Managing drug and alcohol misuse at work
The CIPD is the professional body for HR and people development. The registered charity champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has more than 150,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.
Training scenarios

Managing drug and alcohol misuse at work

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Information for trainers

A key part of implementing a drug and alcohol misuse policy that aims to support an inclusive and supportive culture is giving employees and line managers the knowledge and skills they need to handle any situations which may occur. However, the CIPD Managing drug and alcohol misuse at work report found that too few employers provide training to line managers on either recognising signs of stress (38%), recognising the symptoms of drug and alcohol problems (26%), or on how to manage and support employees more generally (32%). And yet the HR professionals surveyed rated training to help line managers recognise the symptoms of drug and alcohol problems as the most effective method to help prevent misuse, closely followed by improving management practice on how to manage and support employees in general.

In light of this we have produced a set of training scenarios that can be used to introduce employees and line managers to the type of scenarios they could face, to prompt discussions about the best way to manage such situations and allow the organisation to communicate the type of support and management of any drug and alcohol misuse they want to encourage in their business.

How to use these scenarios
The following scenarios can be used in remote or face-to-face training sessions to help line managers and other participants gain awareness of how to manage drug- and alcohol-related situations. The pages on a tinted background can be handed out or sent to participants, while the pages on a white background should be used by the person leading the training. Discussion can centre around differing potential action paths, evaluating the options to take at each point. The scenarios and solutions are made more valuable by structured discussions, perhaps identifying how previous situations may have been handled and how managers can improve upon what they do.

Depending upon the number of training participants, participants can:

• Go through the scenario in small groups, closely examining the complexities of handling the problem and any decisions and approaches that were effective. If the training is being done remotely, breakout rooms can be used. The pages on a tinted background can be handed out or sent to participants, while the pages on a white background should be used by the person leading the training.

• Assign someone to explain the employee’s position, assigning roles in the scenario, including not only the main employee but colleagues, witnesses and any employee representatives. Participants can read and improvise the likely explanations the employee may offer. Participants can make deliberate mistakes to discuss dealing with rectifying those.

After going through and discussing each scenario, participants can add their own complexities. For intensive training, participants can send emails from characters in the scenario or other messages that employers and employees may send if this were a real situation.

If the training is being conducted online, the sessions could be spread out over several days, focusing on an aspect of the scenario as a daily episode so participants can make staged decisions about courses of action and focusing on further aspects of the story one scene at a time. With online training it is possible to let the scenario play out in real time, dipping in and out of the scenarios for a few minutes every few days, inserting realistic delays between stages when actions are taken or decisions made.
Information for participants

Background to scenarios
The employers in the following training scenarios form part of the fictional Broadway group (‘Broadway’). The parent company was originally established in premises on the Broadway in Wimbledon, London SW19.

One of the companies forming part of the group is Broadway Logistics Limited. This is a medium-sized logistics company based in the Midlands. It operates at a number of locations throughout the UK, providing a range of supply-chain warehousing, transport and store distribution services. The company services several retailers, offering shared and dedicated user warehousing, logistics management, contract distribution, express services, road freight, courier services and parcel delivery, including Irish and other European distribution.

HR
The HR team comprises three people, headed up by Diana Ambrose, who has built up over ten years’ experience in the transport sector, dealing with challenges including extended working hours, complex shift patterns, the necessity for skills and development, and industry-specific regulations.

Employees
Employees include a range of warehouse and transport management roles, including warehouse general management, warehouse operatives, shift managers, team leaders, health and safety staff, transport managers and HGV drivers. There are also small IT, finance, and HR and business development teams. The MD feels there will be a need to expand in the near future. Current staff include accounts payable and receivable assistants, finance managers and payroll administrators plus account managers.

Drug and alcohol policy
Broadway Logistics Limited’s drug and alcohol policy reserves the right to carry out random and ‘for cause’ tests in response to an incident or suspicion for both drugs and alcohol. Alcohol testing is based on a sample of breath, while drugs and illegal substance tests are based on a sample of urine. Broadway’s policy reminds warehouse and distribution staff that the use of non-prescribed drugs is dangerous and illegal under criminal law. The policy also states that a refusal to undertake a test may result in disciplinary action up to and including dismissal.

Being under the influence, in possession, using or supplying drugs for non-medical purposes, whether on or off company premises, is strictly forbidden. The policy states that any employee committing such an offence during the course of their employment may face disciplinary action, which could result in dismissal. The policy specifies that staff must also discuss prescription drugs that may affect their ability to perform work with their line manager or a member of the HR team.

An alcohol problem is defined as any drinking, either intermittent or continual, which interferes with a person’s health, social functioning, work capability or conduct. Broadway requires all employees to report for duty free from the effects of alcohol and illegal drugs. It is not acceptable to be under the influence of alcohol or drugs at work or consume alcohol or drugs during hours of work.
Scenario 1

Broadway Logistics have employed Yvonne Williams as a shift manager for three years. At the start of her employment Yvonne signed her contract and a letter to the effect that she had read and understood Broadway’s drugs and alcohol policy. Her current salary is £30,000 per year.

Situation
Yvonne has a number of conditions including long-term anxiety and chronic obstructive pulmonary disease (COPD) - a chronic inflammatory lung disease that causes obstructed airflow from the lungs and pain. About five years ago, in her early thirties, she had several operations after falling and fracturing her knee. The GP prescribed tramadol for the knee pain. Tramadol is an opioid pain medication that Yvonne has taken ever since. The drug has eased Yvonne's knee pain in the short term and, as it can create feelings of wellbeing and euphoria, it has also alleviated her underlying anxiety in the longer term.

On a Friday about three weeks ago Yvonne was told to join several staff who were being tested for drugs and/or alcohol. Yvonne signed a consent form agreeing to the urine test as requested by Mr Knowles, the health and safety manager who was supervising the testing.

Yvonne was then given a pot to urinate in. She did so and returned the pot to Mr Knowles and waited five minutes for the result. To her surprise the sample tested positive for methadone, which she says she has not taken. When asked why the test showed positive for methadone, the only explanation she could think of was that tramadol or one of her other medications had affected the result.

