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Corroborative evidence is required to establish intoxication

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ISSUE

Whether an employer can dismiss an employee who fails a breathalyser test in circumstances where there is no corroborative evidence to prove that the employee was intoxicated to the extent that he was incapable of performing his/her duties?

SUMMARY

A positive test result on a breathalyser test is not sufficient proof to indicate that the employee was under the influence of alcohol to the extent that he or she was incapable of performing his / her duties. The real test is whether the employee's competence to perform his / her work has been impaired. If this is the case, it may be substantively fair to dismiss the employee.

COURT'S DECISION

In the case of *South African Transport and Allied Workers' Union obo Mmotong / Staffing Logistics* (2018) 27 NBCRFLI 8.37.2 the Commissioner for the National Bargaining Council for the Road Freight and Logistics Industry had to consider this issue. Mr Benny Mmotong ("**the employee**") was employed by Staffing Logistics ("**the employer**"). The employee was dismissed after a breathalyser test indicated that he had consumed alcohol. The employer claimed that it handled fragile goods and accordingly had adopted a zero-tolerance policy to mitigate against risks posed by intoxication at the workplace. The employee was called before a disciplinary enquiry where he admitted guilt. The employee, in his defence, argued that he had consumed alcohol on the previous day and that he was unaware of his employer's policy on alcohol.

The Commissioner noted that it is generally accepted that breathalyser tests are less accurate than blood tests. As a result, if an employer wishes to rely on the results of a breathalyser test to prove an employee was intoxicated on duty, they should also provide further corroborating evidence such as manner of speech, the existence of bloodshot eyes and unsteadiness.

In addition, the Commissioner relied on the case of *Tanker Services (Pty) Ltd v Magudulela* 1997 12 BLLR 1552 (LAC) where the Labour Appeal Court held that the important factor is the employee's competence to perform their work has been impaired. In this case the employee was able to perform his tasks and the court held that the dismissal was substantively unfair.

The commissioner noted that the employer led no evidence to prove that the employee was so intoxicated that he was incapable of performing his duties. Furthermore, the employer failed to submit its disciplinary code to indicate that the offence was described widely enough to encompass a zero-tolerance policy.

The Commissioner held that the employee's dismissal was substantively unfair and reinstated the employee with retrospective effect.

IMPORTANCE OF THIS CASE

This case highlights that employers must make employees aware of their policy on alcohol in the workplace. Importantly, where an employee fails a breathalyser test, additional evidence of the employee's inability to perform their functions as a result of being intoxicated must be presented to substantiate the employee's dismissal.

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