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EMPLOYMENT

Revisiting Zero-Tolerance Policies: The NBCCI's Ruling on Cannabis Use

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ISSUE

In *National Union of Metalworkers of South Africa obo Nyawuza / PFG Building Glass* [2024] 6 BALR 595 (NBCCI), the National Bargaining Council for the Chemical Industry ("**NBCCI**") considered an unfair dismissal dispute concerning an employee who was dismissed for misconduct after testing positive for the presence of cannabis in his system.

FACTS

The employee, a manufacturing operator at PFG Building Glass Proprietary Limited ("**PFG**"), had taken a routine alcohol test when reporting for work and had tested positive for cannabis. PFG operates as a glass manufacturer. PFG had no specific policy relating to cannabis usage but had a general drug and alcohol policy in place. The employee had a valid final written warning relating to alcohol usage.

PFG contended that it had a zero-tolerance approach to drug usage. It further contended that the employee should have been aware of this policy and that the workplace was dangerous. The employee continued working for six days after the positive screening result for cannabis before he was suspended. During this period, the employee performed his duties without any reported issues or evidence of impaired performance.

PFG's alcohol and drug policy provided that: (1) the consumption of alcohol or use of drugs while on duty, including an employee's breaks and mealtimes was strictly forbidden and (2) employees may not report for duty whilst under the influence of "*alcohol or illegal drugs/narcotics*".

The Employee was dismissed for misconduct on the grounds that he tested positive for cannabis being in his system whilst within the workplace. The Employee contested his dismissal by filing an unfair dismissal dispute with the NBCCI, seeking retrospective reinstatement.

NBCCI'S FINDINGS

During the arbitration, the employee's representative argued that the drug and alcohol policy did not specifically address cannabis use, especially following the legalisation of the private use of cannabis. However, PFG's representative maintained a zero-tolerance approach to the substance use and argued the positive test violated this rule, justifying his termination.

Under PFG's drugs and alcohol policy, any violation typically led to immediate dismissal on the first offence. When asked to explain whether the employee posed any danger to the workplace after the positive result, PFG conceded that the employee's conduct was not irregular.

PFG could not respond to the question that cannabis is not classified as a drug like narcotics. The employee stated that if an employee is found to be intoxicated, a re-test is usually conducted but that this process only applies to alcohol and not to drugs or cannabis.

NBCCI FINDING

The NBCCI Arbitrator noted that PFG did not provide conclusive evidence that the employee's low THC level impaired his ability to perform his duties or posed any immediate threat to his own safety or the safety of the work environment. The NBCCI Arbitrator also pointed out that PFG's decision to allow the employee to continue working for six days after the positive test result weakened the argument that his presence was a safety risk.

Ultimately, the NBCCI Arbitrator found that PFG failed to prove that the employee's dismissal was fair or proportionate given the circumstances. It was also found that the PFG's policy did not specifically account for the decriminalisation of cannabis in that "*it was incumbent upon the respondent to outline the restrictions relating to the use of cannabis by employees outside working hours days, which directly impacts the workplace rule due to being stored in one's system for 2-3 days*".

The NBCCI Arbitrator held that although cannabis remains in one's system for 2-3 days, the employee continued to perform his work, he was found to have not conducted himself in a manner which posed a threat to the PFG's workplace, and the level of cannabis found in the employee's system was not mind-altering.

The NBCCI Arbitrator was unconvinced that the facts of this case merited PFG finding that the employment relationship with the employee was "untenable" and further that the sanction of dismissal was too harsh and that alternatives to dismissal, given the circumstances of this matter, should have been considered by PFG.

IMPORTANCE OF THE CASE

The NBCCI's award holds two key points. The first, concerns an employer's responsibility to provide specific evidence linking substance use to performance risks or safety concerns, especially when dismissal is considered. A significant shortcoming on PFG's side in this matter was allowing the employee to continue working for up to six days after testing positive for cannabis.

The second key point highlighted concerns the necessity for employers to update workplace policies in response to legislative changes – specifically, adapting drug policies to clarify how they handle substances like cannabis that have been partially decriminalised. Employers need to ensure that policies are clear, fair and properly communicated to all employees.

The absence of case law relied upon by the NBCCI Arbitrator suggests the existence of a legal grey area and signals the need for employers to develop clear policies on the regulation of cannabis use inside and outside of the workplace which may impact internal screenings.



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