Actions taken
A drug and alcohol test investigation then followed, with Yvonne insisting she did not know what caused the positive test other than tramadol or her prescribed medication. She says she had nothing to hide, and has never taken methadone, only prescription drugs. Because of the company’s no tolerance policy and the need to protect other staff in the warehouse, she was suspended on full pay pending a disciplinary hearing.

The letter inviting Yvonne to attend a disciplinary hearing stated the failure of the drug test and testing positive for methadone constituted potential gross misconduct. In the absence of a satisfactory explanation, her employment was at risk of being terminated without notice. The letter said she should supply evidence from a member of the medical profession to support why her test produced a positive drug test result for methadone. Failure to provide the information would result in a decision being made on the evidence available at the time. Yvonne was told of her right to be accompanied by a fellow employee or trade union representative.

Response
Yvonne has tried to get help from her GP, who said it was right for a GP to give an opinion about whether the medication might have caused the positive test.

At the hearing Yvonne told the senior shift manager conducting the hearing, Sarah Tomczyk, that the failure of the test could either be a mistake or because of her prescribed drugs. She explained her GP would not express an opinion that her prescribed
medication could show up for methadone on a drug test because it was beyond her expertise. The investigating manager produced a leaflet from the Drug Aware charity stating that tramadol would not show positive for methadone.

After a short adjournment Mrs Tomczyk made her decision, based on the fact that Yvonne had failed a drug test for methadone and had been advised to obtain medical proof that her medication could result in a positive drug test for methadone and had not done so. She stated, ‘Therefore you have left me no alternative but to terminate your contract with immediate effect with Broadway. All monies due will be forwarded to you in due course. You can appeal this decision in writing to HR within seven working days.’

Between this hearing and the appeal, Yvonne had managed to find CAG Limited, a company specialising in the analysis and interpretation of drug results from human biological samples. She paid for a report, which said:

1. They had tested a new sample of Yvonne’s urine which was negative for methadone. It was not possible to check the previous sample from the test done at Broadway as this had been thrown away.
2. The report stated that the test Broadway had done (known as immunoassay screening) depends upon a biological process creating a colour change when a substance was present. The report confirmed that although immunoassay tests are very quick and sensitive, they are not very specific. The report said: ‘For this reason, a sample should only be considered to be presumptively positive and the same sample should then have had a second confirmation laboratory test specific for the target substance.’ This would have definitively identified if methadone was present in the sample.

**Outcome**

Prior to the appeal hearing HR advised to the effect that there only had to be a reasonable belief that the claimant was under the influence of methadone, and if there was a reasonable belief there were grounds to dismiss. It did not have to be proven to a criminal standard.

The appeal manager then upheld the decision of dismissal, saying: ‘Based on all the evidence provided we had genuine belief that at the time the original drug test was taken that there was methadone present. I am more than 51% certain that the urine sample tested positive for methadone. This is a high-risk drug in a dangerous warehouse setting with machinery in close proximity at all times. In summary, I found your explanation to be unsatisfactory; and uphold the decision of dismissal.’

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**Questions to pose to training participants**

- What potential claims does Yvonne have (if any)?
- Is Broadway’s decision reasonable?
- How could it have handled the situation differently?
- What are Broadway’s options?
- If Yvonne admits obtaining tramadol illegally from online pharmacies as well as from a drug dealer, would that make any difference?
- Would it make any difference to any potential claim if Yvonne had in fact been taking methadone?
Discussion points – potential claims

What potential claims does Yvonne have (if any)?

Yvonne’s primary claim is for unfair dismissal. She may also have claims for:

- **wrongful** dismissal (we know she was dismissed but do not know if she was given a full notice period)
- a separate claim for **failure to allow** an appropriate companion at the disciplinary hearing, if she was not offered that option
- potential **disability** discrimination.

As part of the training, participants can discuss the complexities of any potential disability discrimination claim. Why is a potential disability discrimination claim significant? One reason is that the potential compensation is likely to be significantly higher than in an unfair dismissal claim.

Yvonne has many interlinked conditions, including long-term anxiety and chronic obstructive pulmonary disease (COPD), which will probably count as disabilities under the Equality Act 2010. These conditions meet the definition of mental or physical impairments, but Yvonne would need to show they have a substantial and long-term adverse effect on her abilities to carry out normal day-to-day activities. Is any addiction to a prescription drug covered? A quick internet search may cause an employer to think that employees with addictions are not protected by the Equality Act. While addictions are expressly excluded from the definition of disability, any addiction as a result of taking medically prescribed drugs are an exception to this. Therefore, Broadway are at risk of a disability discrimination claim too, as:

- Yvonne’s addiction arises as a result of taking medically prescribed drugs (tramadol), so she could be protected by the Equality Act for this reason.
- Addiction may cause a condition which is itself a disability. Opioid side effects can include dependency, respiratory issues, and immunosuppression. If Yvonne has been treated unfavourably because of an underlying disability rather than the addiction, she is protected for this reason as well.

**Summary**

Yvonne’s long-term anxiety and COPD almost certainly constitute a disability and she appears to suffer from a substance addiction that contributed to her problems at work. Broadway should have carefully discussed and considered options before dismissal. If they wish to dismiss her anyway, they should at least budget for potential compensation due to a mismanaged departure.

In the UK prescription of opioids has increased dramatically, so employers are likely to encounter more issues related to prescription drugs leading to unfair dismissal and disability claims if not handled correctly.

**Discussion points – was Broadway’s decision reasonable?**

The way Broadway handled this means that the final decision to dismiss was not reasonable in all the circumstances.

There are two stages to the potential unfair dismissal claim:

1. Is there a potentially fair reason for dismissal? There is here, namely ‘conduct’. Broadway have concluded that Yvonne acted contrary to the terms of its alcohol and drugs policy. This is a potential reason to dismiss.
Scenario 1

2 However, the dismissal also has to be fair and reasonable in all the circumstances. This includes looking at the nature of the allegations, the investigation, procedure and the approach taken overall.

