

EMPLOYMENT

Employees beware: the enforceability of zero-tolerance policies in the workplace

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Issues

Whether an employee may be dismissed, in the workplace, for testing positive for dagga and the importance of 'zero-tolerance' policies in this regard.

Court's Decision

In the recent case of *National Union of Metalworkers of South Africa obo Nhlabathi and another v PFG Building Glass (Pty) Ltd and others* [2023] 2 BLLR 142 (LC), the above issues were considered.

The facts of the case are briefly as follows. Two employees ("**Employees**") employed by PFG Building Glass (Pty) Ltd ("**Employer**") as 'manufacturing operators' were dismissed for misconduct. In particular, for testing positive for marijuana/dagga/THC. Both of the Employees pleaded guilty in their disciplinary hearing and were subsequently dismissed. They sought to challenge the substantive fairness of their dismissals before the requisite bargaining council. The arbitrator ruled that the Employees' dismissals were fair. The Employees sought to review the decision.

The Employees raised three grounds for review before the Labour Court. First, that there was no policy which forbade the use of dagga as dagga is not a drug or substance. This argument relied upon an interpretation of the [Constitutional Court](#) judgment of *Minister of Justice and Constitutional Development and Others v Prince and others* 2018 (1) BCLR 1220 CC ("**CC Decision**").

In finding that a rule was breached it was contended that the arbitrator had committed a gross irregularity. Second, that there was no basis to conclude that the rule (i.e.; against testing positive for dagga) was valid and reasonable. Third, that the arbitrator had failed to consider the appropriateness of the sanction of dismissal imposed upon the Employees.

In dismissing all three basis for the review, the Labour Court found, among others, as follows. It was found that there was indeed a policy in the Employer's workplace and that the policy adopted a 'zero-tolerance' approach to the use of alcohol and drugs in the workplace. The Employees had received training on such policy and where, therefore, aware of it. By testing positive in the workplace, the Employees had breached this Policy. To this end, the reliance on the CC Decision was misplaced.

This is because, the Employees "confused issues regarding the decriminalisation of the use of dagga in private and the right to institute criminal proceedings and to prosecute an individual who uses dagga with an employer's right to take disciplinary action against an employee who contravened a disciplinary code". Furthermore, the Labour Court found that in any event, "The Constitutional Court did not interfere with the definition of a "drug", nor did it declare dagga or cannabis to be a plant or herb...it [the CC Decision] does not offer protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes".

With regards to the sanction imposed, the Labour Court had regard to two other recent court decisions in reaching its conclusion. In particular, the cases of *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* [2023] 2 BLLR 125 (LAC) ("**SGB Case**") and *Enever v Barloworld Equipment, a division of Barloworld South Africa (Pty) Ltd* [2022] 10 BLLR 962 (LC) ("**Barloworld Case**").

In the SGB Case, the Labour Appeal Court found that, taking into account the nature of the employer's business, the 'zero-tolerance' policy adopted and the fact that former employees had also been dismissed in the past it was warranted to dismiss the employee in the case. In addition, the Labour Appeal Court recognised the fact that employers are entitled to set their own standards and enforce discipline in their workplace.

In the Barloworld Case, the Labour Court found, among others, that, "everyone is entitled to use cannabis in their own space for recreational or medicinal purposes. Similarly, everyone is entitled to consume alcohol in their own private space and time. This, however, does not mean that if an employee consumed alcohol the previous night and happens to test positive, the employer would not have to take cognisance of the fact that such alcohol was consumed in the employee's private space and time". In this regard, the Labour Court went on to conclude that, "in light of its dangerous environment, [the employer] is entitled to discipline and dismiss an employee who uses cannabis or is under the influence whilst at work in contravention of the policy".

In considering the above-mentioned cases the Labour Court concluded that –

"Zero-tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy is one that does not allow any violations of a rule. How many dependants an individual has or how many years of unblemished service he or she has rendered, or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied. The only factors that are to be considered are whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it was justified in the workplace".

Importance of this case

This case highlights the importance of ensuring that employers have zero-tolerance policies and procedures in the workplace, where warranted. For instance, where the nature of the work is dangerous / hazardous. In such cases employers are entitled to rely upon their policies when enforcing discipline in the workplace. In so doing, employer's must ensure they adopt a consistent approach.

What is important is that the mere fact that employees may lawfully drink alcohol / consume drugs in private does not detract from their obligations to comply with drug and alcohol policies that a adopt a zero-tolerance approach within the workplace. A failure to adhere to such obligations may justifiably result in those employees' subsequent dismissals.

Half-baked challenge by employees dismissed for testing positive for cannabis at work



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