



EMPLOYMENT

Substance dependence in the workplace- misconduct or incapacity?

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One of the challenges faced by most employers today is the increase in substance dependence by employees and the effect it has in the workplace. The critical question is whether an employer should treat such issues as misconduct or incapacity.

Using prohibited substances in the workplace would generally be considered misconduct, however, where an employee is dependent on a prohibited substance an employer must treat this as a medical condition which requires special consideration.

Substance dependency is a serious matter that can impact every aspect of a person's life. One such area wherein substance dependency can create a host of consequences is that of a person's career. This is especially so in the form of alcoholism.

However, what is key to understand about alcoholism in the context of employment relations is that this must be treated as a substance dependency issue, and accordingly, as a disease, irrespective of how it manifests. What flows from this is that in South African labour law, employees who exhibit alcoholism must be treated in terms of medical incapacity procedures and not misconduct or disciplinary procedures. This is evident from the recent judgement handed down in ***PSA obo Randolph van Wyk v Department Of Social Development: Western Cape Provincial Government and Others (C103/2023) [2025] ZALCCT 93 ("PSA")***.

In this case, the employee was dismissed by his employer for "unauthorised absenteeism" after disciplinary action was taken against him for repeatedly being absent from work.

The reason for the repeated absenteeism was that the employee was struggling with alcohol dependency and mental and physical health problems, which facts were established with reference to the employee's attendances at counselling sessions, admittances to treatment facilities, and medical evaluation reports.

The employee claimed that no consideration was given to these factors during the enquiry into his conduct held by his employer. The employee challenged his dismissal on the basis that the enquiry and eventual dismissal, being centred around misconduct, should instead have been centred around incapacity, and that this distinction rendered his dismissal both procedurally and substantively unfair. After referring the matter to the CCMA, despite the arbitrator finding that the procedure that should have been followed by the employer was an incapacity enquiry, the arbitrator nonetheless still upheld the dismissal for unauthorised absenteeism as fair.

The reason that the basis for the enquiry – being an enquiry into either misconduct or incapacity – is of importance, is because the Code of Good Practice: Dismissal ("**the Code**") establishes clear and comprehensive guidelines for how an employee should be addressed, depending on the cause of the issue at hand. Where an employee is potentially incapacitated, the Code provides that the employer must exhaust all other alternatives before resorting to dismissal. In particular, where an employee is struggling with a dependency on substances, the employer is obliged to look into counselling and rehabilitation. In short, the Code expressly provides that *"the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances"*.

The *PSA* judgement draws attention to the fact that a finding of fault on the part of the employee must be made for a dismissal of unauthorised absenteeism to be reached, and that because alcoholism is a disease, the impact thereof on the employee's conduct and behaviour is through no fault of their own.

In particular, the *PSA* judgement, in relying on the judgement handed down in ***Transnet Freight Rail v Transnet Bargaining Council and Others (C644/2009) [2011] ZALCJHB 15***, made it clear that *"the distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such...[t]he purpose of placing such a duty on an employer is based on the current medical understanding of alcoholism – that it is a diagnosable and treatable disease. This disease results in the employee's incapacity."*

Having regard for the above, the court found the dismissal substantively and procedurally unfair, and the employee was reinstated.

The *PSA* judgement highlights the importance of employers knowing that, should an employee be experiencing difficulty as a result of a medical condition and for purposes of this article, alcohol dependency, that the employee may be in need of medical support in the form of rehabilitation or professional medical assistance to deal with the substance dependency which may place an obligation on the employer to assist in certain circumstances. Importantly, employers must understand that in such a context the employee is not necessarily acting wilfully, and the more appropriate enquiry to be conducted is one into whether the employee, due to their medical condition, is incapacitated in their ability to perform their work. Shaping the enquiry around understanding and not punishment is key in ensuring not only that the matter is addressed in a substantively and procedurally fair manner, but that the employee is also recognised and assisted in the best way possible.



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