Broadway must believe Yvonne had taken methadone and lied about this, and it must have reasonable grounds for that belief, which must have been reached following a reasonable investigation.

What deficiencies are there with their approach to date? Examples include:

- The investigation was not as extensive or comprehensive as it could have been, especially when considering the report Yvonne supplied. She clearly highlighted the flaws in the testing process at the appeal stage.
- Yvonne has good service and an unblemished record; she has been a highly regarded, long-serving employee who says she had not taken methadone. She provided a number of explanations and stated that there must have been an influence from her prescription drugs or contamination. It is clear the contamination theory was difficult for Broadway to accept and her slightly shifting explanation does seem inconsistent in places. However, Broadway should have put more effort into examining evidence that would support what a trustworthy, long-term employee was saying.
- The investigation involved in dismissing an employee for testing positive for methadone should be extensive. The all-important initial test relied on by the employer was arguably defective and should have been followed up by a second laboratory test. There was no discussion of the question of whether dismissal was an appropriate sanction either. The dismissal was therefore probably outside the band of reasonable responses.

(See similar cases of Mr N Friend v London Fire and Emergency Planning Authority (2017) and Kenneth Ball v First Essex Buses Ltd (2017).)

How should Broadway have handled the situation?

Broadway should have fully followed both their own disciplinary and drug and alcohol processes and the Acas Code of Practice on Disciplinary Procedures.

An improved handling of the situation can be summarised under the following categories:

- **Prior to the testing**
  Broadway already has a drug and alcohol policy making it clear that attending the workplace under the influence of drugs and alcohol is unacceptable. What proactive intervention was taken under this policy? If the employer was aware Yvonne was taking prescription medicines on a long-term basis, what have they done about this? Prescription drugs can and do affect an employee's performance at work. Has the policy been followed fully?

- **Investigation**
  Broadway could have investigated more thoroughly and taken many other steps to handle the situation differently. The urine sample should initially have been retained rather than being disposed of and the sample should have been kept in appropriate conditions pending the conclusion of the disciplinary process. There should have been second confirmatory laboratory testing. It is impossible to remedy any testing deficiencies once a sample has been disposed of.

- **Medical report**
  Addiction can be the underlying cause of many work issues, including misconduct, absenteeism and poor performance. Here Yvonne’s continued drug use seems to result from stress, anxiety or depression, so Broadway should consider obtaining a medical report to understand her medical position before proceeding with any disciplinary sanction.
**Discussion points – how to handle the situation differently**

Participants can be given a time period to detail steps Broadway should have taken. For example, one person can look at stages before testing, another during testing, prior to the suspension and subsequently. The following steps may be identified:

**Contract**
- Check clauses in Yvonne’s employment contract covering both random and ‘for cause’ workplace drug and alcohol testing.
- Broadway Logistics Limited’s drug and alcohol policy reserves the right to carry out random and ‘for cause’ tests in response to an incident or suspicion for both drugs and alcohol. Does Yvonne’s contract expressly include agreement to random drug tests and state that being under the influence of drugs in the workplace is a dismissible offence? If so, this puts the employer in a stronger position.
- The Broadway policy specifies that staff must discuss prescription drugs that may affect the ability to perform work with their line manager or a member of the HR team. As Yvonne had not done this, her failure to discuss this could have formed part of the disciplinary proceedings together with the methadone accusation.

**Testing**
- On-site workplace drug testing is fine, allowing staff to get back to work with the minimum of disruption, but Broadway should have had a properly trained person doing the tests to ensure there was no contamination.
- Workplace drug testing for transport and construction sectors in the UK may involve more extensive drug screening than normal. Here Yvonne works for a logistics company but she is not a driver, so a more minimum test may have been justified.
- Saliva drug testing is harder to interfere with as the collection is directly observed.
- After a positive workplace drug test result, the positive result should be cross-referenced with the manufacturer’s data for prescription medicines.
- There should have been quality control and drug testing records on the drug test results and urine samples using a secure system so the sample could not be tampered with.
- Yvonne could have been given some of the urine sample to take away and have tested herself.
- Broadway may consider future testing for prescription drugs with an employee’s consent, including drugs such as tramadol, which would show up on toxicological testing for prescription drugs.

**Investigation**
- When Yvonne raised the prescription medicine possibility, this should have been investigated fully.
- There should have been more testing of the sample to see if the prescription medicine was causing the problem.
- Yvonne’s role is not highly safety-critical as she is a shift manager, but it was still probably acceptable that she was not allowed to continue work until the drug test result is checked.
- It was probably correct to suspend Yvonne on full pay, pending further investigations, but disciplinary action should not have been taken until the drug test was confirmed with a laboratory drug test from the same original sample in an accredited laboratory.

**Disciplinary process**
- Training participants can discuss all likely stages of the employer’s own procedure and Acas stages that should have been complied with. For example:
- We do not know if Yvonne was given the opportunity to have a companion in the disciplinary meetings.
- Were correct meeting procedures followed, including different managers for the investigation, disciplinary hearing and appeal? It sounds as if the first two managers were different, but what about the appeal?
- Was there enough evidence to suggest that disciplinary action is appropriate? Probably, but at the information and evidence-gathering stage of the process. It was almost as if the employer presumed guilt.
- Was a sanction of a written warning discussed as an alternative?

What are Broadway’s options now?

Broadway’s potential paths can be divided into options that would have been available prior to the decision to dismiss her and the options available now she has been dismissed. Given the scenario to date, it is clear the dismissal is arguably flawed, so the main options are:

• reinstatement
• negotiating a settlement package to prevent a tribunal claim
• attempting to defend an expensive tribunal claim despite a flawed dismissal.

Discussion points – actions Broadway could have taken

The overall options available to Broadway include:

**Talking to her**

When Broadway initially found out that Yvonne was under the influence of prescription drugs at work, the first step would have been to find out what is happening with her. She had a contractual duty to report her prescription drug use to HR and, at the very least, she has delayed doing so. She has not displayed signs of being under the influence of drugs at work and, even if she has, dismissal may not be a fair response. Being under the influence of drugs can be misconduct, and for certain illegal drugs gross misconduct justifying dismissal, but an employer can’t automatically assume that there will be grounds for termination.

