

# Disability or discipline?

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## Helen Crossland advises employers on how to deal with drugs and alcohol at work

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Research suggests that 13% of employees in the UK use illegal drugs, with the figure rising to 29% for those under the age of 30. Furthermore, an estimated 5% of all work absences are alcohol-related, while 15% of employees have also admitted to having been intoxicated at work.

Any business should thus be prepared for the eventualities that a worker confesses to having an addiction, that an employee is suspected of using illegal or prescription drugs or alcohol to the detriment of their duties, or that a member of staff is found to be in possession of or using illegal drugs on site.

No sector is immune to these issues, but the stakes are that much higher for the construction industry, where misuse of drugs or alcohol could have catastrophic consequences because of the health and safety factors in play.

Workers under the influence can prove costly for any business in terms of behavioural issues, including those affecting other workers, absenteeism, unreliability, reduced productivity, negligence and general underperformance. But where the use of machinery and construction sites are also in consideration, it can have other devastating ramifications ? for the individual themselves, their colleagues and the public ? and potentially derail projects or deadlines. This can naturally lead to legal implications for the business engaging them, as well as untold damage to a company's reputation and its ability to secure future contracts.

So how should a business act where it suspects or discovers one of its workers is misusing illegal drugs or alcohol?

### Addiction or recreation

As a starting point, any action is likely to hinge on whether a distinction can be drawn between a person's dependency on or recreational use of drugs or alcohol, and whether the individual themselves alerts you to the problem.

If a worker has an addiction to alcohol or illegal drugs, this could have significant effects beyond their control, both physically and mentally. In such cases, while the potential dangers presented to work by a person's addiction should never be overlooked, the advice in most cases would be to treat their condition as a serious illness and thus a capability rather than a misconduct issue.

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If it is clear the problem is one of addiction, and particularly if the individual has volunteered this information themselves, the focus should be on encouraging them to seek help and treatment. This may involve a referral to occupational health or a specialist substance abuse counsellor, and granting the individual special leave, paid or unpaid, for any treatment. Subject to the worker having been professionally assessed as capable of resuming their duties, their progress and ability to perform their role can then be monitored. If there is a concern they may not resume employment to the standards of work or the confidence required of the business, a capability (performance management) process may be warranted, which could ultimately lead to their dismissal.

If an individual has not declared any addiction but by virtue of their conduct or appearance is very likely misusing drugs or alcohol in a way that is affecting their performance or behaviour, the employer may still prefer to explore their suspicions, but should proceed with extreme caution. They might require the individual to undergo a drug or alcohol test if there is a company policy permitting this or, where the contract of employment or contract for services allows, referring the employee to a medical expert for an opinion on their health and wellbeing. The employer could pass on their concerns confidentially to the specialist, but should bear in mind how any information they receive will then be treated, particularly where there is evidence of alcohol or drug misuse but the employee has not admitted this or that they have a problem.

Subject to what is said below on disability discrimination, where an employer prefers to avoid the additional administration, time and cost of testing and reference to medical professionals, an alternative approach is simply to default to a standard capability or disciplinary procedure, focusing on the performance or conduct issues under consideration and making no reference to the suspicion of drug or alcohol use.

Regard should also be given to whether an individual is known to have used, or been seen in possession of, illegal drugs on the premises. Notwithstanding that this would likely constitute gross misconduct, a business owner could be criminally liable if they know that illegal drugs are being used on their premises. Even if an employee has a known addiction, disciplinary action culminating in dismissal would very likely be a justifiable response in this case.

## **Disciplinary route**

*When faced by an employee with an addiction, it is essential to consider whether a person's use or suspected use of drugs or alcohol could amount to a disability, entitling them to protection from disability discrimination pursuant to the Equality Act 2010.*

Where the issue is one of misconduct, a formal disciplinary procedure should always be followed, incorporating a reasonable investigation before any course of action is decided. The exceptions are when the individual concerned is a contractor and not subject to the company's disciplinary procedure, or where an employee has less than two years' service, rendering them ineligible to claim unfair dismissal, and the risk of not following a procedure is assessed as low.

In the event that the employee is dismissed and brings a claim for unfair dismissal, an employment tribunal would want to review whether it would have been reasonable to defer to medical advice. For example, if an employee presents as being drunk at work but they claim to be suffering from a medical condition that bears similar symptoms to intoxication, the employer would be ill advised to disregard the evidence without investigating it before deciding to dismiss.

## **Disability discrimination?**

When faced by an employee with an addiction, it is essential to consider whether a person's use or suspected use of drugs or alcohol could amount to a disability, entitling them to protection from disability discrimination pursuant to the Equality Act 2010. The need to consider reasonable adjustments to accommodate their condition, as well as the risk of the individual bringing a disability discrimination claim on top of any unfair dismissal claim if they are terminated, can then be reviewed. Any individuals, including employees, workers and freelancers, can claim discrimination, and need no minimum length of service.

An addiction to or dependency on alcohol, nicotine or any other substance does not constitute a disability under the 2010 act unless the addiction has been triggered by the use of prescription drugs or other medical treatment. However, impairments brought on by addiction, such as depression or nerve damage caused by alcoholism, could be classed as qualifying disability.

## **Policies and testing**

In a safety-critical environment such as the construction industry, employers are permitted to undertake spot testing for drugs and alcohol provided they have a company policy governing this. This policy should be widely communicated to workers so they are aware of what the tests entail and also that they may be subject to random testing, or for cause testing where misuse has been reported or is suspected. Where there are positive findings, it is essential to administer any sanctions consistently, which may include disciplinary proceedings or, where an addiction emerges, to support the individual in seeking professional help.

## **Conclusion**

The underlying advice where an employer needs to take steps to address an employee's addiction is to adopt a line of help and support. No employer is expected to maintain this approach indefinitely, however, and where there is a loss of trust in the employee or a legitimate concern that the individual could endanger themselves or others at work, dismissal can normally be justified.

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## **Further information**

- Related competencies include [Conduct rules, ethics and professional practice](#) and [Healthy and safety](#)
- This feature is taken from the RICS *Construction journal* (November/December 2016)