

## SUMMARY

# 2014/50 Testing for drug use subject to strict conditions (LU)

***Article 8 of the European Convention on Human Rights prohibits an employer from organising drug detection tests unless the testing is justified by the hazardous nature of the employee's job or justified by a serious incident. The tests may only be carried out by a medical doctor, never by the employer itself. In order to protect the employee's private life, the employer cannot have direct access to the results of the tests, but if they confirm the employer's suspicions, it can be given access to the doctor's opinion regarding the employee's (in)ability to perform his work.***

### Summary

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### Facts

The employer in this case was a manufacturer of dangerous chemicals. On 10 September 2012 a bag was found on the company premises. A notice was posted to advise the owner that he or she could collect the bag. When, after a few days, no-one had claimed the bag, it was opened on 14 September. What appeared to be banned substances (possibly ecstasy, heroine, cocaine

and cannabis) were found inside it. Fearing that one or more of the employees might be taking illegal drugs, the company's management decided to ask all employees to submit to a drug detection test on the basis of urine samples. The tests were carried out internally by the company on a voluntary basis under the supervision of the managing director, the HR manager and one of the staff representatives. The employees were not informed that a refusal to take the test would lead to dismissal.

The plaintiff in this case was an employee who worked in the analysis and metrology lab and whose work consisted of checking the measuring tools in the lab and the manufacturing plant. He decided not to take the test under the conditions determined by the company's management, but he offered to submit to a drug test administered by someone competent to take such a test, for example a doctor or the police. He did, however, admit that he was a regular cannabis user. On 18 October 2012, he was dismissed with immediate effect on the grounds that he had refused to submit to the test.

The employer then publicly displayed a notice of its decision to dismiss the plaintiff and seven employees who had tested positive. The notice mentioned the names of all eight individuals.

The plaintiff brought legal proceedings against his former employer, claiming compensation for unfair dismissal.

### **Judgment**

The Court began by stating that the employer had failed to provide evidence regarding the nature of the products found on the company premises. It did not produce any analysis report from an accredited laboratory confirming what had been found in the bag. Therefore, the employer did not bring any evidence to justify the seriousness of the incident on which it based its decision to impose a drug detection test on all employees.

The Court found that the letter of dismissal was precise enough in terms of specifying the reason for the dismissal, namely that the employer terminated the employment contract because the employee (1) had admitted to being a regular cannabis user and (2) had refused to submit to the drug detection test. However, the Court considered that the letter did not enunciate with enough precision the effects that the consumption of cannabis could have had on the employee's work, since the letter was not precise about the facts or time.

The Court then noted that the fact the employer had found a bag containing suspicious (though unidentified) content did not mean this was attributable to the plaintiff.

In the opinion of the Court, there was good evidence proving the reasons for the dismissal, i.e.

that the employee had admitted being a regular cannabis user and had refused to submit to the test. The Court considered that the issue was whether these facts justified summary dismissal.

The Court then tackled the issue of the lawfulness of the drug detection test. To justify requiring all employees to submit to a drug detection test, the employer argued that it had a legal duty of care in relation to the health and safety of its employees in all respects linked to work. It added that the test had to be imposed on all the employees, regardless of the levels of risk involved in their jobs in order to avoid discrimination.

The Court then observed that in Luxembourg, the Labour Code is silent on drug detection tests at work. It does, however, set out the conditions under which medical tests can be ordered and carried out by the employer.

The Labour Code states that the employer is responsible for taking care of the health and safety of its employees in all respects linked to work. Medical tests may therefore be implemented provided two sets of conditions are respected: first, the test must be limited to employees in hazardous occupations; second, the test can never be carried out by the employer itself, but must be assigned to the occupational health care system. The Code defines which occupations are considered hazardous, namely *“any position involving exposure to a risk of professional illness, a specific risk of accident at work, physical or biological substances likely to be harmful to health, or carcinogenic substances”* or *“any position involving an activity likely to seriously endanger the security and health of other employees or third parties, along with any position involving the control of an installation whose malfunction could seriously endanger the security and health of other employees or third parties”*.

The Court applied Article 8 of the European Convention on Human Rights (ECHR), pointing out that - apart from situations where an employee consumes drugs on the employer's premises - the employer's obligation to protect the security of its employees must to be balanced against the employee's right to private life.

