspected drug use in particular, you may want to raise it in the same way as above.

Advising line managers on what to do

When involving line managers regarding an employee whom you suspect may have a problem with drugs or alcohol, advise them to:

- be alert to any changes in behaviour/uncharacteristic actions by the individual
- make note of any specific incidents (including the date/time)
- escalate the situation if the individual clearly does something that would warrant formal action regardless of the potential cause (for example is repeatedly late)
- balance confidentiality with the need to manage and communicate with colleagues who may become aware that there is a possible issue.

The line manager's goal will be to encourage the employee to acknowledge that there is a problem that needs solving. The manager should be seen to be firm but also fair, demonstrating qualities of concern and empathy, combined with practical, non-judgemental advice and direction. The tone of this discussion between manager and employee is crucial. An aggressive or hectoring attitude by the manager is likely to drive the substance misuser into denial. This is where training for line managers on how to have this type of conversation is crucial.

This training should cover the fact that the issues disclosed may be complex and a substance misuse issue could exist alongside other problems such as mental health problems or financial worries. Managers should be trained to point employees to sources of support or to HR for further advice. Line managers should also be prepared to address any work-related factors that may be contributing to a problem, for example the number of hours an employee is expected to work or an expectation to consume alcohol at client entertaining events.

Specific considerations when employees are working from home

During the pandemic there has been an enforced move to widespread working from home and there are predictions that a large number of employees will request to continue a degree of remote working. Employers continue to have a duty of care for their employees when they are working remotely. This means that existing policies concerning the use of drugs and alcohol in the workplace should apply in much the same way. However, particular issues might arise where employees are working partially or fully remotely. Alcohol and drug misuse can be harder to spot and employers should consider how to ensure that they continue to meet their obligations towards their workforce in these circumstances.

Support

Employers should consider providing additional training to managers in how to support and manage employees remotely and about how to recognise the signs of drug and alcohol problems.

Employees should also be reminded of the employee assistance programmes and counselling support services in place and how to access them when working remotely.

‘Virtual’ social events

Despite the obvious fact that virtual social events will not take place in the office, they should be treated in much the same way as office-based social events from an employment law perspective. Where drinks are arranged between colleagues as part of the course of their employment (for instance, Friday night drinks or team drinks), employers will continue to be vicariously liable for employees’ behaviour at those drinks.

In the same way as for office-based employees, employers should give thought to ways of encouraging socialising that does not revolve around alcohol. For instance, daytime coffee breaks rather than after-work virtual drinks.

Disciplinary action

While the boundaries between an employee’s working life and social life may become blurred when working from home, employers can still investigate suspicions that an employee is misusing alcohol or drugs during working hours.

Depending on the circumstances, this can also be done remotely or from the office. If done remotely, there will be additional challenges, such as arranging for the employee to be virtually accompanied by a colleague or trade union representative and ensuring that the meeting is not disturbed. If possible and convenient, employers should ask employees to join the meeting via a video call, instead of a phone call. This will allow employers to see facial expressions and body language.

In addition, where employees are working remotely, it will be much harder (if not impossible) for an employer to conduct a search for evidence of alcohol or drug misuse. It therefore may be more difficult as part of an investigation for employers to evidence suspicions of alcohol and drug misuse for employees working from home.

If an employee is found to have misused alcohol or drugs during working hours, employers can take the same disciplinary action as they would for an office-based employee.

Testing for alcohol and/or drugs

Where an employee is entirely based at home, the ability to test for alcohol and/or drugs will be more difficult. If employers decide to test employees for the presence of alcohol and drugs, despite the fact that they are working from home, consideration will need to be given to how to carry out the testing from a practical perspective as well as whether there is a valid rationale for testing them in this way. Where employees are working at home, the usual rationale of ensuring the safety and wellbeing of colleagues working in the same working environment is no longer relevant.

Dealing with disclosure from an employee’s friends or family

There may come a time where you (or a line manager) are made aware by an employee’s friends or family (who don’t work for you) that your employee has an issue with drugs or alcohol. This clearly presents an ethical issue and needs to be handled carefully. The family are unlikely to have contacted you without genuine concerns, but if you have little or no evidence that your employee has a problem, can or should you take this up with them?

If you already have some concerns about the employee, you may wish to follow a similar approach to the scenario above. If you or their line manager haven't noticed any concerning behaviour, it is best to put them on a 'watching brief'. Line managers will often be the people who notice differences in behaviour in a team member, so ensure that you are clearly communicating with them regarding the individual.

You should also advise the family member to contact specialist charities or organisations who can offer support.

This may also be a good opportunity to review the working practices and culture in the organisation to ensure that the issue doesn't stem from stress.

Moving to disciplinary and dismissal procedures

If, despite your best efforts, the individual is unwilling to either acknowledge or address a problem, and their performance or conduct deteriorates, you may need to move into dealing with the situation through the appropriate procedure (disciplinary, absence management, or performance/capability) in the same way that you would with any other non-drug or alcohol-related issue that breached policy. Make clear that a failure to improve may ultimately result in dismissal.

If the individual is receiving support (see below), you may wish to set timescales by which certain improvements need to be made before escalating action. If you do so, you need to balance the business requirements (how long you can manage with the employee absent or operating at a 'below standard' level) with a realistic assessment of how much time they need to make an effective recovery. Seek advice from the individual's drug worker or medical adviser.

Even if you are aware of an individual's issues, a serious incident (for example attending work drunk and getting into a fight) should still be dealt with in the same way as any other employee – following your disciplinary procedures if appropriate.

Supporting the substance misuser

If an employee discloses that they have a substance abuse problem, you should advise them to contact their GP and/or one of the specialist charities or organisations that can offer support and advice. If treatment is advised, you will need to assess the time off you will offer, in line with your policies.

What treatment may involve

Below is a short description of the main types of organisations that offer services to substance misusers:

- **GP:** a small number of specialist GPs offer a treatment service, but many GPs simply refer on to local specialist substance misuse treatment and/or counselling agencies.
- **Specialist substance misuse treatment agencies:** most substance misuse treatment and counselling agencies in the UK are publicly funded and are free to attend. They are usually NHS or voluntary/independent sector organisations. There may be a waiting list for in-patient treatment, but usually out-patient treatment and counselling is offered fairly promptly. People can follow this form of treatment alongside their jobs, taking a few extra hours off a week to get support. Following formal treatment, a follow-up service is normally available to prevent subsequent relapse. Publicly funded agencies will only share a patient's progress with the patient's written consent. Reports on progress

are likely to be limited to whether the patient attended as requested, and if they appear to be engaged in the process. With the patient's permission, these agencies will often be willing to make a more detailed report to the employer's occupational health medical practitioner (for example a GP), particularly if occupational health made the referral.

- **Private sector substance misuse counselling and treatment agencies:** all residential treatment centres must be officially registered. The private sector is more likely to be able to offer treatment at times to suit the substance misuser and their employer, and alongside peers who can also afford private treatment or care. It's important that a private sector agency is also able to provide some form of follow-up service after formal treatment to prevent subsequent relapse.
- **Self-help groups:** organisations such as Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) provide free peer-led group and individual support to their members, who recognise they need support with controlling their alcohol/drug consumption. Some people can find the structured philosophy very helpful. An assessment is not conducted.
- **Employee assistance programmes (EAPs):** these provide a broad-based portfolio of counselling services (usually including substance misuse) for an organisation's employees. Their rationale is that employees bring their problems to work, these problems may become unmanageable, and a troubled employee is an inefficient worker. An EAP may be outsourced by an employer or may be in-house.
- **Telephone helplines or self-help apps:** these are useful for initial advice and times of crisis.

