

# Drug and alcohol testing: Lack of impairment doesn't prevent sacking

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Courts and Tribunals are increasingly upholding employers' decisions to sack employees for breaching zero tolerance drug policies despite there being no evidence of impairment.

However, an employer's defence may only be as good as its policy. A recent case highlights the importance of having a well drafted drug and alcohol policy which clearly states what is acceptable behaviour and the consequences of any unacceptable behaviour.

Most recently, in *Shane Clayton v Coles Group Supply Chain Pty Ltd*, the Fair Work Commission found it reasonable for Coles to dismiss a worker who tested positive to cannabis despite no evidence that he was impaired.

Coles' drug policy allows the employer to initiate disciplinary action, including dismissal, if employees return a positive test for "illicit drugs".

The employee had been tested five hours into his shift after he had been involved in a safety incident that was not his fault. The employee claimed he had consumed the cannabis at 11.00pm in the evening before his 1.30pm shift, however, the level of THC in his blood indicated he had consumed cannabis in the morning before his shift.

In deciding to uphold the decision to sack the employee as not harsh, unjust or unreasonable; Commissioner Hampton followed the principles adopted by the Full Bench in *Harbour City Ferries Pty Ltd v Toms*. That case confirmed that a policy based upon the presumption that there is to be no illicit drugs present in an employee's system (i.e. zero tolerance) may be reasonable, and; depending upon the circumstances in which that policy is to operate, a breach of such a policy is a significant factor to be considered as to whether there is a valid reason for dismissal.

Two additional factors central to Commissioner Hampton's decision were the employee's deliberate or reckless breach of the drug policy and the employee having "misled" Coles about when he smoked the cannabis.

HopgoodGanim Lawyers advises its clients at the leading edge of legal developments relating to the management of drug and alcohol issues for workplaces. For further advice or assistance, contact our [Industrial and Employment Law](#) team.

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