**Support and time off**

Broadway could decide to support Yvonne with her addiction. Broadway could offer access to support such as obtaining a medical report to understand her medical position, counselling or time off to attend medical, rehabilitation and other appointments. Some employees with addictions can beat the issue and return to their previous work performance if given the right support.

**Alternatives**

Yvonne could have been given a warning and opportunity to get the drug dependency issues under control. If it is accepted the drug is a prescription one, did it have a detrimental impact on her ability to do the job? If so, dismissal is more likely to be appropriate. There must always be a good reason to justify dismissal, related to conduct or capability. Dishonesty about drug use may be conduct justifying dismissal, as is continually missing work and evidence of illegal drug use and abuse.

**Settlement**

As an alternative to the dismissal route, Broadway should have a contingency budget for payment of compensation if needed to manage Yvonne’s departure. Participants can create specific monthly financial details for Yvonne’s £30,000 salary package and be asked to make some rough calculations of the potential settlement package. This would be based on what
an unfair dismissal basic and compensatory award would be, assuming Yvonne cannot find other work for six months and, if she does, that this is on a lower salary. Assuming Yvonne is between the ages of 22 and 40, she is entitled to an unfair dismissal basic award of one week’s pay for each complete year of employment capped at £538 per week. In addition, she would claim a compensatory award taking into account money lost as a result of being dismissed. This element will include:

- compensation for any period of unemployment before finding another job, although she must try to find work and limit the amount of money lost
- an extra amount to make up for the fact that it will take her two years in a new job to get unfair dismissal protection (called compensation for loss of statutory rights)
- reduction for any partial responsibility for the dismissal
- any increase for Broadway’s failure to follow the proper procedure before dismissal
- taking into account the maximum cap for compensation for an unfair dismissal claim (likely to be far less than the unfair dismissal cap anyway).

Bearing in mind the disability discrimination issues, this adds a risk contingency to the unfair dismissal settlement package. The overall taxable limits on settlement packages should also be borne in mind. Negotiations leading to a settlement package could have occurred as an alternative to dismissal, but may also be advisable after a flawed dismissal.

**Points to address**

If Yvonne admits obtaining tramadol illegally from online pharmacies as well as from a drug dealer, would that make any difference?

Obtaining prescription medicines from online pharmacies without medical supervision is usually a criminal offence, as is purchase from a dealer. The only significant difference from an employment law perspective would be the fact that she was admitting the issue rather than denying illegal drug use. If an employee admits the issue rather than denying the validity of the test, the employer may have a greater chance of conducting a fair dismissal if it wishes to do so. However, the employer would have an additional risk of exposure to criminal prosecutions if they know illegal drug use is taking place at work.

Would it make any difference to any potential claim if Yvonne had in fact been taking methadone?

If Yvonne admitted that the test was correct and that she had been taking methadone, some of the legal issues would be similar to the illegal prescription drug scenario above. Allowing Yvonne to be in the workplace while under the influence of drugs could lead to the employer’s prosecution.

The Equality Act 2010 protections from discrimination do not cover addiction to non-medically prescribed drugs, so Yvonne is less likely to be protected for this reason, although she has other potential disabilities. There is also a suggestion that Yvonne’s drug use is as a result of stress, anxiety or depression, so Broadway should consider obtaining a medical report to understand her medical position before proceeding with any disciplinary sanction.

In any event Yvonne’s long-term anxiety and COPD constitute a disability. The Acas Guide to Discipline and Grievances at Work advises employers of those suffering from drug or alcohol abuse to at least consider measures to help employees. Failing to consider possible help may affect the reasonableness of any disciplinary sanction imposed. Broadway could consider offering Yvonne time off to seek medical help for her addiction issues, with medical advice perhaps about a phased return.
Employers should take the following into account:

- **Law**
  Relevant legal provisions include the Misuse of Drugs Act 1971, which makes the production, supply and possession of certain controlled drugs unlawful. This Act covers illegal and non-prescription drugs, including tramadol and methadone. Allowing Yvonne to be in the workplace while under the influence of drugs could lead to the employer’s prosecution, as the severe side effects of tramadol, especially if misused, could include hallucination, unconsciousness, seizures, difficulty breathing and poor concentration, and could put Yvonne or others at risk. (See Health and Safety at Work Act 1974 and Management of Health and Safety at Work Regulations 1999.)

- **Policy**
  If Yvonne admitted she was using illegal prescription drugs, the company should have started by talking to her and following its policy. We are told that the policy specifies that staff should discuss even prescription drugs that affect the ability to perform work with their line manager or a member of the HR team. Employers should always ensure that their policy covers the misuse of illegal drugs, alcohol, and prescription drugs that may affect an employee’s performance.

- **Prompt action**
  As with any other illegal drug use, Broadway should have taken action as soon as it became aware that Yvonne had a potential addiction, either due to suspicions about the way she acted or at the very least when she finally told them. Tramadol and similar prescription drugs, even though originally needed for a health reason, can become habit-forming and addictive. This should have been investigated (with Yvonne’s permission), as the employer has a duty to take care of all employees’ health and safety. Potentially the company could follow a disciplinary process leading to dismissal, provided that the employment contract defines breach of the drug and alcohol policy as gross misconduct. This may be the chosen course of action, especially if poor concentration, and so on, could put her or others at risk through the substance misuse. The fact that the substance is illegal is likely to be a relevant factor for the employer to take into account in determining appropriate sanctions.

With an ageing workforce, increasing numbers of employees will be on prescription medication for common health problems during working hours. Employers need to become more informed about how to deal with both prescription and non-prescription medicines. The UK is the worst offending country for prescription drug abuse in Europe. Buying medicine from illegal online pharmacies is increasingly common, with painkillers, anti-anxiety medicines, and anti-depressant drugs presenting an increasing problem. For example, diazepam (Valium) is a commonly illegally obtained Class C drug in the UK. Employers should be alert to the fact that the NHS does not recommend some of these drugs to be taken for longer than four weeks. Any employees who are long-term users may be possessing drugs without a prescription, which is a criminal offence and carries a maximum prison sentence of two years.
4 Scenario 2

The second scenario concerns some night warehouse operatives.