The different types of services listed above vary in the way they respond to the substance misuser. Different types of response seem to work with different people. There's no single solution, as people and their circumstances do vary. However, what's important is for the employer to encourage the employee in making that first step in seeking help. Some substance misusers are able to get their lives back in order at the first attempt. For others it will be an arduous process, with relapses en route.

If an employee who has disclosed a problem (or whom you may suspect has a problem but has not disclosed) goes on to unexplained absence, you should follow your usual procedures for dealing with employees who go 'missing'.

For ideas on the type of support you could consider offering, see our survey report.

Keeping in touch

You should try to keep in touch with an employee who is absent for treatment in the same way as you would for any other type of absence. Be aware, though, that employees may prefer to have no contact with work and you will need to respect this but ask that they contact you when they are ready.

Supporting employees whose family members have drug or alcohol problems

In some situations, your employee may not be the individual with the drug or alcohol problem. Instead, it may be their partner or a family member who has an issue, but this is having a 'knock-on' effect on their work or attendance. In this situation you also need to consider what support, help and access to advice you can give to your member of staff. It should be consistent with your approaches to supporting employees with other personal problems.



Returning to work

If an employee has been absent for a period of rehabilitation – or has been granted a more flexible arrangement to receive support from a drug charity or medical professional – but is now in recovery and able to work normally, you should plan for their return. In many cases this is likely to be a similar approach to an employee returning after a long period of sickness absence – consider a phased return to work, a mini ‘induction’ to allow them to catch up on any missed business changes or developments, and ensure line managers support them during the first few weeks. You may also have to offer some flexibility in the employee’s working pattern (for example, if the employee is part of a mutual aid fellowship (like AA), they should attend 90 meetings in the first 90 days).

You should work with line managers to address any aspects of work that could have been contributing to a problem (for example workload).

If the employee has to leave

The circumstances in which the employee’s employment may come to an end will depend on the specific circumstances and could give rise to dismissals on grounds of ill-health, capability, or conduct.

In some situations, you may want to consider whether to reach a mutual agreement to end the employment relationship by way of a settlement agreement.

Depending on the circumstances, you need to decide how the employee’s departure is communicated to other staff. You will need to balance confidentiality with the requirement to keep colleagues informed and minimise the potential for rumour or gossip.

Providing references

If you are later approached for a reference by a potential employer of an employee who has left (either voluntarily or because they were dismissed) as a result of substance misuse, you need to consider what you will include in the reference.

Employers should consider the following when providing a reference:

- In the absence of a statutory requirement to do so, there is no obligation for an employer to provide a reference for a former or current employee. So, the employer may refuse to provide a reference altogether.
- Employers can adopt a policy to give only minimal references that confirm the dates of employment. It is worthwhile saying that providing a brief factual reference of this sort is the employer’s policy, and that no positive or adverse inference should be drawn from the minimal information supplied.
- If a reference is provided, it must be true, accurate and fair and not give a misleading impression – the employer owes an obligation towards both the employee and the potential new employer.

Employers should note that explaining, for example, that the employee was dismissed for failing a drug test may have data processing implications under the Data Protection Act 2018, as this involves medical information about the employee that is a special category of data for which an employee’s specific consent would be needed.

Best practice would be to develop an agreed approach in the organisation for dealing with references, which may be limited to provision of basic details only.

Supporting line managers

Dealing with a situation involving drug or alcohol misuse can have a significant impact on line managers in terms of their own wellbeing and ability to manage their workload. Make sure that you offer support to any line managers involved in supporting employees or whose team member may be facing a disciplinary procedure.

5 Drug and alcohol testing

Some organisations may wish to introduce some form of drug or alcohol testing. However, there are a number of factors to consider before doing this. It's wise to outline your approach to testing in a policy, making sure that you consider the following.

The justification

There needs to be a justification for introducing testing – for example, the safety-critical nature of the work. If you don't have a clear business reason, you should be considering whether testing is appropriate.

You also need to be clear about what your 'trigger' for action will be. Will it be any evidence of any drugs or any level of alcohol? Only above a certain 'level'? Evidence of specific drugs only? Again, ensure you have a business rationale for why you have decided this.

What the law says

In sectors with high safety concerns (for example public transport), there may be a need to guarantee employees are not intoxicated in order to avoid risks to themselves, fellow workers and other people, and this is often achieved through drug and alcohol testing. However, testing intrudes upon workers' privacy and human rights. Employees cannot be forced to take drug or alcohol tests unless it is set out in their contract of employment and the employee has given their consent.

Employers will need to understand the collective implications of various pieces of other legislation.

The legislation that is relevant to testing is as follows:

<p>Misuse of Drugs Act 1971</p>	<p>This makes the production, supply and possession of certain controlled drugs unlawful. If an employer knowingly permits the production or supply of any controlled drugs, the smoking of cannabis or certain other activities to take place on their premises, they could be committing an offence. This may mean the employer is justified in testing, but the employee's consent would still be needed.</p>
<p>Health and Safety at Work etc Act 1974</p>	<p>This obliges employers to ensure a safe place of work and safe systems of work for their staff and other people who might be affected by their business. When dealing with substance misuse, this could include having clear rules and policies about drinking alcohol or taking drugs while at work or work events. However, there is no strict requirement to carry out testing of employees.</p>
<p>Road Traffic Act 1988</p>	<p>Employers in safety-critical industries are more likely to be justified in enforcing drug and alcohol testing. Offences under this Act arise where a person driving or attempting to drive a motor vehicle on a road or other public place is unfit to drive through drink or drugs.</p>



<p>Transport and Works Act 1992</p>	<p>Employers in sectors where drugs or alcohol could have disastrous effects for workers, members of the public and the environment (for example train drivers, pilots and some machinery operators) are also more likely to be justified in enforcing drug and alcohol testing. Criminal offences under this Act apply to those working on railways, tramways and other guided transport systems who are unfit through drink or drugs. The operators of the transport system are also guilty unless they have shown all due diligence in trying to prevent such an offence being committed.</p>
<p>Employment Rights Act 1996</p>	<p>An employee with over two years' service has the right not to be unfairly dismissed. A dismissal will be unfair unless the employer can show a potentially fair reason for dismissal (that is, conduct) and that it acted reasonably in all the circumstances. It is an implied term in every contract of employment that an employee will obey their employer's lawful and reasonable instructions. Dismissal of an employee for refusing to obey such an instruction may be a fair dismissal for misconduct. If an employee has agreed in their contract to undertake drug and alcohol testing, and subsequently refuses to do so, courts have ruled that, in certain circumstances, that can be grounds for dismissal.</p>
<p>Human Rights Act 1998</p>	<p>This Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to, including the right to respect for private and family life. See case law in Appendix 3 for examples.</p>
<p>Access to Medical Reports Act 1988</p>	<p>This Act gives individuals rights to access their medical reports provided by doctors for employment or insurance purposes. The release of any record is subject to consultation with the health professional. Employees should be given the right to see their health records within 21 days following a request. Employees can also see a medical report before it is given to the employer and the employee can ask for changes if they consider anything to be incorrect or misleading.</p> <p>An employer must notify the employee before applying for a medical report to be used for employment or insurance purposes and get the employee's written consent. 'Medical reports' normally cover reports by a medical practitioner who is or has been responsible for the clinical care of the individual; therefore any report prepared by a company doctor after a one-off examination will not normally fall within the Act unless the employee has previously received clinical care from the company doctor.</p>
<p>Equality Act 2010</p>	<p>The Equality Act prohibits discrimination in employment in respect of the protected characteristics of age, disability, gender reassignment, marital or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. If an employer targets drug testing more at men than women or at a particular racial group, this may be discriminatory.</p> <p>In claiming disability discrimination, an employee must show they have a disability that meets the definition in the Act. Alcohol and drug addiction are expressly stated not to be impairments, and therefore not disabilities (although this does not apply where the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment). Impairments caused by addiction (such as depression or liver damage) might amount to an impairment.</p>
<p>Data Protection Act 2018</p>	<p>For data protection purposes drug and alcohol-related information on employees is likely to be special category personal data. This was formerly known as sensitive data and needs more protection. In order to lawfully process special category data, employers must identify:</p> <ul style="list-style-type: none"> • a lawful basis (Article 6), and • a separate condition for processing the data (Article 9). <p>Employers must determine the basis and condition before they begin processing the data. Employers need a policy that explains how they will comply with the data protection principles (which reflect the GDPR principles). For example, this will address how the employer will deal with the retention and erasure of special category personal data.</p>



