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# Alcohol abuse in the workplace

20 May 2014 *8 min read*

Employers are often beset with the challenges of addressing issues of alcohol abuse in the workplace.

## Challenges of addressing issues of alcohol abuse in the workplace

What is crucial, therefore, is the determination of the employer's obligations and rights in dealing with alcohol abuse in the workplace. Issues that arise in this regard range from when employers can bar an employee's access to their premises, to the steps that can be taken by employers against recalcitrant employees.

First and foremost, the Occupational Health and Safety Act 85 of 1993, as amended, ("OHSA") imposes general obligations upon an employer to maintain and ensure a healthy and safe working environment for all users. In particular, section 2A of the General Safety Regulations regulates the issue of intoxication within the workplace. Importantly, for present purposes, it provides that an employer **shall not** permit any person who is, or appears to be under the influence of intoxicating liquor or drugs, to enter or remain in the workplace.

There is therefore a peremptory and non-discretionary duty imposed upon employers to bar such employees from the workplace, regardless of the nature of the employer's business and the functions performed by the particular employee.

## Barring access to intoxicated employees

However, the mere barring of access to intoxicated employees is but one of the hurdles encountered in such a scenario. Equally important is a consideration of the means available to an employer in proceeding against offending employees. The answer to this question depends on whether the employee has sought assistance for an alcohol dependency and can provide cogent proof indicating the presence of such a dependency. The course of action available to an employer will also depend, to an extent, on the nature of any drug and alcohol policies within the workplace.

To the extent that the employee truly has a dependency problem, the issue is best addressed through an incapacity enquiry. Schedule 8: The Code of Good Practice: Dismissal, recommends that, but does not positively oblige, employers to assist and/or refer employees with alcohol problems to counselling and/or rehabilitation.

However, where the employee is unable to show that he has a dependency on alcohol, the employer may proceed with an enquiry as to the employee's misconduct. In this regard, the case of *Superstone Mining (Pty) Ltd v Kuebu and others* [10 September 2013] [Unreported] clearly summarises the important factors applicable to disciplinary action for alcohol abuse in the workplace.

Briefly, the facts of the matter were that the employer, a diamond-processing business, dismissed the employee for misconduct as a result of his being intoxicated while on duty. The employer had a strict alcohol and drug dependency policy in place which provided for a zero tolerance approach to alcohol abuse in the workplace. The employee was aware of this policy. However, upon being called before the disciplinary enquiry the employee alleged, for the first time, that he had an alcohol dependency problem.

The chairperson took into account the employer's zero-tolerance policy, the fact that the employee was a senior employee, and the fact that the employee only alleged alcohol dependency after being caught. The chairperson dismissed the employee for misconduct.

The employee then approached the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The commissioner found that the key question was whether the employer should have continued with the disciplinary enquiry in the face of the employee's claim that he had an alcohol dependency problem. The commissioner found that the hearing should have been postponed so that the possibility of rehabilitation could be investigated and consequently ruled that the employee's dismissal was unfair.

## Alcohol-related misconduct

The matter was taken on review by the Labour Court. The Court disagreed with the commissioner's finding that the dismissal was unfair, stating that it was trite law that where a policy is in place, it falls upon the employee who has an alcohol dependency problem to make use of the employer's assistance scheme. In addition, the Court found that an employer does not have a duty to treat an instance of alcohol-related misconduct as incapacity where there is no evidence of such incapacity.

In this regard the Court reiterated the rationale of *Transnet Freight Rail v Transnet Bargaining Council and Others* [2011] 6 BLLR 594 (LC), which found that intoxication on duty is only to be treated as a form of incapacity if the employee is truly dependent on alcohol. Lastly, the court emphasised the importance of maintaining safety within the workplace.

An employer who is faced with an employee who is under the influence of alcohol in the workplace may, in the absence of satisfactory evidence by an employee as to his alcohol dependency, proceed by way of a disciplinary hearing for misconduct. The mere fact that the employee subsequently claims to have an alcohol dependency problem during the hearing is no absolute bar to the dismissal of such an employee for misconduct. If, however, the employee can provide suitable evidence, or alternatively has previously approached the employer with his dependency problem, then the employee must rather proceed by way of an incapacity enquiry.

In the instance where it is appropriate to proceed with charging the employee for misconduct, a further consideration requires determination; namely whether dismissal is the appropriate sanction. Case authority is clear in indicating that dismissal will not always be justified. Material considerations would include whether any alcohol and drug related policies allow for a strict zero tolerance approach justifying immediate dismissal, whether the employee performs work which is critical to health and safety, and whether the trust required for the functioning of the employment relationship has been irreparably broken.

For example, in the case of ***Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others*** **[2012] 12 BLLR 1301 (LC)**, the court found that the employee's dismissal was too harsh a sanction. The court had regard to the fact that the employee had a long and clean disciplinary record, had shown remorse, the company's disciplinary code did not prescribe dismissal at first instance for the offence, and the employee was not performing a complex or inherently dangerous task.

## Provisions of disciplinary policies

The importance of the provisions of disciplinary policies and alcohol and drug dependence codes in constraining actions available to employers was starkly highlighted in the case of *Black Mountain v CCMA and Others* [2005] 1 BLLR 1 (LC), where the court, among others, found the dismissal of an employee who caused an accident while driving a heavy vehicle at a mine to be unfair; primarily because the employer had ignored its own policy, which provided that in such an instance, employees should suspended and given an opportunity to undergo voluntary rehabilitation.

Finally, when seeking to prove that an employee actually is or was under the influence of alcohol, the use of breathalysers is not an absolute determinant of an employee's intoxication. Rather, and as found in the case of *Tosca Labs v Commission for Conciliation, Mediation and Arbitration and other* [2012] 5 BLLR 529 (LC), a breathalyser on its own is not conclusive.

The real test is whether the competence to perform has been impaired (see also *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC)). For example, in the case of *Jizana/Abbeydale Building & Civils* [2012] 11 BALR 1152 (CCMA), the

commission found that observations made by witnesses as to the employee's sobriety were sufficient to prove the employee's inebriation.

This is not to say that breathalysers cannot be useful; only that they should be considered with the totality of evidence. That an employer can subject an employee to alcohol tests is acceptable by virtue of the provisions of the Employment Equity Act 55 of 1998, as amended, ("EEA"). The EEA does not allow for medical testing unless, among others, it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. It is submitted that where employees perform functions which have a bearing on the health and safety of others, and thus require sobriety, then medical tests for alcohol will be justifiable.

## Conclusion – health and safety of their workplace

In conclusion, it is pivotal that employers take cognisance of their obligation to ensure the health and safety of their workplace; which obligation, among others, calls upon the barring of intoxicated employees from the workplace. The employer furthermore is enjoined with rights to proceed against intoxicated employees by virtue of either an incapacity enquiry, where the employee can illustrate he has an alcohol dependency, or alternatively by virtue of a misconduct hearing. In the instance the employee is found guilty of misconduct, the suitability (or otherwise) of his dismissal will be determined with reference to the abovementioned factors.

Read more about the use of alcohol in the workplace.




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