

## SUMMARY

# 2012/53 Refusal to take drug test is just cause for dismissal (MT)

### Facts

The plaintiff in this case, Mr Marco Cassar, was employed by the co-operative association Kooperattiva All 4 One (the 'Cooperative'). This Cooperative's business included transporting the staff of another company, Malta Freeport, to and from their work. The plaintiff's job was to drive a bus carrying Malta Freeport employees. At a certain point in time, the Cooperative received complaints from Malta Freeport's management that the plaintiff was driving under the influence of illegal substances. Malta Freeport threatened to terminate the outsourcing agreement, if no disciplinary action was taken by the Cooperative.

The Cooperative decided to run 'random' drug tests on a number of employees, including the plaintiff. However, both he and one other employee refused to give a urine sample for the test.

The Cooperative dismissed the plaintiff for not taking the drug test, on the same day as his refusal. The plaintiff filed proceedings before the Industrial Tribunal, claiming compensation because the termination of his employment was not for a good and sufficient cause.

The plaintiff said he had refused to take the drug test, on the advice of his family doctor because he was taking prescribed medicine at the time. However, Cooperative officials testified that the plaintiff did not mention any medicines or doctors prior to dismissal.

The family doctor testified that he had not advised against taking a drug test, but had merely told the plaintiff that the drug test would reveal that he was taking medication to counteract substance abuse. The tribunal noted that the plaintiff did not release his doctor from professional secrecy obligations to confirm whether that medication was related to drug abuse.

### Judgment

As a preliminary plea, the Cooperative argued that the plaintiff was actually engaged on a self-employed basis and not employed. The Industrial Tribunal hastily dismissed this argument. It opted for a 'substance-over-form' approach and saw that the contract included clauses more akin to a contract of employment, than one of services. These clauses regulated the number of hours worked, including overtime, an hourly rate of pay, leave, and subordination to management directives. The termination of the working relationship was, therefore to be regulated by Maltese employment law and not by simple contract law.

The Industrial Tribunal reached the conclusion that the Cooperative had no other option than to terminate the plaintiff's employment for good and sufficient cause under Maltese employment law. The Tribunal remarked that the Cooperative had a moral and legal obligation to safeguard the health and safety of Malta Freeport's employees during transportation. Moreover, the Cooperative risked losing its contract with Malta Freeport if it did not take any action. This would have meant other employees having been laid off. The Tribunal also took into consideration the plaintiff's refusal to produce a urine sample and to release his personal doctor from his professional secrecy obligation.

Finally, the Tribunal expressed dissatisfaction with the way the plaintiff's dismissal had been handled from a procedural point of view and it handed down a pecuniary penalty of € 750 to be paid to the plaintiff.

### **Commentary**

There are a number of interesting aspects to this recent decision by the Industrial Tribunal, but the most interesting is the reasoning of the Tribunal that the employee could be dismissed for refusing to submit to a drug test.

Under Maltese law, there are two modes of termination of the employment relationship by the employer: (1) termination by reason of redundancy and (2) termination without prior notice for a good and sufficient cause. Although the law provides a non-exhaustive list of reasons that do not constitute a good and sufficient cause, there is no definition as such. The Tribunal is therefore required to assess each case according to its particular circumstances.

Employers may welcome the fact that the Tribunal is prepared, at least in principle, to find that refusal to submit to a drug test may constitute a good and sufficient cause for termination. Unfortunately, the Tribunal overlooked a potential conflict with the plaintiff's fundamental right to privacy. Clearly, an employee may refuse to take a drug test, given the right to respect for private life enshrined in the Maltese Constitution and Article 7 ECHR and, more particularly, the right to physical integrity provided in Article 3 of the Charter of Fundamental Rights of the EU. The beckoning question, however, is whether an employer

may infer that an employee is under the influence of an illegal substance simply because he refused to produce a urine sample. For some employees, being given the choice between undergoing a drug test and losing one's job is equivalent to being forced to undergo the test. Thus, the plaintiff was in effect being forced to agree to a violation of his physical integrity. Certainly, this is a matter to be determined on a case-by-case basis, but we submit that it would be in the best interests of both parties for the employer to require the employee to provide justification for his or her refusal prior to dismissal, and if need be, an employer should refer the case to the appropriate competent authorities prior to making any hasty decisions about a person's employment.

In this case the Tribunal has taken the view that the economic needs and interests of the employer may, in certain circumstances, override the individual interests of the employee. It is uncertain whether the Tribunal would take this approach even if the business of the employer was not in jeopardy, or there were no risks associated with the job.

### **Comments from other jurisdictions**

*Austria (Martin Risak):* From an Austrian perspective the questions raised in the decision have not yet been resolved by the courts. The legal literature, which mostly deals with the issue of alcohol abuse, tries to balance the employer's interest in getting full and uninhibited performance from the employee and the employee's constitutionally protected right to privacy and physical integrity. It argues that without explicit legal provisions (which only exist for driving under influence) an absolute prohibition on all forms of control of the physical state of a person prevails, even if these do not infringe directly the physical integrity of the individual (as in the case of a urine test). Of course, an employee may submit him- or herself to such a control voluntarily, but refusal must not result in summary dismissal. The frequently suggested solution is a clause in the employment contract allowing an employer to suspend an employee without pay from working if there are indications of intoxication and the employee does not agree to an alcohol or drug test.