To ensure compliance with the data protection principles, the justifiable legal basis for processing employee data on alcohol and drugs is likely to be the health and safety of fellow workers. Further justification may be use of the substances breaching the employment contract. Employers should take into account the Information Commissioner's Office Employment Practices Code that deals with the testing of workers for drug or alcohol use.

Employees have a right to object to the processing of their personal data and the employer must be able to show why its legitimate interests override the employee's competing privacy rights.

More detail on this legislation and relevant case law can be found in the appendices.

Who will be tested?

- Will tests cover all staff or will they just be done randomly?
- If random, what process will you use to select individuals?
- Alternatively, will testing only be for those in roles deemed 'safety-critical'?
- What happens if someone moves role?
- What about those who are not employees (for example contractors, agency workers, freelance staff)?
- What procedures for testing can be set up for these individuals and what are your rights to insist?
- Will there be any exceptions (for example employees on prescription medication due to health issues)?

When will people be tested?

- Will it be a part of a pre-employment process?
- Will tests in work be done regularly (for example once a year)?
- How much notice will employees be given of the testing date?

What will you do with the information?

- If an individual's test shows some evidence of having taken drugs, what action will you take?
- Does it provide the justification for some form of action? If so, on what grounds – especially if there is no other concern with the employee?

Be aware that traces of some drugs (for example cannabis) can remain in the system for months – so the individual may have taken it some considerable time ago, possibly before working for you. If the individual suggests this may be the case, take advice and, if necessary, arrange to retest them at a later date.

What if someone refuses to take a test?

Some employers may take this as evidence of something to 'hide', but you may also need to consider religious, ethical or medical reasons why someone may not want to take a test. If someone does refuse, you need to balance out the need for testing (usually safety) with the individual's circumstances. In some cases, you may decide not to test (ensure the reasons why are carefully documented); in others you may wish to rearrange a testing date once you have had the opportunity to discuss the individual's concerns.

How will testing be introduced?

If testing is a new policy, you may want to consult with current staff (and their representatives) first. If you wish to include it as a contractual change, you will also normally need to give appropriate notice. Think about how you will respond to objections and what you will do if someone refuses to accept a contractual variation. Follow your normal consultative processes and procedures for any contractual variation.

6 The aftermath

Once a specific situation has been dealt with, there are some key areas to review to improve your policy and procedures where possible:

1 How did you communicate the situation with others?

- If the employee has left, you should ensure this is communicated to colleagues (and external contacts if appropriate) in the same way as any other employee who leaves in a similar situation (for example long-term sickness).
- You should also review communications during the process. For example, did you give the person's line manager too much or too little information about the situation? Or if the line manager was the principal contact with the employee, did they keep you sufficiently informed?
- How did you deal with any rumours or gossip among other members of staff? How did you balance confidentiality with the need for others to have some awareness of the situation?

2 Review your policies

- Did the policy 'work'? Were you able to support the employee while balancing business requirements? Were there any aspects of the process that need to be amended? Did it help or hinder you in dealing with the situation?
- Has it revealed any areas you had not previously considered? If so, what will you do to change procedures?
- Did the support from external advisers (drug workers, medical professionals, and so on) assist in the situation? Was it received in a timely manner?

3 Training

- Has the incident revealed a need to offer further training to line managers? If so, what specific aspects and who will provide it?
- Do other staff need any training?
- What about the HR team?

4 Employee relations issues

- Does the incident suggest that there may be a wider problem with drugs/alcohol than you suspected?
- Is this a consequence of your working practices and culture?
- Is it a reflection of your recruitment practices?
- Is it a result of wider societal issues (for example drug problems in the area you are based) that you could address with other organisations (such as other local employers, drug charities, the police, and so on)?

Although it can be a difficult situation to have dealt with, it's important afterwards to take the opportunity to review actions and make improvements as much as possible.

7 Conclusion

Managing and preventing drug and alcohol misuse in the workplace needs to be tackled through a supportive culture, where people feel able to come forward with a problem and ask for help, and where people trust they will be treated fairly rather than the organisation simply relying on disciplinary action for policy infringement.

An organisation's health and wellbeing approach should consider prevention of drug and alcohol misuse, early intervention and support for employees, where employees are aware of how and who to ask for help. To allow a focus on prevention, organisations must seek to build a supportive culture and steps must be taken to ensure that employees genuinely trust that their employer will try to support them if they ask for help.

In addition, it is essential to critically appraise the culture and working practices of the organisation to ensure it is promoting the desired behaviours (for example, as opposed to encouraging frequent or heavy drinking during client entertaining or network events).

One of the key aspects of creating this type of culture is to train people professionals and line managers to be able to sensitively handle any situations that may arise and to have an understanding of the principles of good practice in this area to be able to apply this to any of the complex and individual situations they may be faced with.

By supporting employees to overcome their problem and either stay in work or make an effective return to work, employers will be able to hold on to talented people as well as enhance their brand as an organisation that genuinely cares about their employees, and discharge their basic duty of care.

Now more than ever it's vital that organisations look to provide the individual support and understanding that employees will need in these stressful and uncertain times, and that employees are aware of what support is available to them and feel comfortable asking for this support.

The CIPD's Profession Map offers three guiding principles that are helpful reminders when developing your organisation's approach to dealing with drug and alcohol misuse:

- **It should be principles-led:** it seeks to make sure that your organisation meets its legal obligations, protects the people who work for you and other stakeholders, and offers support to individuals who need it.
- **It should be evidence-based:** it utilises the advice of experts in the field to develop effective approaches and solutions.
- **It should be outcomes-driven:** it seeks to achieve, where possible, a positive result for individuals with a drug or alcohol issue, and one that also benefits the organisation.

If you need further information about dealing with drug and/or alcohol misuse, Appendix 1 contains links to specialist organisations.

CIPD members can also contact the CIPD's employment law helpline (03330 431 217) for advice on legal aspects and you can raise anonymous discussions with fellow professionals on the [Workplace Dilemmas in Confidence](#) forum on the CIPD community.

8 Appendix 1: Further information

Support organisations

Adfam National

Organisation that works with and on behalf of families affected by drug and alcohol problems. Helpful for the family of the alcohol or drug user.

Website: www.adfam.org.uk

Al-Anon

Al-Anon Family Groups UK & Eire provide support for anyone whose life is or has been affected by someone else's drinking.

Website: www.al-anonuk.org.uk

Alcoholics Anonymous

The largest self-help group for people who acknowledge they cannot handle alcohol and want a new way of life without it. Services are free. The comprehensive website explains the philosophy of AA, what to expect, and local groups.