Situation
The daytime warehouse operations manager Mark Bartlett came back to Broadway to collect his car at about 11pm after a birthday celebration for one of the daytime staff. He was sober; he heard laughter and loud voices coming from a side area known as the control room and saw someone outside smoking.

He thought he would just check and inside the room there was a total of about six people. The table normally in that room had been moved for the purposes of what appeared to be a card game. There was a strong smell of alcohol and there were cans, plastic beakers and chip wrappers on the table.

On seeing Mark, the group dispersed quickly, returning to work. Rob Turner (the night-time supervisor) said they were just finishing up after a 15-minute break.

Actions taken
The next day Mark reports the matter to HR and the following night shift employees are told that drinking on duty is a serious disciplinary offence and potentially gross misconduct. They are all suspended following the usual investigation pending separate disciplinary hearings. The suspension letter states that the employees should not contact other staff members until after the disciplinary hearing. The following facts emerge:

• Pardeep Singh says that he had one lager before coming into work but that he had not been drinking while sat at the table with the others. Mark Bartlett said he smelled of alcohol and was behaving as if drunk on the evening in question, and employees have previously reported him for smelling of alcohol on other occasions.
• Rob Turner has also been seen drinking alcohol on duty before. During the investigation, he admitted drinking and says that his manager already knows he is an alcoholic. He was subject to an earlier disciplinary process about six months ago because he turned up for his night shift drunk; he was sent home unfit for work and given a written warning the following day. He says he has taken assistance from the employer’s occupational health (OH) service previously and been referred to them for counselling. In fact, no OH referral has been made.
• Luca Nicolosi had attended the birthday drinks for one of the Broadway daytime staff before arriving for his shift. He admits he had received some bad news about a sick relative and had drunk a couple of alcoholic drinks. Other witnesses say Luca was ‘hammered’ when he left the birthday drinks. At the event, he had behaved ‘erratically’, introducing himself to people he already knew. Luca telephones the employee whose birthday was being celebrated during his suspension, asking her to tell Broadway that he had not been drunk at the birthday drinks. He says he had not read the entire suspension letter and had therefore failed to realise that he was not to contact staff members.

Questions to pose to training participants
• What further information would you need to know to investigate this matter fully?
• Would dismissal for gross misconduct be appropriate for any (or all) of the employees?
• If the employees were dismissed, what potential claims could there be?
• How should Broadway have handled the situation with respect to each employee?
Discussion points

What further information would you need to know to investigate this matter fully?
In order to investigate this matter fully, Broadway needs to be very thorough. The first point to make is that all the night-time warehouse staff presumably have responsibilities involving driving or care of machinery, so they may be risking their own or each other’s health and safety by drinking on duty. Employers can often justify more serious sanctions where health and safety is a consideration and employees operate machinery or drive vehicles as part of their duties.

The employees’ behaviour may justify dismissal for gross misconduct. But Broadway must promptly allocate significant time and resources to investigate and follow a fair and reasonable investigation and overall procedure.

Participants can list the steps they would take, for example:

- **Planning:** The manager allocated to deal with this should start by making an investigation plan. This will include who is carrying out stages of the procedure, starting with the investigation. The employer should think about who will handle matters if further action is needed. Acas advise that a different person should handle each step of the disciplinary procedure, including the investigation, the disciplinary hearing and outcome, and the appeal hearing. Where possible, the employer should assign a more senior person to handle the disciplinary hearing than the person assigned to the investigation.

- **Policy:** An early step is to look at the Broadway drug and alcohol policy and disciplinary and grievance policy. We are told that this requires all employees to report for duty free from the effects of alcohol and illegal drugs. Drinking alcohol is listed as an example of gross misconduct in Broadway’s policy. Employers must make it clear to employees what the rules are and the consequences of any breach of the rules. It is too late to test these employees. The policy states that a refusal to undertake a test may result in disciplinary action up to and including dismissal. Does the policy clearly explain what will happen if an employee tests positive or if they are not tested at all?

  If employees will lose their job for alcohol consumption at work (including during breaks), this should be clearly set out and the policy drawn to the specific attention of employees. Ideally employees should sign to confirm receipt of the policy. Employers must actually establish all employees would have known that this conduct was a serious breach of their duties, which is difficult when the night-time supervisor (Rob Turner) was joining in and possibly leading the drinking.

- **Testing:** Broadway needs to prove that the employees were actually drunk. However, this was difficult as the event happened on the night shift and nothing was done until the next day. In a sector like logistics, it is reasonable to ask for blood tests and this is covered in the Broadway contracts and employee’s consent is provided for. On these facts, Broadway is too late to obtain blood tests and employers are frequently unable to do so. (If they do, like drugs, the information resulting from an alcohol test is still sensitive information under the Data Protection Act. Any medical professional carrying out a test is subject to the Access to Medical Reports Act too.)
• **Suspension:** We are told Broadway has suspended the three employees on full pay. While it may be correct to suspend on full pay, why were just those three employees suspended and not the other three present? An employer should normally avoid suspending employees under a disciplinary investigation unless it is essential to protect any of the investigation, the employees under investigation, any other staff or the employer’s business. Broadway should have made it clear that this does not mean it believes all the employees are guilty; the reason for suspension should be kept confidential. The employees should have been told to not contact colleagues. A named manager should keep regular contact with the employees throughout.

• **Basics:** Broadway must issue a written communication setting out the facts in an accurate way (so not ‘you were drunk’, but details like the smell of alcohol, slurred speech, if any, noisy atmosphere, cans on the table, and so on) and that the drinking of alcohol on the premises may result in dismissal. The employer will tell the employee they are opening an investigation, explaining who will be carrying it out and that the employer will talk to all witnesses, and setting out all the disciplinary stages and that everything will be kept confidential.

