

# Evolving Drug Laws:

## Impact on Workplace Policies & Risk Management

Following our recent webinar, we want to highlight a significant recent legal decision that could impact your organisation's Drug and Alcohol (D&A) Policies.



The Fair Work Commission's decision in *Goodsell v Sydney Trains [2023] FWC 3209*, published on Monday, 4 December 2023, sheds new light on how employers should approach drug testing and workplace impairment.

### Case Overview

In this case, the Fair Work Commission examined the dismissal of a Sydney Trains employee following a positive result in a workplace drug test. The ruling emphasised that the presence of drug metabolites did not conclusively indicate impairment, or risk of impairment, at work. The Commission critiqued the employer for not exercising caution in interpreting the test results and the risk of impairment, and not considering mitigating factors like Mr. Goodsell's long, unblemished employment history. Consequently, the dismissal was deemed harsh, unjust, and unreasonable, and the employer was ordered to reinstate the employee.

### Key Takeaways

- **Nuances of Drug Testing and Workplace Impairment**

Employers must carefully consider the results of workplace drug tests and their implications for workplace safety and fairness. The decision in this case highlights the critical distinction between detection of drug metabolites and actual impairment at work. Lack of impairment may be relevant to the seriousness of an employee's conduct and proportionality of dismissal as a disciplinary outcome. This distinction is crucial for ensuring fairness and relevance in your D&A policies.

- **Procedural Fairness in Disciplinary Actions**

Employers must offer employees a chance to respond to alleged policy breaches, and consider all relevant mitigating factors, including employment history and potential impairment risk, or absence of such risk. Dismissal should not be taken as the only outcome for a breach of policy, particularly where a policy suggests alternative outcomes may be considered. The decision highlights the importance of procedural fairness in workplace drug testing and management actions.

- **Balancing Safety and Fairness**

While ensuring safety is paramount, especially in high-risk industries, this case clearly identifies D&A policies and their enforcement should balance safety concerns with fairness to employees. This includes considering the nature of the work, the conduct outside the workplace, and the actual risk posed by the employee's actions. As established through previous cases, while an employer may not need to prove an employee is in fact impaired when they attend work, they must be able to establish that there is a risk of impairment. The link between the testing regime and risk of impairment can pose difficulties depending on the nature of the substance.

- **Clarity in Policy Communication**

The decision calls for clear communication to employees about what it means to be 'drug-free' in the context of workplace D&A policies. This clarity is essential to avoid misunderstandings and to ensure that employees are fully aware of the standards they are expected to meet.

- **Legal and Ethical Considerations**

As highlighted in our webinar, the case serves as a reminder of the evolving legal landscape surrounding drug law reform and workplace drug testing. Employers should regularly review and update their D&A policies to align with current laws and ethical standards.

- **Implications Regarding Cannabis Use**

In light of proposed drug law reform to legalise cannabis for recreational use, and growing numbers of medicinal cannabis prescriptions issued in Australia, this decision underscores a critical area for employers. The ruling highlights the need to differentiate between lawful medication use and workplace impairment. Policies should be clear on the use of legally prescribed substances.

**This requires a careful approach, balancing compliance with workplace safety laws, and the rights of employees using prescribed medication.**

Employers should also ensure that their policies are clear on how medicinal cannabis use is managed and communicated, alongside establishing procedures to assess actual impairment rather than relying solely on presence detection in testing.

The decision in this case should be viewed in the context of its unique circumstances, however provides valuable insights regarding the management of similarly complex workplace drug testing cases.

We encourage you to review your D&A policies in light of these insights. Our team is available for consultations to help you navigate these complex issues and implement effective risk management strategies.

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