Helpline: 0800 917 7650

Website: www.alcoholics-anonymous.org.uk

Alcohol Change UK

Leading UK alcohol charity formed from the merger of Alcohol Concern and Alcohol Research UK. Work for a society that is free from the harm caused by alcohol.

Website: <https://alcoholchange.org.uk/>

Cocaine Anonymous

National self-help group specifically for cocaine users.

Helpline: 0800 612 0225, open 10:00am to 10:00pm, 7 days

Website: <https://cocaineanonymous.org.uk/>

Drinkaware

An independent UK-wide alcohol education charity. Provides advice and information to anyone concerned about their own drinking or someone else's and a range of support tools to help people reduce their drinking, change their relationship with alcohol and improve their health. Free, confidential advice is provided through the online chat service, DrinkChat, and helpline, Drinkline (0300 123 1110). A workplace awareness training programme is provided by Drinkaware at Work.

Website: www.drinkaware.co.uk

Narcotics Anonymous

The largest self-help group for people who want to stop using drugs. Services are free.

Helpline: 0300 999 1212

Website: www.ukna.org (includes details of local groups)

Release

A registered charity able to advise on specialist areas of drugs law.

Helpline: 020 7324 2989

Website: www.release.org.uk

Talk to FRANK

A government-funded free service offering information and sources of support. The website provides detailed information on drugs that the non-specialist can understand.

Helpline: 0300 123 6600

Website: www.talktofrank.com

WDP

Charity providing drug and alcohol treatment and recovery services across England. Also provide organisational training on drugs, alcohol, smoking, mental health and wellbeing.

Website: www.wdp.org.uk

We Are With You (formerly Addaction)

Drug, alcohol and mental health charity

Website: www.wearewithyou.org.uk

Rehab 4 Addiction

An advisory and referral service for people who suffer from alcohol, drug and behavioural addiction.

Helpline: 0800 140 4690

Website: <https://www.rehab4addiction.co.uk/>

Useful links

- Acas: [Alcohol and drugs policies](#)
- Health and Safety Executive: [Managing drug and alcohol misuse at work](#)
- NHS: [Drug addiction: getting help](#)
- NHS: [Alcohol support](#)
- United Kingdom Accreditation Service (UKAS) – the sole national body recognised by government for the accreditation of testing laboratories (www.ukas.com)
- Faculty of Occupational Medicine: [Information for employers on using occupational health services](#)
- The Employee Assistance Professionals Association: EAPA is the professional body for employee assistance programmes (EAPs). It represents the interests of professionals concerned with employee assistance, psychological health and wellbeing in the UK (www.eapa.org.uk).
- UK Chief Medical Officers have published guidelines on how to keep health risks from drinking alcohol to a low level. They provide the public with the [most up-to-date information](#) to help people make informed decisions about their own drinking.

9 Appendix 2: Relevant legislation

Misuse of Drugs Act (1971)

This Act makes it a criminal offence for any occupiers of premises (including employers) to knowingly permit the production, supply or use of controlled substances on their premises. This is the main law that controls and classifies dangerous drugs.

Schedule 2 of the Act divides controlled drugs into one of three classes:

- Class A drugs – considered the most harmful, for example cocaine, methadone and opium
- Class B drugs – for example amphetamine, cannabis and ketamine
- Class C drugs – for example temazepam and diazepam.

The above are only examples; the list of drugs under the Act has been supplemented numerous times to add new drugs, including a number of psychoactive substances. The alphabetical list is long, ranging from Acetorphine (primarily used to sedate elephants, giraffes and rhinos) to Zopiclone.

The schedules to this legislation also classify drugs according to whether they have any medicinal purpose. Special provisions cover access to controlled drugs for legitimate medicinal or therapeutic purposes (also see the Misuse of Drugs Regulations 2001 below).

Offences

The 1971 Act provides for a range of offences in relation to controlled drugs, including importing or exporting of illegal drugs and:

- Section 4 Production, supply or offering to supply (including giving them away for free or sharing with others)
- Section 5 Possession and possession with intent to supply
- Section 8 Permitting premises to be used for certain activities, including the production or supply of a controlled drug and smoking cannabis.

Occupiers of premises

Section 8 of the Act obliges people concerned in the management of premises to take action where specified drug activities are taking place. The section covers employers, occupiers, workers, managers and directors, whether they own, rent, use or occupy the premises where the drug-related activity is taking place.

The occupiers' obligation would cover, for example, a house, shop, flat or office being used to undertake any of the specified unlawful activities. The obligations only apply if the occupier knowingly permits or puts up with:

- production or attempted production of a controlled drug
- supply, attempted supply or offers to supply any controlled drug to another person
- preparation of opium for smoking
- smoking of cannabis, cannabis resin or prepared opium.

Interestingly, the Act does not mention legal obligations to stop the use of any substances other than cannabis or opium on their premises; the focus of this legislation is on production and supply. Permitting the use of other substances such as heroin or cocaine on premises is not covered by the Act.

The Government previously proposed extending the legal obligations concerning the use of cannabis and opium on premises to all illegally held controlled substances, but this never came into force.

Penalties

The maximum penalties for the offences under the 1971 Act vary according to the class of the controlled drugs. However, the maximum penalty on indictment for employers who permit certain activities to take place on their premises is 14 years' imprisonment, a fine or both.

Generally, drug offences at or near a school, youth facility or location where young people formally meet can be treated as an aggravating issue with increased penalties.

The key point for employers is that they commit a criminal offence under this Act if they knowingly allow their premises to be used for the production or supply of controlled drugs. There is a legal risk to employers who ignore drug-related activities taking place on their premises because not taking reasonable action to prevent supply may constitute permitting the activity.

The Misuse of Drugs (Safe Custody) Regulations 1973

Employers who run care homes and retail pharmacies, doctors or other healthcare settings will be familiar with this legislation, which sets minimum storage requirements for some illegal (or controlled) drugs involving storage in a cabinet or safe, locked with a key.

The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 included changes that specifically affect care homes.

Health and Safety at Work etc Act 1974

The relevant duties under this Act are:

- Section 2: a duty on employers to provide a safe place of work
- Section 3: a duty on employers to look after the health and safety of others, including members of the public
- Section 7: a duty on employees to take reasonable care of their own and others' health and safety at work, which would include co-operation with regard to matters relating to health and safety.

The key point for employers is that if they knowingly allow employees to work while under the influence of alcohol or drugs, they will be in breach of their duties under this legislation and be potentially liable. If an employee could place themselves or colleagues in danger, the employer must take steps to remove that risk or danger.

An employer has a duty to ensure the safety of the employee with the drug or alcohol issue as well. This can involve many stages, ranging from support and early intervention to increased supervision or, in extreme cases, steps to remove them from the working environment, either temporarily or permanently. In extreme cases a procedure resulting in suspension or dismissal may be necessary if the behaviour persistently results in danger to themselves or others.

Further regulations under this Act require employers to undertake assessments of the risks to the health and safety of employees and others affected by the organisation, which could include the use or presence of drugs and alcohol at work. Preventive measures must be taken if there appears to be a risk to staff (see the Management of Health and Safety at Work Regulations 1999 under regulation 3, which, among other things, gives employers a duty to conduct risk assessments).

Misuse of Drugs Regulations 2001

The Misuse of Drugs Regulations 2001 allow for the lawful possession and supply of controlled (illegal) drugs for legitimate purposes. These rules cover prescribing, administering, safe custody, dispensing, record-keeping, destruction and disposal of controlled drugs to prevent diversion for misuse.