• **Investigation:** There should then be an investigatory meeting with all employees individually where the matter can be discussed. The tribunal will expect the employer to have carried out a reasonable investigation. All three employees must be treated fairly, and evidence gathered from both sides, including things which may excuse one or all of the employees. The employee’s conduct during the evening shift must be put to each employee to address fully.

• **Witnesses:** This evidence is key. The daytime warehouse operations manager Mark Bartlett can give a clear witness statement about what he saw. However, we are told that more than just the three employees were present; there were at least six people present. What is their explanation for what happened that evening? There may also be CCTV recordings. Confidentiality is important to help make sure the process is full and fair. The person investigating will have a meeting with all witnesses to ask them what they saw. At the end of the meeting, the witness should sign meeting notes, which can also form the basis of a witness statement. Things to include are if the employees staggered, smelled of alcohol or slurred their speech. Detailed statements should be sent to the employee in good time to allow them to consider it before later hearings.

• **Investigation report:** When the investigation is finished, all relevant people dealing with the disciplinary process should have a written report, which is also sent to the employee.

• **Full disciplinary procedure:** Assuming the person investigating recommends formal action, the next stage is the disciplinary process. Some issues can be resolved informally; here a formal procedure is probably justified, otherwise the incident may be repeated. However, if it is established that the manager was instructing the more junior employees to join in against their better judgement, informal action or a warning may be sufficient. The employer must follow the Acas Code of Practice on Disciplinary and Grievance Procedures, and Broadway’s own policy or procedure.
What disciplinary sanctions would be appropriate, if any?

Obviously, dismissal is one option, but alternatives to dismissal should at least be considered. What penalties have Broadway used in similar cases? The options are fairly limited:

• verbal warning
• written warning
• performance improvement plan
• demotion.

With the employee’s consent, other solutions may include splitting the group up, transferring some to the day shift, and so on.

Discussion points – appropriate sanctions

How do employers decide which sanction is appropriate for each employee?

As Broadway’s rules clearly stipulate that drunkenness is gross misconduct, employers may also be able to dismiss, but in other cases a warning may be appropriate. Sanctions must take the employee’s circumstances into account, considering any mitigating elements, the impact of the conduct on the business, positions of significant responsibility, and danger from the incident. Dismissal may be appropriate, especially for the more senior manager Rob, but he has a pre-existing addiction that the employer is aware of.

As well as the witness statements, Broadway should consider mitigating circumstances that should be taken into account, for instance domestic problems, provocation or ignorance:

• Pardeep Singh says that he had one lager, although this is not the first report of him smelling of alcohol at work.
• Rob Turner has previously revealed he is an alcoholic. Employers should always proceed carefully with employees who struggle with alcoholism. Alternatives might include time off for treatment, support meetings or other rehabilitation.
• Luca Nicolosi says he was feeling sad following some bad news about a relative.

Broadway should also take into account its overall experience with the employees, the impact of the drinking on the workplace, and how others have been treated in similar circumstances, such as the other three people present.

While compassion is appropriate for employees who are worried about relatives or who suffer from an addiction, in most workplaces, impairment due to alcohol poses risks and dangers to everyone and Broadway have duties towards other employees to take care of their health and safety. Broadway can discipline and dismiss employees whose use of alcohol adversely affects their job performance, but also see the comments on disability below.

If the employees were dismissed, what potential claims could there be?

If the employees are dismissed, the potential claims are most likely to be:

1 unfair dismissal
2 wrongful dismissal (if the employees are dismissed for gross misconduct and therefore without notice)
3 potential disability discrimination in one case.
Discussion points – potential claims

In Rob Turner’s case, his alcohol abuse may be disguising an underlying disability, such as long-term depression, although we have no information to suggest this is the case. Addiction to alcohol on its own is an excluded condition for Equality Act 2010 purposes, but there may also be an underlying disability that is protected. The Act prohibits employers from discriminating against employees in respect of a disability. If Rob suffers from depression, this would be a mental impairment, with a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Broadway should at least take steps to look behind the alcohol use to see if there is a genuine disability before deciding upon disciplinary action. It may mean that adjustments will have to be made, such as counselling.

Examples can be seen in:

• *Power v Panasonic* (2003), where the Employment Appeal Tribunal held that depression caused by a dependency on alcohol can still be a disability even though addiction to alcohol is excluded from the definition of disability under the Equality Act.

• *Bartlett v Elegant Resorts* (1995) held that although an employee had been warned about her drinking before a business function, her dismissal was unfair because the employer had not conducted a full investigation into the circumstances. The employee’s compensation was reduced by 50%, given her contributory behaviour towards her dismissal.

How should Broadway have handled this situation?

The steps taken to handle this situation fall under similar headings to those under the first scenario. Broadway should have fully followed both their own disciplinary and drug and alcohol processes and the Acas Code of Practice on Disciplinary Procedures. More details of how things should have been handled are provided below:

• **Prior to the event:** Broadway already has a drug and alcohol policy that makes it clear that attending the workplace under the influence of drugs and alcohol is unacceptable. How proactively has this been enforced? Was the employer aware events like this have taken place before? Has the policy been followed fully?

• **Investigation:** Broadway must investigate thoroughly, as explained in the ‘what further information’ question above.

• **Medical report:** Addiction can be an underlying cause of many work issues, including misconduct, absenteeism and poor performance. The employers are aware of Rob’s alcohol use. Should they have known he did not follow up with occupational health? Have they been sufficiently proactive in understanding and supporting his medical condition? Generally, unacceptable conduct in employment cannot be excused by an underlying illness and Rob has misled the employer about obtaining treatment.
Discussion points – steps Broadway should take

Participants can be given a time period to list the steps Broadway should take, which may include the following:

Contract and policy
- Check there is a clause as a part of the employment contract for all staff, covering both random and ‘for cause’ workplace drug and alcohol testing.
- Check the provisions relating to alcohol use at work and whether the employees were aware of the policy.
- Regarding Rob Turner’s failure to contact occupational health, was he made aware this would also lead to disciplinary consequences?

