



EMPLOYMENT

Employers' beware: not every positive test warrants a dismissal, even where a zero tolerance policy is in place

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When it comes to workplace policies on alcohol and drugs, some employers adopt a zero-tolerance stance. However, caution must be exercised in the use of such policies. The case of *Chill Beverages International (Pty) Ltd v Tsamse* illustrates this. In this case, the employee tested positive after undergoing a breathalyser test. The employee did not contest the positive result, rather he alleged that it arose as a result of having taken cough mixture. Nevertheless, the positive result, coupled with among others the employer having a zero-tolerance policy in place, led to the dismissal of the employee. The fairness of his dismissal was challenged by the employee. The Commission for Conciliation, Mediation and Arbitration ("**CCMA**"), ruled that the dismissal was substantially unfair and found that the employee must be reinstated and paid arrear salary. The decision was taken on review by the employer to the Labour Court ("**LC**"). In its judgement, the LC held that a zero tolerance policy will be accepted if the circumstances necessitate its implementation by the employer. Given the particular facts of this matter, the LC dismissed the review application (in other words, the CCMA's finding as to the substantive unfairness of the dismissal remained in place).

Facts

In this case, Chill Beverages International (Pty) Ltd ("**the Employer**") sought to review and set aside an award issued by a commissioner of the CCMA ("**the Commissioner**") which declared the dismissal of Mr Tsamse ("**the Employee**") unfair. The dismissal followed a charge of misconduct against the Employee for having failed a breathalyser test.

The CCMA's findings

The common cause evidence placed before the CCMA indicated that there was an Alcohol, Drug and Substance Abuse Policy ("**the Policy / the Employer's Policy**") in place and the Employee was aware of same. The Policy states that employees are prohibited from having any intoxicating substances in their bloodstream during work hours and are prohibited from using alcohol during work or within 6 hours before work. The Policy includes a zero-tolerance clause to the effect that no alcohol in an employee's blood is permitted.

The charge of misconduct relates to the following incident: the Employee was breathalysed after having arrived late to work. He was tested more than once, using different apparatus and the result on each occasion was positive. At the arbitration, the Employee's case was that he did not drink any alcohol the day before he was due to work, nor on the morning of his shift. He did, however, consume a cough mixture the evening before and the morning of his shift at work. The cough mixture, however, contained alcohol. The Employee did not dispute the correctness of the breathalyser tests but argued instead that he unintentionally breached the Employer's Policy (as he did not know the cough mixture contained alcohol). In addition, he did not exhibit any signs of intoxication and argued therefore that dismissal would not be an appropriate sanction. The Employer argued, among others, that the Employee worked on machinery and that if he worked on machinery under the influence of alcohol this would present a health and safety risk. Reference was made to the Policy.

The Commissioner ruled in favour of the Employee by holding that his dismissal was substantively unfair and arrived at his decision based on the following:

1. There was no evidence to suggest that the Employee consumed alcohol (in the conventional sense) the evening before or on the morning of his shift. Moreover, he did not exhibit signs of intoxication whilst at work;
2. The Employee had a clean disciplinary record; and
3. There was no evidence presented which contradicted the Employee's version that he did not know the cough mixture contained alcohol and the Commissioner found him to be a credible witness in this regard.

With regards to the Employer's Policy, the Commissioner noted that the Policy requires each case to be considered on its own merits, taking into account the nature of the employee's role, the risk to the work environment, and the employee's service record. The Commissioner noted further that independent evidence must be led to prove that an employee is intoxicated and that, in the context of this case, the Employee was not intoxicated. As a result, the Commissioner ordered that the Employee be reinstated and that he receive his arrear salary.

The Employer challenged the Commissioner's findings as unreasonable. In particular, the findings that the policy had not been violated by the Employee despite the fact he tested positive and the independent evidence suggesting that the Employee was not under the influence of alcohol or that he breached the policy. The Employer also challenged the ruling as unreasonable, to the extent that it stated that the Employee was negligent but did not breach the Employer's Policy. The Employer argued, furthermore, that the Commissioner erred in not recognising that the nature of the Employee's job was high risk which would warrant strict compliance with the Policy.

The LC's findings

It was found to be common cause that there was indeed a policy in place (i.e. the Policy) and the Employee was aware of it. Furthermore, the Employee never contested the fact that he failed the breathalyser test. Rather, he argued that he "unknowingly" breached the Policy and that he should not be dismissed as a result thereof.

The LC confirmed that the appropriate test for review, as enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*^[1], is whether the decision reached by the commissioner is one that a reasonable

decision-maker could not reach.

In reaching its decision, the LC considered various prior cases on zero tolerance policies and intoxication in the workplace. In summary, the LC concluded that zero-tolerance policies will be accepted where the circumstances necessitate its implementation by the employer. An employer is therefore obligated to show that dismissal is appropriate and proportional to the offence that was committed.

Having arrived at this conclusion, the LC held that the Commissioner's decision was not unreasonable. Rather, he evidenced a clear understanding of the issue and was cognisant of the fact that the Employee failed the breathalyser tests, that the Policy was in place and that the Policy contained a zero-tolerance clause.

The Commissioner also considered that the Policy stated that each case must be assessed on its own merits, with consideration to the nature of an employee's role, the risk to the working environment and the service record of that employee (which was 6 years in the Employee's case). The Commissioner could not be faulted in finding that the Employee was a credible witness. There was no evidence that the Employee had consumed alcohol or that he was intoxicated. Furthermore, the Employee had an "impeccable record". The Employee's dismissal would therefore be inappropriate.

The LC concluded that the award issued by the Commissioner was therefore reasonable. As such, the LC dismissed the review application.

Conclusion

This case illustrates that while zero-tolerance policies may be justified/necessary in certain circumstances, an employer is still obliged to show this to be the case in any given matter. The mere fact that an employee has alcohol in their system does not necessarily mean that they are intoxicated or that a breach of any zero-tolerance policy, as a result thereof, would warrant dismissal. Rather, the touchstone of the law of dismissal remains fairness. This requires a consideration of each case on its own merits.

[1] (2007) 28 ILJ 2405 (CC). The court also made reference to the cases of *Herholdt v Nedbank and Another* (2013) 34 ILJ 2795 (SCA) and *Gold Field Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC).



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