Police Reform and Social Responsibility Act 2011

This Act includes provisions to temporarily add new drugs to the list of controlled substances until a decision is made about whether they should be *permanently* controlled under the 1971 Act. The Act provides for temporary class drug orders for new substances that are being, or are likely to be, misused. This covers certain substances until they become permanently designated as a controlled drug.

For example, orders have been made under this Act covering methoxetamine, ketamine and methylphenidate-related materials and specified derivatives.



The Psychoactive Substances Act 2016

This Act makes it illegal to produce, supply or offer to supply any psychoactive substance that is likely to be used to get high. Alcohol is not covered by this Act and neither are substances that are already controlled by the Misuse of Drugs Act 1971. Nicotine, caffeine and medicinal products are not covered either.

Psychoactive substances are:

‘any substance which (a) is capable of producing a psychoactive effect in a person who consumes it, and (b) is not an exempted substance’.

For example, nitrous oxide would be exempt if used as a food preparation but would be considered a psychoactive substance if it was sold with the likelihood of being used to get high.

The Act is aimed at shutting down shops and websites that trade in previously ‘legal’ highs.

Both the sale and importation of psychoactive substances are illegal – including website sales, even if based abroad.

It is not illegal to possess a psychoactive substance (which is not covered by the Misuse of Drugs Act 1971) unless the person with it intends to supply it to others, or if they are in a custodial institution.

Within this Act there are quite detailed powers given to the police and local authorities for dealing with shops and UK-based websites, and penalties for failure to comply with notices issued under the Act.

Road Traffic Act 1988

This Act makes it a criminal offence to drive or attempt to drive a motor vehicle while unfit through drink or drugs:

- In England, Wales and Northern Ireland, the legal limit for alcohol is 80 milligrams of alcohol per 100 millilitres of blood.
- In Scotland and most other European countries, the limit is 50 milligrams of alcohol per 100 millilitres of blood.

It should be made clear in your policies that employees are required to comply with drink-driving laws.

Transport and Works Act 1992

This Act also makes it a criminal offence for workers to operate transport systems while unfit through drink or drugs. It covers rules for commercial and at-work drivers working on railways, tramways and other guided transport systems.

Employers or operators of the transport system are also guilty of an offence unless they show all due diligence in trying to prevent such an offence being committed. A carefully structured drugs and alcohol policy (including a testing regime for drugs and alcohol use in the transport sector) is an important element in demonstrating due diligence. For example, railway operators should periodically test staff carrying out safety-critical tasks. This would normally include informing new job applicants of the drugs and alcohol policy and pre-appointment testing. For existing employees in such roles, pre-planned, for cause, random and unannounced testing will usually be appropriate.

Railways and Transport Safety Act 2003

There are numerous criminal offences under this Act that can be committed by people working in the field of aviation, transport and shipping. For example, offences include air crew or controllers who perform an aviation function or ancillary activity while their ability to do so is impaired due to drink or drugs. The rules broadly follow national drink driving legislation.

Air Navigation Order 2016

Special regulations cover aircraft crew, who must not be under the influence of drink or a drug so that their capacity is impaired. This applies both when they are on duty as crew and when they are being carried in any aircraft for the purpose of acting as a member of the crew.

Employment Rights Act 1996

Rights under this Act will be relevant if formal steps need to be taken following drug or alcohol use at work. Section 94 of the Act gives the right to employees (with two years' continuous service) to not be unfairly dismissed. In order to dismiss an employee fairly, an employer must establish a fair reason and that it acted reasonably in all the circumstances.

Fair reasons in these circumstances include:

- **conduct:** which may include theft, drug and alcohol use, continually missing work, and so on
- **capability:** which may include poor performance or a long illness.

Being drunk or under the influence of drugs at work may not in and of itself warrant dismissal. In order to defend a claim for unfair dismissal, employers need to be able to justify that they have acted reasonably in dismissing the employee for that reason.

All the usual stages of the employer's own disciplinary and dismissal procedures will apply as well as the steps in the [Acas code of practice](#). This will include written advance information, meetings to discuss the issue, the offer of a companion in formal meetings and the ability to appeal the decision in the usual way.

The Acas guidance suggests that employers should consider measures to help employees suffering from drug or alcohol abuse. An employer failing to consider alternatives to a disciplinary sanction may affect the reasonableness of any measure imposed. While the intoxication is likely to constitute misconduct, an employer can't automatically assume it can dismiss, but should consider all the circumstances.

Human Rights Act 1998

This Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to. Article 8 provides the right to respect for private and family life. Poorly planned or unjustified attempts by employers to force employees to take drug tests could potentially be challenged as a violation of this right.

Equality Act 2010 and the Equality Act 2010 (Disability) Regulations 2010

The Equality Act prohibits discrimination in employment in respect of the protected characteristics of age, disability, gender reassignment, marital or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In claiming disability discrimination, an employee must show they have a disability that meets the definition in the Act. Alcohol and drug addiction are expressly stated not to be impairments, and therefore not disabilities (although this does not apply where the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment).

A case study example of this is set out below:

Alex, a software engineer, has been prescribed 'benzos' from the doctor for her anxiety (benzos is an abbreviation for benzodiazepines, such as valium). She has not been able to function without this drug for three years. Her symptoms include mood changes, drowsiness, sweating, headaches and difficulty concentrating, which causes absences from work.

This addiction is likely to amount to an impairment for the purposes of the Equality Act, whereas an addiction to alcohol without any other condition would not.

The exclusion of addiction from the definition of disability might make employers think that they can ignore disability discrimination when dealing with employees with an addiction, but it is more complicated than that. Employers cannot ignore the Equality Act protections. A disability is a physical or mental impairment that has a substantial and long-term adverse effect on someone's ability to carry out normal day-to-day activities. An employee with such a physical or mental impairment that was caused by or was the result of non-prescription drug or alcohol addiction (for example a serious liver condition, Hepatitis C, HIV, angina or a depressive illness) may still amount to a disability within the Act. The employee would be protected despite the fact that the disability was originally caused by the addiction.

Therefore, employees who appear to be suffering from addiction may be protected as disabled persons, and the employer should make medical investigations and consider obtaining a medical report to ascertain whether there is a disability. The courts would look at how the employer treated the employee and decide if the reason for the treatment was because of the underlying disability, or the addiction itself. See the case law in Appendix 3 for further examples.

Psychoactive Substances Act 2016

This Act makes it illegal to produce, supply or offer to supply any psychoactive substance that is likely to be used to get high. Alcohol is not covered by this Act and neither are substances already controlled by the Misuse of Drugs Act 1971. Nicotine, caffeine and medicinal products are not covered either.

Within this Act there are quite detailed powers given to the police and local authorities for dealing with shops and UK-based websites, and penalties for failure to comply with notices issued under the Act. Further details appear in Appendix 1.

Data Protection Act 2018

At its simplest, this Act requires employers to make sure any personal information on employees held by employers is managed properly. Data protection issues are most likely to arise in connection with any information on employees resulting from drug and alcohol testing.

More information is given in section 5 about testing, employees' consent and safety-critical roles. However, for data protection purposes, drug and alcohol-related information is likely to be special category personal data. This was formerly known as sensitive data and needs more protection. In order to lawfully process special category data, employers must identify:

- a lawful basis (Article 6), and
- a separate condition for processing the data (Article 9).

Employers must determine the basis and condition before they begin processing the data. Employers need a policy that explains how they will comply with the data protection principles (which reflect the GDPR principles). For example, this will address how the employer will deal with the retention and erasure of special category personal data.