The restriction of a fundamental right is only acceptable if it is a proportionate means of achieving a legitimate aim. The Court's analysis of the decision of the employer to test all employees must therefore be assessed against these two conditions. With respect to the legitimate aim, the Court mentioned two rulings of the European Court of Human Rights (*Madsen – v – Denmark*, 58341/00, 7 November 2002 and *Wretlund – v – Sweden*, 46210/99, 9 March 2004) to point out that ensuring the safety of a ferry and its crew and passengers or of a nuclear power station are legitimate aims which may require interference with employees' private lives. However, the proportionality condition forbids the detection test to be

systematically imposed on all employees, regardless of the nature of their occupation within the company. A drug detection test can only be justified for those in hazardous jobs, and even then, only under the conditions (i) that a serious incident has occurred; (ii) that the test is carried out by a medical practitioner within the occupational health care system; and (iii) that the employer should only be given information about results that could affect the employee's ability to do his or her job.

As the employer in this case carried out the test itself, without entrusting it to the occupational health care system and also without proving that the employee's job was hazardous or that there was potential danger, the test had to be considered unlawful, despite its authorisation by the staff representative. The Court therefore considered the drug detection test to have been unlawful and unethical. Therefore, the plaintiff could not be blamed for having refused to submit to it and he did not commit serious misconduct by doing so.

Finally, the plaintiff's admission that he was a regular cannabis consumer was not, in itself, sufficient reason to distrust him as an employee and could not be considered as evidence that he consumed drugs on company premises or that he might behave in such a way as to threaten the security that the employer is required to maintain.

Consequently, the Court considered that the employer's reasons for dismissing the plaintiff were ill-founded and that his dismissal should be declared unfair.

### **Commentary**

This case gives an interesting additional view of where the boundary between security at the work place and private life should be drawn in the sensitive context of drug consumption. More specifically, the legal issue for the Labour Court here was to determine whether an employee could be dismissed for using cannabis after refusing to submit to a drug detection test which was imposed because some allegedly illegal substances were found on the premises.

Applying Article 8 ECHR, the Court stated that a drug detection test can breach the employee's right to private life because of the sensitive nature of the test results. But in this particular case, the employer went even further in breaching Article 8 ECHR, by displaying a notice of its decision to dismiss the plaintiff and seven other people. This allowed the plaintiff's colleagues to have a glimpse of his private life to which they had no right and this created a breach of his rights with respect to those colleagues.

The decision is welcome because it reaffirms that restrictions on fundamental rights are only permitted where there is a legitimate goal and the action taken is proportionate to it. This

should ensure that the breach of the right is minimised. In its decision, the Court went further than the European Court of Human Rights by ruling that before a drug detection test can be approved, the employer must identify that the occupation of the employee is hazardous. In the *Wretlund – v – Sweden* case (9 March 2004), referenced by the Luxembourg Court in the present decision, the European Court of Human Rights ruled that a woman employed as an office cleaner at a nuclear power plant, whose function was to clean the offices at the plant, could lawfully be required to submit to a drug detection test even though she did not have a hazardous job. The Labour Court could have followed the path laid down by the European Court of Human Rights but it decided to go deeper into the protection of employees' fundamental rights.

In this case, the employer produced dangerous chemicals and the employee worked in the analysis and metrology lab whose activities consist of verifying the measuring tools both within the lab and in production. His job could therefore have had an indirect impact on safety or security. However, since the employer did not produce the list of the positions it considered risky and did not clarify how dangerous or otherwise 'metrology' is, the Court ruled that there was no valid reason to submit the plaintiff to a drug detection test, holding that "*the condition of proportionality prohibits the use of systematic detection tests imposed on all employees, without any distinction made regarding the nature of the position.*"

What might be surprising, however, is that the Court added, after quoting the ECHR cases, that "*the drug detection test can only be used in relation to hazardous jobs, under the condition that a serious incident justifies its implementation*". The wording implies that both conditions are cumulative. We think that these conditions are alternative, since one cannot reasonably expect an employer to have to wait until a serious incident happens before being allowed to implement a drug detection test. For hazardous jobs, the employer should be allowed to impose a preventive drug detection test without waiting for an incident.

The Court finally considered that the drug detection test was against the law and ethics. This is a strong assessment. An explanation for this might be found in the questionable behaviour of the staff representative, whose role was to protect employees' interests, yet who decided on this occasion to give crucial testimony against the plaintiff - which led to the latter's dismissal. Or, maybe the fact that the employer disclosed the names of the employees who had tested positive or had refused to submit to the test after having clearly stated that submission to the test was voluntary, could have led the Court to make that very unambiguous ruling.

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*Parties: unknown*

*Court: Tribunal du travail (Labour Court of Luxembourg)*

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