A second question in this context concerns the co-determination rights of the works council. Measures of control that affect the personal dignity of an employee may only be undertaken – even in cases where the employee consents – if a works agreement (i.e. a written agreement between the employer and the works council) provides for them. As drug tests are considered to fall into this category, in businesses where a works council has been established, if they are not included in a works agreement they will be illegal.

*Germany (Klaus Thönißen, LL.M.):* Generally speaking, a German employer is not allowed to impose random drug tests on employees if the purpose of the tests is merely preventive. In

such a case, the employees' personal rights will outweigh the employer's interests.

On the one hand, an employee's obligation to participate in a drug test might arise out of his or her duty of loyalty to the employer. Therefore, before imposing such a test, the employer must have reasonable belief that the employee is working under the influence of drugs or alcohol. Therefore, as in the case at hand, a German employer would have the right to ask an employee for a urine sample, if the employer received information concerning the employee's behaviour.

On the other hand, the Regional Labour Court of Hamm found in 2006 that an employer can lawfully establish random drug tests within the company if this is necessary to assess the employees' ability to work, provided this is based on a collective bargaining or an employer/workers council agreement.

If one of the two aforementioned situations imposes a duty on the employee to take a drug test, the employer would be able to dismiss the employee if he or she refused.

*The Netherlands (Peter Vas Nunes):* In 2007 the Dutch Supreme Court handed down its controversial judgment in the *Dirksz – v – Hyatt Aruba* case. The Hyatt hotel chain had a "drug-free workplace policy" that included random urine testing for substance abuse. The staff were informed that anyone who tested positive for a drug test would be summarily dismissed. One day, Ms Dirksz, a casino beverage server in a Hyatt hotel on the Caribbean island of Aruba, was selected for a drug test. She consented to the test, which turned out positive for cocaine. Ms Dirksz was given the choice of participating in a rehab programme, being fired or resigning. She refused to enter the rehab programme and did not resign, so she was dismissed. She claimed that her dismissal was invalid. One of her arguments was that cocaine use yields a positive test result for up to 72 hours (3 x 24 hours) after the use has ceased, as was widely known on Aruba. Thus Hyatt's policy effectively meant that its employees could never use cocaine, even in their free time, regardless whether such private use long before starting work could influence work performance. The Supreme Court accepted that this was a violation of Ms Dirksz's private life, but it found the violation to be justified by a legitimate aim and the strict drug-free workplace policy to be a proportionate measure to achieve that aim.

One question that arose after the *Dirksz – v – Hyatt* judgment was what the court would have done had Ms Dirksz refused to undergo a drug test and had Hyatt dismissed her for that reason. At least one author has opined that such a dismissal would likely have been declared invalid. Although this author does not explain the opinion, the context of her statement indicates that it has to do with the Dutch law transposing the 'Privacy Directive', Directive 95/46. Data concerning health are 'special' data within the meaning of Article 8 of the

Directive, which may not be processed except (inter alia) where the data subject (Ms Dirksz in this case) “has given his explicit consent”, which Article 2(h) defines as “any freely given specific and informed indication of his wishes”. How freely given and how specific is consent that is given on pain of dismissal?

A recent judgment by an appellate court (18 September 2012, LjN: BX 8354) held that refusal to undergo a drugs test could, in the circumstances of the case (oil refinery, zero tolerance policy), lead to a summary dismissal, given that the (random) test served a legitimate aim (safety) and that the means to achieve that aim were proportionate.

In a sense, the fact that the Dirksz – v- Hyatt judgment caused a stir among lawyers is surprising, given that the ECtHR had previously given its blessing to similar drug-free work policies in its 2002 ruling in Madsen (appl.nr. 58341/00) and in its 2004 ruling in Wretlund (appl. nr. 46210/99).

*United Kingdom (Richard Lister):* In the UK, compulsory drug testing in the workplace would engage the employee’s right to privacy under the Human Rights Act 1998 and also fall within the Data Protection Act 1998. A drug testing policy can still be justified, but only where it is genuinely necessary and carried out proportionately. It is much easier for an employer to justify drug testing in a safety-critical job, such as in this case.

Testing positive for drugs can be a fair reason for dismissal in the UK, depending on the nature of the employee’s job. In relation to whether it would be fair to dismiss an employee for refusing to take a drug test, it would certainly be unlawful to force someone to take such a test. This would breach their privacy rights and also their data protection rights because they would not have given genuine consent.

However, where a drug testing policy is justified in a particular workplace, the employer could include a provision in the contract stating that refusal to take a drugs test is a misconduct offence. The employee could then be disciplined for the refusal. Whether any consequent dismissal is fair will depend on whether the drugs testing policy is justified, the importance of a clear drug test for that particular employee’s role and the employee’s reasons for the refusal. The employment tribunal would take account of the employee’s privacy and data protection rights in reaching its decision.

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**Parties:** Cassar Marco - v - Koperattiva All 4 One

**Court:** Industrial Tribunal, Malta

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**Creator:** Industrial Tribunal of Malta

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