To ensure compliance with the data protection principles, the justifiable legal basis for processing employee data on alcohol and drugs is likely to be the health and safety of fellow workers. Further justification may be the use of the substances breaching the employment contract.

Employees have a right to object to the processing of their personal data and the employer must be able to show why its legitimate interests override the employee's competing privacy rights.

10 Appendix 3: Relevant case law

Case law can provide helpful guidance to employers on how to lawfully deal with employee issues relating to drug and alcohol misuse.

Investigations

Frodsham v Callplus: Employment Tribunal: 2017

Facts: An employee had worked with a charity for 16 years and had never been subject to a disciplinary procedure. Before a work event she drank several alcoholic drinks and was 'hammered' when she arrived at the party, for example, introducing herself to people she already knew. She was suspended for failing to carry out her role properly while under the influence of alcohol and putting the charity's reputation at risk.

During her suspension the employee asked her colleague to tell the employer that she was not drunk and the disciplinary panel said contacting a witness and asking them to change their evidence was gross misconduct and there was no alternative but to dismiss. The conduct during the party was not put to the employee to address fully.

Her appeal failed and she was dismissed for gross misconduct and she then claimed unfair dismissal.

Decision: The tribunal ruled that the employee had been unfairly dismissed because the investigative procedures into her conduct were defective. She was not given the chance to respond to many of the specific details of her colleague's evidence against her. Although she had had several drinks and received bad news that had affected her behaviour, this should not have led to dismissal, particularly given her 16 years' service.

There was also insufficient evidence that her behaviour at the event was down to drunkenness, or that the behaviour risked the charity's reputation. The employer did not distinguish between allegations that the employee might have been drink-driving and allegations that she was behaving erratically due to having some alcohol still possibly in her system and being upset by bad news she had received the night before. The tribunal stated that if it had been the latter and the evidence of drink-driving was unsubstantiated, in light of the employee's 16 years' service, it would not have been appropriate to dismiss. However, a deduction of 50% of the compensatory award was made because there was a chance she may have been dismissed even if the employer had carried out an appropriate investigation.

Key points for employers: An employer must carry out a proper investigation and a full and fair disciplinary process. Employees must know the nature of allegations against them and have an opportunity to state their case.

Vicarious liability

Shelbourne v Cancer Research UK: High Court: 2019

Facts: At a work Christmas party an animal technician was physically lifted up on the dance floor by a visiting scientist, who lost his balance and accidentally dropped her, leading to a spinal injury. She brought a claim against her employer for damages of £300,000 for the personal injury she suffered. She claimed that there had been inadequate organisation and supervision of the party and that Cancer Research was vicariously liable for the actions of the drunk visiting scientist (who had lifted several women at the party before lifting her up).

Decision: The County and High Court decided the employer had not breached its duty of care and was not liable in negligence for the injury nor was it vicariously liable for the visiting scientist's actions.

The employer had taken reasonable steps in the planning and operation of the party, including undertaking a risk assessment, which focused on preventing people returning to the laboratories during the course of the party or afterwards. The extent of the duty of care did not require the employer to put in place measures to guard against the actions of a drunken party-goer. The drunken act was not so closely connected with the employer that it gave rise to vicarious liability. The scientist had effectively engaged in a 'frolic' of his own.

Key points for employers: The law has imposed vicarious liability in some work-related social events that lead to injury or loss. Liability usually arises where the actions fall within the employee's 'field of activities', which must be sufficiently connected so as to give rise to vicarious liability for the employer.

Each case will depend on its own facts, so it will always be sensible for employers to:

- set out clearly when the employer's organised part of the evening ends
- warn about the dangers of intoxication
- emphasise the need for employees to have travel and accommodation arrangements in advance.

Mohamud v WM Morrison Supermarkets PLC: Supreme Court: 2016

Facts: A petrol station employee seriously injured a customer in an unprovoked attack that took place on the employer's premises. The customer brought a claim against the supermarket that ran the petrol station on the basis that it was vicariously liable for the assault. The Court of Appeal found that the supermarket was not vicariously liable because there was no sufficiently close connection between the attack and what the employee was employed to do. The customer appealed on the basis that the question should be whether a reasonable observer would think the employee was acting in the capacity of a representative of the employer at the time of committing the wrongful act.

Decision: The Supreme Court held that the employer was vicariously liable. Liability should depend on two matters:

- What functions or field of activities have been entrusted by the employer to the employee (and this question should be addressed broadly)?
- Was there a sufficient connection between the position in which the employee was employed and the wrongful conduct to make it right for the employer to be held liable for reasons of social justice?

The employee's job was to attend to customers and their inquiries. Although he performed that job in an inexcusable manner by attacking a customer, it was still within the field of activities

assigned to him. There was an unbroken sequence of events moving from service at the counter, following the customer and attacking him by his car. He told the victim to never return to the petrol station and in giving such an order he was purporting to act on behalf of the employer's business. It was irrelevant that his supervisor had tried to stop him at one point.

Key points for employers: The case is relevant to alcohol and drugs cases because it shows that the vicarious liability test can be applied very widely. There is a broad approach as to whether a wrongful act like this assault was committed in the course of the employee's employment. Case law shows that a sufficient connection can be found even where an employee has used or misused the position entrusted to him in a way which injured the victim.

Employers can be made vicariously liable for an employee's actions even when they have been drunk or taking drugs at work.

Bellman v Northampton Recruitment Ltd: Court of Appeal: 2018

Facts: After the employer's Christmas party a number of guests and employees (including the sales manager and the managing director) went on to a hotel where some party-goers were staying. This was for an impromptu drink and was not a planned extension of the party, although the company paid for taxis there and some of the drinks at the hotel. In a conversation about work-related matters, the managing director lost his temper and lectured the employees present about how he owned the company and made the decisions. The sales manager challenged him, and the managing director assaulted him, resulting in severe brain damage. The sales manager brought a claim against the company alleging that it was vicariously liable for the managing director's actions.

Decision: The Court of Appeal held the employer could be vicariously liable because there was a sufficient connection between the managing director's field of activities and the assault to make it just that the employer should be vicariously liable for his actions. The drinking session at the hotel was not a seamless extension of the Christmas party, but it did occur on the same night as the work event paid for and organised by the managing director. The managing director was still acting in his role during the drinking session by lecturing his subordinates.

Key points for employers: An employer will usually be held liable for the acts of an employee done 'in the course of employment'. This is a broad test, and it is wrong to focus too narrowly on what the employee is expressly authorised to do in their job. The legal test is whether the acts were so closely connected with the employment that it would be fair and just to hold the employer vicariously liable.

Employers do not automatically become vicariously liable every time a drunken argument about work leads to an assault. However, employers may be found liable for their employees' actions, even if those actions take place after hours, if there is a sufficient link with the employee's employment. It is only in exceptional cases where vicarious liability will arise where the employee's actions were far removed from the workplace, as they were in this case.

Here there was a close link between the managing director's actions and the exercise of his managerial authority. The 'close connection' test for wrongdoing by employees can lead to employer's liability for events resulting from excessive alcohol consumption by employees at work-related social events. Employers should set out what constitutes acceptable behaviour at work-related social events and the consequences of misbehaviour. Employers should not encourage heavy drinking and should limit the amount of free alcohol for employees. Senior staff especially should behave responsibly.

Fairness of dismissal

McElroy v Cambridgeshire Community Services NHS Trust: Employment Tribunal: 2014

Facts: A healthcare assistant smelled of alcohol and was suspended and referred to occupational health (OH). There had been other occasions where colleagues thought that he smelled of alcohol, but there had never been any concerns about his behaviour or his ability to help patients. The eventual OH report suggested he was fit to return to work. The NHS subsequently became aware that he had previously been admitted to hospital for oesophagitis, which can be linked to excess alcohol consumption.