Testing
- Broadway may consider future testing for alcohol use at work with an employee’s consent.

Investigation
- See comments on thorough investigation explained in the ‘what further information’ question above. Stages involve investigatory meeting with all employees who were present individually, with examining evidence gathered including things that may excuse one or all of the employees.
- The daytime warehouse operations manager Mark Bartlett is only one witness, but there was a total of at least six people present. If witnesses confirm that all employees smelled strongly of alcohol, were slurring words, and so on, employers are justified in concluding that they were unfit for work through drink. However, turning up at work smelling of alcohol may not be a gross misconduct offence. Being unfit for duty through the effect of drinking alcohol may be a gross misconduct offence, but some cases have found that simply attending work smelling of alcohol would not amount to gross misconduct unless there was evidence of an adverse effect on the employee’s ability to do their job.
- Regarding Rob Turner’s failure to contact occupational health, was he made aware that this would also lead to a disciplinary?
- Which employees had highly safety-critical roles – all of them?
- It was possibly correct to suspend the employees on full pay initially, but one of them had apparently not been drinking; how should this be handled? How long should suspension be? While it may be appropriate for the manager, was it appropriate for all of them on the evidence available? Suspension from work is appropriate to investigate in severe cases. It does not imply guilt and should be used only in exceptional circumstances – usual examples include suspected fraud, theft or accusation of harassment. It would include severe intoxication. Suspension should only be considered for allegations that fall within the category of gross misconduct.
- Any period of suspension should be as short as possible and wages must be paid during investigation. Suspension is not a sanction.
Discussion points – the disciplinary process

Participants can discuss all likely stages of the employer’s own procedure and Acas stages that should be complied with, including companions in the disciplinary meetings, allocation of managers for the investigation, disciplinary hearing, evidence and potential sanctions. This could include the following:

- All employees must have time to prepare for the disciplinary hearing. Assuming all employees knew that the drinking was an offence of gross misconduct, as set out in Broadway’s disciplinary and substance procedures, were the employees aware of the penalty that could be imposed as a result? The employees must be given an opportunity to appeal against the final decision in accordance with the drug and alcohol and disciplinary and grievance policy.

- While employers must be cautious about disciplining for disability-related misconduct, Rob Turner’s alcoholism probably doesn’t qualify as a disability under the Equality Act. A common mistake employers make is to fail to recognise that alcohol abuse may be disguising an underlying disability, such as long-term depression. While an addiction to alcohol on its own is an excluded condition under the Equality Act 2010, there may also be an underlying disability that is protected. Employers should therefore take steps to look behind the alcohol use to see if there is a genuine disability in play before taking disciplinary action. It may mean that adjustments including counselling are appropriate.

Sanctions – points to consider

Dismissing employees who attend work under the influence of alcohol can be within the band of reasonable responses. However, many matters need to be checked:

- Has the alcohol policy been circulated to all of them?
- Has Broadway made clear exactly what the employees needed to do to stop the disciplinary action? As one or possibly two employees have previous alcohol problems, the need to seek treatment for alcoholism should be made clear.

Case law has found a difference between testing positive for drink or drugs and actually being unfit to perform duties. In addition, other cases show receiving bad news that has affected an employee’s demeanour and behaviour leading to an isolated slip may not be conduct that should lead to dismissal, particularly if there has otherwise been good length of service.

Scenario 3

The third scenario involves Broadway senior management. The HR director has been asked to get involved with a serious problem with more senior management.

Situation
The CEO at Broadway recently attended a conference and then googled some follow-up on articles on employee engagement. As a result, he has been experimenting with a culture where employees can voice their concerns freely and, as a first step, HR were asked to set up an anonymous employee engagement survey. The CEO is persuaded by studies showing that ‘it drives innovation if more employees can speak up ... leading to groundbreaking company progress with increased staff retention, stronger performance and better financial results’ (from Business Review Magazine).

Actions taken
In the responses to the very first survey, one employee says that: ‘Getting a marketing guy who isn’t a space cowboy, smack head might be a good start.’

This is a reference to Lee Rawson, the business development director. He is in his early forties and is direct and forceful, having a style that has led to him being regarded as very successful at client relationship management, tracking new markets, developing new strategic partnerships, and so on. When he joined Broadway, he brought a small team with him. He is unpopular with some staff – he is seen as only being out for himself. There have been rumours about Lee and both cocaine and marijuana use in the past. There have never been any allegations or observations of him being under the influence of drugs at work.

After discussions with the CEO, Diana asks Lee to undertake a voluntary drugs test. Lee refuses. He says that there are not sufficient grounds for testing him. The CEO insists that he must. Diana attempts to encourage Lee by saying she trusts him and that he should take the moral high ground and undertake the test to set a good example.

Response
Lee continues to refuse, saying that the drug and alcohol testing is insulting, does not apply to senior management, and that random testing is primarily for warehouse staff who operate machinery. He says his senior colleagues say that he has done nothing wrong, which makes insisting on taking the test unreasonable. He says that he is being told contradictory things, and if he is trusted and there is no suspicion, he shouldn’t have to take the test as other management don’t.

Lee did not have a reference to the drug and alcohol policy in his terms and conditions and did not have the policy brought to his attention before joining Broadway. He has, in the past, referred to the drug and alcohol policy in his management of his own staff and, on one occasion, he has disciplined a team member pursuant to the procedure.

Outcome
His refusal has now increased the suspicion of his drug-taking, as it looks like he is trying to hide something. Broadway had been calling it a voluntary test to try and reduce stigma and act warmly towards him, but now there is a suspicion. The CEO now feels the test should be compulsory as Lee holds responsibility for enforcing the employer’s drug and alcohol testing policy and should have set an example. Lee still refuses.
Questions to pose to training participants

- If Lee continues to refuse a test, how can this be handled by the company?
- If Lee is dismissed, what are his potential claims?
- Does the fact that Lee is the manager of junior team members make any difference?
- What are options to resolve matters?
- Does it make any difference to how this should be handled if Lee admits to marijuana use only outside work but denies a cocaine habit?
- Does it make any difference to how this should be handled if Lee admits to marijuana use only outside work as self-medication for migraine pain relief?
Discussion points

If Lee continues to refuse a test, how can this be handled by the company?

