

EMPLOYMENT

Testing the reliability of breathalyser tests

8 August 2023 6 min read

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Whilst employers regularly rely on the convenience and accessibility of a breathalyser test to determine whether employees are under the influence of alcohol, the result of a breathalyser test may not be reliable enough in order to discharge the onus to prove that an employee is guilty of misconduct.

This issue was considered in the case of *Samancor Chrome Ltd (Western Chrome Mines) v Rickus Willemse and Others* ("**Samacor**"), the employer had dismissed an employee for having a positive blood alcohol level, after failing a breathalyser test when he arrived at work. The Commission for Conciliation Mediation and Arbitration ("**the CCMA**") found that the dismissal was unfair. The employer brought an application to review and set aside the arbitration award.

The employer had zero tolerance for the use of drugs and alcohol in the workplace. The employer's zero tolerance policy stated that a person was deemed unfit to enter the employer's premises if their breath alcohol level exceeded 0.000 percent. The policy further stated that if an employee tested positive for alcohol, this would amount to gross misconduct and may lead to summary dismissal on the first offence.

Upon his arrival at work on a particular day, the employee was asked to submit to a breathalyser test. The breathalyser test yielded a positive result, suggesting that the employee had alcohol in his bloodstream. The employee questioned the result and he was tested again with the same breathalyser test, with the same result. The employee denied that he had consumed any alcohol either on that day or on the previous evening. He was then breathalysed on a different machine. The result was again positive and indicated a blood alcohol level of 0.013%. The employee was subsequently dismissed for contravening the zero tolerance rule. The employee took issue with his dismissal and referred the matter to the CCMA.

At the arbitration the employee led evidence that he consulted with his doctor after he was accused of consuming alcohol. The doctor took a blood sample which was sent to a pathology laboratory to test for the presence of alcohol in the employee's blood stream. A chemical pathologist testified that the method used by the pathology laboratory to determine blood alcohol, a so-called 'plasma ethanol test', cannot test for alcohol below 0.010g/dl.

The report issued by the laboratory was negative, i.e. it indicated that the employee's blood sample had less than 0.010g/dl alcohol content. The pathologist further testified that the blood test was more accurate than breathalyser tests and that the breathalyser tests might be false in circumstances when the person being tested has not eaten for more than eight hours, or has consumed any substance containing yeast. In his opinion, the result of the blood test did not mean that the employee did not have any alcohol at all in his blood; it simply meant that there was no blood alcohol content exceeding 0.010 g/dl. For all clinical purposes however, the result was negative.

The arbitrator found that, while he understood that the employer used a method that is convenient to check if employees are intoxicated, the chairperson of the disciplinary hearing ought to have taken the laboratory results into consideration since those have more accurate and reliable results. The arbitrator concluded that there was no breach of the rule by the employee as the laboratory results, coupled with the expert testimony, confirmed that the employee did not have alcohol in his blood.

On review the employer argued that an employee need not be intoxicated to breach the workplace rule. The employer further argued that the employee was not dismissed for being intoxicated and unable to perform his duties; he was dismissed for contravening the zero tolerance rule. The breathalyser tests established that the employee had alcohol in his system.

On review the Court found that the only finding made by the arbitrator was that the employee did not have alcohol in his blood and that there was no finding regarding intoxication.

The Court took into account the pathologist’s evidence that the blood test was more reliable than any breathalyser test, that a breathalyser test is prone to producing false positive results and that the negative result of the blood test was correct. The pathologist conceded that the employee’s blood alcohol content could have been between 0.000 g/dl and 0.009 g/dl, given that a blood test could not test for blood alcohol content below 0.010 g/dl, but at the same time, that it was possible that the employee’s blood alcohol level could have been 0.000 g/dl.

The Court noted that the employer bore the onus of establishing that there was alcohol in the employee’s blood stream.

The evidence that breathalyser tests were prone to give false positive results was corroborated by the employee’s doctor, who also confirmed that breathalyser tests were less reliable than blood tests and substantiated the evidence that a false positive test might be generated under certain conditions. There was no evidential basis to reject the pathologist’s evidence who stated that in his opinion, the breathalyser test results were false.

Upon a conspectus of the evidence the employer did not discharge the onus to prove that there was alcohol in the employee’s blood stream and the arbitrator’s finding was upheld.

Importance of case

Employers have a duty to ensure a safe environment for all persons who attend at their premises.

Whilst it is convenient and practical for employers to rely on breathalyser tests to determine whether employees and/or other persons who attend at their premises have consumed alcohol, it must be borne in mind that, within the context of a disciplinary process, the employer bears the onus to prove on a balance of probabilities that an accused employee is guilty of the alleged misconduct.

In the case of an allegation that an employee is guilty of misconduct because the employee contravened a zero tolerance to alcohol rule, the result of a breathalyser test may not be enough to discharge this onus, especially in instances where the result indicates a near negligible blood alcohol level, such as in the current instance. In such instances the employer may be well-advised to refer the employee to a doctor for a more accurate blood alcohol test, before embarking on a disciplinary process.



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