At an investigatory meeting the assistant denied coming to work drunk and suggested that the smell may have been his aftershave.

The NHS policy recommended employees should not drink alcohol shortly before attending work but did not ban it. The policy did say being unfit for duty through intoxication was an example of gross misconduct. The tone of the policy emphasised assistance and support but stated that continued misuse or refusal of treatment could lead to disciplinary action. After the disciplinary process, the healthcare assistant was dismissed for gross misconduct because he had attended work under the influence of alcohol and had put himself, colleagues and patients at risk. The dismissal was also because the NHS had tried to make a further referral to occupational health, but he refused to participate. His appeal against dismissal was unsuccessful and he claimed unfair dismissal.

Decision: The employment tribunal held his dismissal was unfair. A reasonable employer should not have treated attending work smelling of alcohol as grounds for dismissal when there was no evidence of an adverse effect on the employee's ability to do his job. Also, the employee had not been given any previous warnings about the matter. It was also not reasonable to take account of the employee's failure to attend a second occupational health appointment when he had not been told that it would be a disciplinary matter if he failed to do so.

Key points for employers: Employers should always consider whether dismissal is reasonable. Managers should follow appropriate policies and be trained on how to deal with alcohol and drug issues. Employers have a legal duty to take reasonable care of the welfare of employees. An employee being suspected of being under the influence of alcohol or drugs should lead an employer to take action to protect the employee and others. The extent of the action will depend on the employee's role and behaviour. Drivers or those who operate heavy machinery may create more of a risk compared with office-based workers.

Asda Stores Ltd v Coughlan: Employment Appeal Tribunal: 2010

Facts: An employee with 21 years' unblemished service met a colleague outside the back door of the workplace and received an eighth of an ounce of cannabis, which he put in his staff locker. The smell of the cannabis attracted attention and his locker was searched in his presence and the cannabis seized. Under Asda's disciplinary rules, unlawful possession of drugs was treated as gross misconduct. He was dismissed for gross misconduct.

Decision: The EAT held that the dismissal for this single act of gross misconduct fell within the range of reasonable responses and was fair.

Key points for employers: Employers may wish to undertake searches for evidence of drug or alcohol use. Employers should be aware that this could give rise to allegations of breaching the right to privacy and, in the case of employees, the implied contractual

term of mutual trust and confidence. Reserving a right to search, and how this would be exercised in practice, should be considered carefully.

Angus Council v A Edgley: Employment Appeal Tribunal: 1999

Facts: The council's policy on alcohol abuse said employees with drinking problems would be assisted with professional help and rehabilitation and that disciplinary action would be suspended in the meantime. The employee was dismissed for taking time off work to go drinking.

Decision: The dismissal was unfair since the employer dealt with a medical issue (capability) as if it were disciplinary (conduct). It was not appropriate to deal with this as a 'one-off' disciplinary matter when the employer knew from his disciplinary history that he was alcohol-dependent.

Key points for employers: Employers must apply any policy they have on alcohol abuse, otherwise the dismissal will likely be rendered as unfair.

Sinclair v Wandsworth Council: Employment Appeal Tribunal: 2007

Facts: A business support assistant had a five-year clean work record until he was observed drinking at work. He received a final written warning and admitted that he considered himself an alcoholic. He was advised by occupational health to seek specialist help, but failed to do so and was dismissed shortly after for being drunk at work. The council's alcohol policy said disciplinary proceedings could be suspended pending treatment for alcoholism, but he was not given a copy of this until shortly before the disciplinary hearing.

Decision: It was found that the dismissal was unfair. The council had not given the employee a copy of its alcohol policy and had failed to make it clear to the employee what steps he needed to take to avoid dismissal. However, the tribunal had wrongly taken the view that, since alcoholism was an illness, the employee's drunkenness at work could not be considered as contributory conduct. Contributory conduct (otherwise known as contributory fault) is the argument that even if the dismissal was unfair, the employee's own actions brought things on him or herself at least in part. This means that the tribunal can take this into account when deciding how much compensation to award. Usually the tribunal will apply a percentage deduction. A greater deduction for contributory conduct could be made in this case for the purposes of assessing compensation.

Key points for employers: Employers should follow the terms of their drug and alcohol policies and failure to do so may render a dismissal unfair. Misconduct arising from alcoholism can still amount to contributory fault and lead to a reduction in unfair dismissal compensation.

Mr H Birdi v Mears Ltd: Employment Tribunal: 2017

Facts: A home and call-out manager was subjected to his employer's disciplinary process following a detailed allegation of drinking alcohol and then driving a company vehicle. He was dismissed for gross misconduct because of this and claimed unfair dismissal, wrongful dismissal and racial discrimination.

Decision: The employment tribunal held that he had been unfairly dismissed but that he was entirely responsible for the dismissal, reducing his compensatory award by 100% for contributory conduct. He did receive the basic award, which was increased by 25% for his employer's failure to follow the Acas code, less 50% for contributory conduct, leaving a sum of £6,735.93 as compensation for his unfair dismissal claim. The claim for wrongful dismissal and race discrimination failed.



Key points for employers: Although it was found that the employer in this case had a potentially fair reason for dismissal, Mr Birdi was found to have been unfairly dismissed due to ambiguities in his employer's policy on drugs and alcohol and a number of failures in the procedure, such as having a witness of fact being appointed as the investigating officer and continuing the suspension without explanation. Having a potentially fair reason for dismissal will not of itself make the dismissal fair, although in this case the compensatory award was reduced by 100% to reflect the contributory conduct.

Disability arising from alcohol and drug addiction

Ms A Kunicki v Commissioner of Police of the Metropolis: Employment Tribunal: 2017

Facts: A police officer claimed disability, race and sex discrimination. She drank alcohol to excess (around 112 units per week). She alleged she was the only white female non-British police officer for many years and was harassed because she was Swedish. She claimed there were many incidents, including being sent lewd pictures by a colleague. She eventually went on long-term sick leave, but at the time of the hearing to address the disability part of the claim she was still employed as a police constable. The key issue was whether her impairment was by reason of depression and anxiety and post-traumatic stress disorder or if the cause of the impairment was solely alcohol addiction, and so excluded from the definition of a disabled person. There was a preliminary hearing to decide whether the claimant was disabled within the meaning of the Equality Act 2010.

Decision: There were substantial adverse effects on the policewoman's day-to-day activities, but these were caused by excessive alcohol consumption, and so excluded from the definition of disability. The tribunal concluded that there was no clear basis for concluding that without the drinking the claimant's reported symptoms would be identified as resulting from depression or anxiety. The effects were not caused by a personality disorder, because although this can make relationships difficult, and so cause stress, historically the evidence pointed to the claimant having functioned well enough when not drinking to excess. So, if the disorder had an adverse effect, it was not substantial. Accordingly, the claimant was not a disabled person within the meaning of the Equality Act.

Key points for employers: Alcohol and drug addiction is excluded from the definition of disability for the purposes of the Equality Act 2010. An employee with a physical or mental impairment caused by alcohol addiction, for example a depressive illness, may amount to a disability within the Act. However, there is a distinction between depression as an illness, and depressive symptoms which are a reaction to adverse life events. Some cases of excessive alcohol consumption are protected by disability discrimination provisions and some are not. If the employee consents to a medical report, employers may need the benefit of medical advice to assist their conclusion as to whether an employee is disabled or not. The report needs to address whether the employee's condition is solely an addiction or whether a further impairment exists.