If Lee continues to refuse a test, the company has a number of options. These are set out in more detail in the ‘options’ answer below. What it wants to do depends upon what other evidence there is of Lee’s drug use and if he is valued despite the staff responses.

It is unfortunate that Lee does not have a reference to the drug and alcohol policy in his terms and conditions and did not have the policy brought to his attention before joining Broadway. At the very least, he has an argument that senior management are excluded from normal policy. Broadway could give a warning to Lee on this occasion and issue an amended policy (which the employees should really consent to) to show senior management are included in compulsory testing going forward. A failure to consent to a test can only safely lead to dismissal if there is no argument about whether the employee knew the policy applied to them. In most properly applied and communicated policies, a failure to consent to testing can then be treated as a positive result.

The fact that Lee has, in the past, applied the drug and alcohol policy in his management of his own staff means that he is on notice about the policy. Broadway could try and argue it is incorporated into his agreement by implication. On one occasion he has disciplined a team member pursuant to the procedure, so there is a strong argument that he is clearly familiar with it. Lee must also know that the use of non-prescribed drugs is dangerous and illegal under criminal law. Dismissal may be an option, especially if there is other evidence of, or witness to, his drug use.

In the UK drug and alcohol testing must generally be justified, necessary and proportionate. Testing should be done with the employee’s consent, which ideally is agreed at the outset. An employer may try to make withholding consent a disciplinary matter, as appears to have been the case here, at least for other employees. Employers must also comply with the data protection principles relevant to sensitive personal data.

If Lee is dismissed, what are his potential claims?

If Lee is dismissed, depending on how matters are handled, his potential claims are likely to be:

1. unfair dismissal
2. wrongful dismissal – if he were dismissed and was not given his full package for a full notice period, which is likely to be sizeable and include share options, considerable bonuses, pension contributions, and so on
3. a potential disability discrimination – this seems unlikely as any addictions would be to non-prescription drugs. There is no suggestion he has an underlying condition.

Does the fact that Lee is the manager of junior team members make any difference?

The fact that Lee is a senior manager of junior team members does make a difference. Broadway could argue that Lee knew it was the responsibility of senior management to observe policies and to be seen to do so.

In Dyson v Asda Stores Ltd (2016), the employment tribunal held that a warehouse operations manager who refused to take a drug test was fairly dismissed. In that case the manager, with an exemplary record, had in the past enforced the supermarket’s drug and alcohol testing policy and used it to dismiss an employee. There was confusion with another Asda employee with exactly the same name who had been in the newspaper for taking drugs in the past.
The manager was initially asked to take the test voluntarily, but he refused, and the test was made compulsory and he was dismissed after he continued to refuse.

The employment tribunal held that the employer’s decision to dismiss was within the band of reasonable responses because:

• There was a potentially dangerous workplace with forklift trucks in operation and the employer could not run the risk of not testing once it had been alerted the employee might have a problem.
• Senior management had added responsibility to observe the employer’s policies and lead by example, setting high standards for others to follow.

**What are options to resolve matters?**

If Lee continues to refuse a test, the company has a number of options. These include:

• informal conversation
• informal warning
• disciplinary process leading to formal warning
• a warning to Lee combined with an amended policy including senior management in future compulsory testing
• potential dismissal with some risks
• budgeting to negotiate a managed departure using a settlement agreement, if his overall performance warrants this.

A starting point for a settlement package will be to look at the length of the notice period and benefits package, taking into account pay in lieu of his notice period, bonuses, share options and benefits after termination, such as health cover. There may also be negotiation over an agreed reference and leaving statement. A reinforcement or waiver of the restrictive covenants in Lee’s employment contract may be needed. There may also be protection against derogatory comments and keeping company property (for example mobile phone, company car, laptop, and so on).

**Points to consider**

Does it make any difference to how this should be handled if Lee admits to marijuana use outside of work but denies a cocaine habit?

If Lee admits to marijuana use, this is evidence of use of an illegal substance. There is still the same issue of non-incorporation of the company’s substance abuse policy, but we do know Lee is aware of the policy. Being in possession of or using drugs for non-medical purposes, whether on or off company premises, is strictly forbidden. So, Lee could face disciplinary action that could result in dismissal.

Admitted use of illegal substances, like a positive test, is usually classified as gross misconduct. However, as Lee has not been under the influence at work and has only admitted consumption of cannabis at weekends, and so on, outside work, this may not justify immediate dismissal.

Broadway can still follow a disciplinary process and give a formal warning, reminding Lee that under the Health and Safety at Work Act 1974 it has to ensure, as far as is reasonably practicable, the health, safety and welfare at work of employees. If it knowingly allows him under the influence of drugs to continue working, it could be prosecuted. Presumably he drives for work purposes and knowingly allowing drug use could put him or others at risk. Employees have an obligation to take reasonable care of themselves and others who could be affected.
There is a difference between having residual traces of substances present in an employee's system and actually being intoxicated at work. Some previous cases have held that employers with zero-tolerance policies in relation to substance misuse may be able to dismiss for gross misconduct for cannabis use outside work, especially if they operate in safety-critical environments (see *Kuehne & Nagel Limited v Cosgrove* (2013)).

**Does it make any difference to how this should be handled if Lee admits to marijuana use only outside work as self-medication for migraine pain relief?**

Yes - if Lee admits to marijuana use only outside work as self-medication for migraine pain relief, Broadway should probably be more lenient. Their policy has issues about whether senior management are covered, and the policy implies that possessing or using drugs for medical purposes, whether on or off company premises, is permitted. However, Broadway still needs to discuss the pain issues, migraine and medication taken, and manage this situation proactively, as there is still a risk to others. On the first occasion, at least, Broadway should consider measures to help Lee; failing to consider possible help may affect the reasonableness of any disciplinary sanction imposed.