



"Invasive" urine-sample demand reasonable: FWC

23 September 2021 7:01am

The FWC has upheld the dismissal of an "intransigent" sales employee who declined on "medical" grounds to comply with her employer's lawful and reasonable direction to supply a urine sample for a random drug and alcohol test.

Hardware supplier Lyndons Pty Ltd T/A Lyndons terminated the employment of the internal salesperson in February for her "continued refusal" to provide a sample under the terms of its "zero tolerance" drug and alcohol policy.

However, the self-represented worker claimed she objected to the "invasive" request for a urine sample because of a "personal medical condition" – a urinary tract infection.

She told the FWC she had been happy to provide an oral swab, which is one of the testing methods available under the employer's drug and alcohol policy.

As a result she had complied with the policy and she had reasonably refused to provide a urine sample, the salesperson contended.

She claimed she told the testing officer and her employer's managers of her reasons for refusing and about the nature of her medical condition, but the testing officer said she didn't specify the condition.

Lyndons failed to consider her reasons or discuss the matter with her before deciding to terminate her employment, she said.

The salesperson conceded she had consented to a urine test in 2018, but at that stage didn't have a medical condition to prompt her to object.

When the salesperson declined the urine test for medical reasons on February 1 this year and sought a saliva test, the company's testing provider, [Drug Detection Au](#), told her this would not be possible and would be deemed to be a refusal to undergo testing.

Deputy President Ingrid Asbury observed that the salesperson did not object to the policy *per se*, but "took issue" with the way the employer applied it.

The employer's policy provided for a drug and alcohol "screen" that might involve "a breath test, urine sample, oral swab, and blood test", while leaving the door open to "new technology".

The salesperson told the Commission that when the employer conducted training on its drug testing regime in 2019, she questioned it about why it "chose to have such an invasive method of testing when swab testing was used by the police, mining companies and the majority of the building and construction industries" and the trainer responded that it cost Lyndons the same amount to swab test as it did to urine test.

She later exchanged emails with the company's head of marketing and communications (copying-in the chief executive and her branch manager), in one of which she stated that she did not condone testing positive in the workplace and was fully aware of the policy, but believed "the company should adapt to a culture practiced in the

building industry to support all employees and offer rehabilitation, especially those who have been loyal and served many years".

At a meeting late last year with the chief executive (a former CFMMEU organiser) the salesperson put her arguments to him, including that testing based on urine samples involves an invasion of privacy.

The chief executive said that he then consulted with Craig Bartkowski, the owner and manager of Drug Detection Au, who convinced him that the company could best meet its duty of care to employees by maintaining its urine testing regime and that Bartkowski told him "swab testing is just a moment in time which cannot detect substance abuse".

Bartkowski told the Commission that saliva testing is preferred by drug users "owing to the shorter detection window compared to urine".

He cited as an example the six-week window for cannabis in urine for a heavy user, while in saliva that is reduced to eight to 10 hours.

He told the Commission under cross-examination he stated that as a general comment about testing methods and he had not directed it at the salesperson nor suggested she had been motivated by drug use in refusing a urine test.

The salesperson said she found Bartkowski's comments offensive and that someone would request a saliva test if they had a urinary tract infection and that "females know what it is like to have such a condition".

Deputy President Asbury accepted the salesperson's protestations that she "had no concern about passing a drug and alcohol test including a urine screening test".

She found that she "unreasonably maintained her refusal to undertake a urine test", given that by eight days later "she had recovered from the medical condition which she claims prevented her from undertaking the test on 1 February 2021".

The company did not claim the salesperson had been dishonest in claiming a UTI prevented her taking the test, but claimed that the condition did not provide a basis for establishing that she had been unreasonable in refusing to comply with the urine test direction.

Deputy President Asbury concluded that the salesperson did not have an entitlement "to insist upon her preferred method of testing in circumstances where she was lawfully required to undertake a test using a testing method chosen by [her employer] pursuant to its right to do so and that requirement was reasonable".

"If [the salesperson] had a reasonable basis to refuse to undertake a urine test on 1 February 2021, she did not have a reasonable basis to continue that refusal after 9 February 2021, when on her own evidence, her urinary tract infection had resolved."

[Kylie Desmond v Lyndons Pty Ltd T/A Lyndons \[2021\] FWC 5677 \(21 September 2021\)](#)

- In a sidelight, a tester employed by the company's testing provider told the Commission that when testing resumed in the second half of last year after a pandemic-driven "halt", a high incidence of "non-negative" results "forced" the company under its zero tolerance policy to dismiss 13 employees, including 90% of its workers at one branch.

© Copyright 2021 Workplace Express