EMPLOYMENT

Workplace Discipline: Testing Positive for Cannabis

19 June 2024 *5 min read*

and S'nenhlanhla Lushaba – Candidate Attorney

In the case of ***Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd*** **[1]** the Labour Appeal Court ("**LAC**") had to determine whether the Constitutional Court's decision in *Minister of Justice and Constitutional Development and Others v Prince* [2] ("***Prince***"), in which the Court decided that the criminal prohibition of the cultivation, possession and use of Cannabis in one's own home is a violation of the right to privacy, would have any effect on workplace discipline following a positive cannabis test.

Enever used cannabis and cannabis-based products daily for certain medical benefits and recreational use. After undergoing a compulsory medical test by Barloworld, she tested positive for cannabis. In accordance with Barloworld's Alcohol and Substance Abuse Policy ("the **Policy**" and/or "**Barloworld's Policy**"), she was sent home with an instruction to return after seven (7) days to be tested again. This process took place four (4) more times with Enever testing positive for cannabis each time, before the employee was then given a notice of disciplinary inquiry. Following the inquiry, Enever was summarily dismissed.

Enever challenged her dismissal in both the Labour Court and the LAC on the basis that the Policy was discriminatory in nature. Both courts found that there were four (4) questions which had to be answered, namely:

1. Did Barloworld differentiate between Enever and its other employees?
2. Was there a direct causal connection between Enever testing positive for cannabis and her dismissal in that it amounts to discrimination on the grounds of spirituality, conscience and belief or, alternatively, on an arbitrary ground in terms of section 187(1)(f) of the Labour Relations Act [3]?
3. Was Barloworld's Alcohol and Substance Abuse Policy unfair and discriminatory?
4. Was the approach that Barloworld adopted insulting, degrading and humiliating and did it impair Enever's dignity as a result of the unfair discrimination?

When the matter came before the Labour Court, the Court found that the Policy was consistently applied to all employees and it was only as a result of Enever's defiance of the Policy (in that she claimed that she would not stop using cannabis) that dismissal was deemed to be the appropriate sanction. The Labour Court concluded that the *Prince* judgement had no impact on the consequences of testing positive for cannabis in the workplace. Consequently, the Labour Court found in Barloworld's favour and Enever's dismissal was found to be fair.

The LAC found that there was no discrimination on any of the grounds listed in section 6(1) of the Employment Equity Act [4] ("the **EEA**") and also found that the argument, raised by Enever, of discrimination on the basis of spirituality, conscience and belief was inapplicable as she did not only use cannabis for those reasons but recreationally as well.

It was common cause that Enever's use of cannabis never impaired the performance of her duties nor was she ever suspected of being intoxicated. It was further common cause that Enever did not operate any dangerous or heavy machinery in the course of her work as she was always in the relatively safe zone of an office nor was she required to drive vehicles for

Barloworld. Furthermore, Barloworld conceded to having knowledge that cannabis remains in the bloodstream for longer than alcohol and, consequently, an employee could be completely sober-minded and still have cannabis in their bloodstream.

The LAC found that by only using blood tests to determine whether an employee had been using cannabis and not requiring proof of impairment while at work, Barloworld's Policy was a violation of Enever's right to privacy and dignity as it prohibited her from using cannabis in the privacy of her own home in circumstances where this had no adverse effect on Barloworld as her employer. The LAC held that this conduct by Barloworld forced Enever to choose between her job and exercising her right to consume cannabis. The LAC further found that the effect on Enever's ability to perform her work functions would be the same whether she used cannabis or not. Accordingly, the Court concluded that the prohibition of cannabis was not an inherent requirement of Enever's job.

In the end, the Court found that Barloworld's Policy was excessive and infringed on Enever's right to dignity and privacy. By treating her as though she was intoxicated when she was not amounted to unfair discrimination in terms of section 6(1) of the EEA because it had the effect of differentiating cannabis users from alcohol users. The Court did, however, state that the discriminatory behaviour on the part of Barloworld was not malicious in the sense that it intended to insult, humiliate and degrade Enever through its approach. It concluded that Barloworld was simply mistaken on the correct legal position. It therefore found that Enever's dismissal was automatically unfair in terms of section 187(1)(f) of the LRA and awarded her 24 months remuneration as compensation.

We suggest that the following are take away lessons from the LAC judgment for employers in regard to drafting their alcohol and substance abuse policies:

In the aftermath of the *Enever v Barloworld* LAC decision, we recommend that companies look carefully at their Substance Abuse policies and ensure that they are compliant with the judgement.

---

[1] (JA86/22) [2024] ZALAC (23 April 2024).

[2] *(Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018).

[3] 66 of 1995.

[4] 55 of 1998.



Kerry Fredericks

Director

View Profile



Lloyd Abraham

Keep us close