Power v Panasonic: Employment Appeal Tribunal: 2003

Facts: A Panasonic employee was dismissed after being off work when depressed and drinking heavily. She claimed that she had been unfairly dismissed and that she had been discriminated against contrary to the Disability Discrimination Act. The employment tribunal focused on whether the depression or alcohol abuse had come first, and decided that as the depression had been caused by the alcohol misuse, she was not disabled for the purposes of the Act.

Decision: The Employment Appeal Tribunal said that the employment tribunal had been wrong to concentrate on whether the claimant's depression had been caused by alcohol misuse – it did not matter how the disability was caused, but whether it was a disability within the meaning of the Act or explicitly excluded from being such.

Key points for employers: A condition arising from drug and alcohol addiction will not be precluded from being considered to be a disability, as long as it meets the statutory tests for this.

Drug testing

First Bristol v Bailes: Employment Appeal Tribunal: 2013

Facts: Mr Bailes had been employed as a bus driver for over 20 years with a clean disciplinary record until he was dismissed for failing a drugs test. Mr Bailes appealed his dismissal and raised queries over whether the result could have been affected by the antibiotics he was taking, or whether the result had been caused by him handling a significant number of banknotes (which are generally known to be contaminated to some extent by cocaine). He also had a hair strand test done at his own expense, which gave a negative result. Despite this, his appeal was unsuccessful and he brought a claim for unfair dismissal.

Decision: The employment tribunal found that Mr Bailes had been unfairly dismissed because First Bristol had failed to properly investigate the possible accidental contamination of the test due to his contact with banknotes. However, the Employment Appeal Tribunal remitted the case to the judge, who had appeared to overlook expert comments that were relevant to this question. In considering what First Bristol would have done had it acted fairly, the Employment Appeal Tribunal noted that the following factors should have been taken into account:

- First Bristol had in the first instance been so surprised and unbelieving of the test results that Mr Bailes had not been suspended.
- Mr Bailes had a very long service with First Bristol.
- Mr Bailes had undertaken a hair strand test at his own expense, which gave a negative result.

Key points for employers: A positive drug test may well be a fair reason for dismissal, but it will be important to carefully consider all of the circumstances in a case before solely relying on this.

Ball v First Essex Buses Limited: Employment Tribunal: 2017

Facts: A bus driver of 20 years tested positive for cocaine on a saliva drugs test at work. The driver disputed that he had been taking cocaine and argued that handling money may have meant that bank notes with traces of cocaine had contaminated his saliva sample. The employer ignored a hair follicle test, which detected no cocaine, and the driver's offer to take another test. The driver was summarily dismissed for gross misconduct and a later appeal was unsuccessful. The driver claimed wrongful and unfair dismissal.

Decision: The employer had not followed a fair procedure and the employee was awarded a basic award and compensation for lost income of three years.

Key points for employers: The employer should have:

- followed its own disciplinary procedure and the Acas code
- considered the hair follicle test evidence that the employee provided or made it clear in their policy that alternative tests would not be recognised

- considered the driver's offer to undertake further drugs tests
- told the employee further investigations were taking place during the appeal
- included failing a drugs test as a specific example of gross misconduct under their policy.

Andrew Dyson v Asda Stores Limited: Employment Tribunal: 2016

Facts: An Asda warehouse operations manager, Mr Dyson, operated heavy machinery, including fork-lift trucks. Asda had a comprehensive and clear drug testing policy which stated that refusing a test may result in disciplinary action up to and including dismissal. Asda undertook both random drugs testing and 'for cause' drugs tests, where there were grounds for suspicion.

There were no allegations of this manager being seen under the influence of drugs at work. Mr Dyson knew the drug and alcohol policy well, having used it to dismiss a colleague. The employer received an anonymous tip-off making various drugs allegations about an Andrew Dyson and referred to a newspaper article with details of drug convictions, although it transpired that this related to a different Mr Dyson.

The claimant was asked by Asda to undertake a voluntary drugs test to demonstrate that the issue had been sufficiently investigated. The claimant refused to take it. He said there were insufficient grounds for testing him. The test was then made compulsory, but the claimant still refused to take it. He was consequently dismissed.

Decision: The employment tribunal held that the employer's decision to dismiss was fair. There was a responsibility on senior management to observe the employer's policies and set an example to others. There were faults in the employer's procedure by initially saying the test was voluntary, but overall the dismissal fell within the band of reasonable responses an employer could take.

Key points for employers: If drug testing has been contractually agreed to, and a request by an employer to take a drug test is reasonable, refusal to take it may be a fair reason to dismiss. This is the case especially where the employee is a senior one who has implemented the policy in the past.

O'Flynn v Airlinks the Airport Coach Co Ltd: Employment Appeal Tribunal: 2001

Facts: A customer care assistant had been employed for more than two years when the employer introduced a zero-tolerance alcohol and drugs policy, which stated that a positive drugs test would be gross misconduct and lead to disciplinary action, and likely dismissal. It also introduced random screening of 10% of the workforce each year. The assistant was selected for testing, admitted she was a weekend drug taker, had a positive test and was suspended. The employer was in the transport sector and although she was not a driver, the job description said the assistant could be required to assist drivers manoeuvring their vehicles and to serve hot drinks on moving coaches. At the disciplinary hearing she confirmed awareness of the policy and knew a positive test result may lead to dismissal. She did not appeal her dismissal but claimed unfair dismissal.

Decision: The EAT held that the dismissal was fair – the claimant had been aware of the new policy and its consequences. The investigation and dismissal fell within the band of reasonable responses that a reasonable employer might take, particularly as there were safety issues to consider. The policy did not state that employees should not take drugs, but that they should not report to work with drugs in their system. The employee could have been required to assist drivers, and the policy was necessary to protect public safety.

The claimant had tried to argue that the drugs test was a breach of her right to a private life under Article 8 of the Human Rights Act 1998. This had come into force after the random drug test and so did not apply, but the EAT commented that such interference in an employee's private life might be justifiable.

Key points for employers: The right to private life as set out in the Human Rights Act 1998 could be breached by an employer's testing policy. Random alcohol or drug testing has to be balanced against an employee's right to privacy under Article 8 of the Human Rights Act. Employers must ensure policies are clear that positive drugs tests would lead to disciplinary action and that such policies are well communicated.

11 Notes

- 1 Home Office. (2019) *Drug misuse: findings from the 2018/19 Crime Survey for England and Wales*. London: The Stationery Office.
- 2 www.bma.org.uk/media/1067/bma_alcohol-and-drugs-in-the-workplace-_oct_2019.pdf
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- 5 Nicholson, P., Mayho, G. and Sharp, C. (2016) *Alcohol, drugs and the workplace: the role of medical professionals*.
- 6 CIPD. (2020) *Managing drug and alcohol misuse at work report*. London: Chartered Institute of Personnel and Development.
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- 9 www.drinkaware.co.uk/professionals/press/employers-urged-to-support-staff-wellbeing-as-research-reveals-furloughed-workers-drinking-more-on-lockdown
- 10 www.thetimes.co.uk/article/coronavirus-social-distancing-measures-may-make-drug-addicts-relapse-t0mqwdj7c
- 11 CIPD. (2020) *Managing drug and alcohol misuse at work report*. London: Chartered Institute of Personnel and Development.
- 12 [Drinkaware: Peer pressure infographic](#)
- 13 CIPD. (2020) *Managing drug and alcohol misuse at work report*. London: Chartered Institute of Personnel and Development.

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