

# AN ANALYSIS OF DISMISSAL OF AN EMPLOYEE ON THE GROUNDS OF INTOXICATION AND ALCOHOLISM

By

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LLM

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## DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Masters of Labour Laws (LLMLabour) has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution, and that all material contained therein has been duly acknowledged.

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Date.....

## **DECLARATION By SUPERVISOR**

I declare that I am the Supervisor of Matlaila Obed Sentimeledi, and that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Masters of Law in Labour Laws (LLMLabour) has not previously been submitted by him for a degree at this or any other university, that it is his own work in design and execution, and that all material contained therein has been duly acknowledged.

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Date.....

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## **ACRONYM**

ACCI-Australian Chamber of Commerce and Industry

CCMA-Commission for Conciliation Mediation and Arbitration

DACT-Drugs and Alcohol CO-Ordination Team

DVLNI-Driver and Vehicle Licensing Northern Ireland

ECHR- European Convention on Human Rights

HSENI-Health and Safety Executive for Northern Ireland

ILO-International Labour Organisation

OHS-Occupational Safety and Safety

LRA-Labour Relations Act of 66 of 1995

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## **ABSTRACT**

The overlap between misconduct and incapacity in case of intoxication and alcoholism remains a grey area. It is trite that an employee can be dismissed if under the influence of alcohol during working hours. On the other hand, the Code of Good Practice: Dismissal for conduct and incapacity in item (10) of schedule 8 of the Labour Relations Act 66 of 1995 singles out alcoholism as a form of incapacity that may require counselling and rehabilitation. There is a thin line between cases in which intoxication can be treated as misconduct, and those cases in which alcoholism should be treated as incapacity. The purpose of this study is to critically analyse dismissal on the grounds of alcoholism and intoxication at the workplace.

## CHAPTER 1

### 1.1. Introduction

Intoxication at work is normally a disciplinary offence because an employee who consumes alcohol at work, whether drunk or not commits an act of misconduct.<sup>1</sup> Intoxication as a misconduct is not measured at work by the bad things which the employee may be doing while intoxicated.<sup>2</sup> In *Numsa obo Davids / Bosal Africa (Pty) Ltd*,<sup>3</sup> the dismissal of a crane driver was found to be justified, even though he had operated the crane without mishap for a number of hours before it was discovered that the alcohol content in his bloodstream was three times the legal limit for driving a vehicle on a public road. This case clearly shows that an employee under the influence of alcohol will not only be dismissed for failure to perform the work entrusted on him/her, but the mere fact of being intoxicated or exceeded a particular prohibited degree was sufficient to warrant dismissal.

Whereas an intoxicated employee is an employee who is dependent on alcohol and such an employee requires a cure, like any other sickness. Its premise is that any cure requires medical or clinical intervention. Albertyn<sup>4</sup> talks about a medical theory, which takes the view that alcohol dependence is a disease or illness. An employee incapacitated by alcohol is the employee who habitually depends upon or addicted to the consumption of excessive quantity of alcohol, or an inability to limit alcohol consumption, within reasonable limits. In the case of *Castle Lead Works*<sup>5</sup> the employer

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<sup>1</sup> *Naik v Telkom* (2000) 21 ILJ 1266 (CCMA).

<sup>2</sup> *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1992) 13 ILJ 304 (LAC) at 3123.

<sup>3</sup> (1999) 10 BALR 1240 (IMSA).

<sup>4</sup> C Albertyn & M McCann *Alcohol, Employment and Fair Labour Practice* (1993).

<sup>5</sup> *Castle Lead Works (Pty) Ltd v National Union of Metal Workers of SA* (1989) 10 ILJ 776 (CCMA); *Schneier and London v Bennet* 1927 TPD 346; *Boon v Vaughan & Co Ltd* 1919 TPD 77.

dismissed a worker for reporting to work under the influence of alcohol. It appeared from the evidence that the grievant was dependent on alcohol because at the arbitration proceedings the grievant volunteered that he had a drink of *sondela* (a kind of Bantu beer) every day and he stated that without this drink he could not cope as it made him strong. This had been the case for the full five years of his employment with the company and indeed he volunteered that before the arbitration hearing commenced he consumes some *sondela* for him to be strong. It was clear that if the grievant were reinstated he would resume alcohol consumption because of his dependence. The employer indicated that it would be willing to reinstate the worker save for his alcoholic dependence. In these circumstances, the arbitrator reinstated the grievant on condition that he reports to an alcohol rehabilitation programme for a period of eight weeks.

Under the Labour Relations Act<sup>6</sup> (LRA) the employee has a right not to be unfairly dismissed and consideration of a dismissal as to whether it is fair or unfair, takes account as to whether the reason for the dismissal relates to the employee's misconduct, incapacity or operational requirements.<sup>7</sup>

## **1.2. Problem statement**

Being under the influence of alcohol or drunk is not desirable at a workplace. An employee who consumes alcohol at work whether being drunk or not commits a misconduct. In the case of *Castle Lead Works*<sup>8</sup> an employee was dismissed for reporting to work under the influence of alcohol. The evidence presented showed that he was dependent on alcohol.

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<sup>5</sup> Section 185 of the Labour Relations Act 66 of 1995.

<sup>7</sup> Section and Section 188 (1) of the Labour Relations Act 66 of 1995.

<sup>8</sup> *Hoechst (Pty) Ltd v CWIU & Anor* (1993) 114 ILJ 1449 (LAC) at 1459 H-I, see also Chuks Okpaluba on Current Issues of Fair Procedure in Dismissal based on Misconduct & Incapacity.

### **1.3. Hypothesis**

The research examines the following hypothesis;

- To show that an intoxicated employee conduct amounts to misconduct and should be disciplined and dismissed through misconduct procedures.
- To outline and discuss relevant laws, cases and articles dealing with intoxication and alcoholism relating to dismissal of employees.

### **1.4. Objective of the study**

To examine and analyse dismissal of an employee on the grounds of intoxication and alcoholism.

### **1.5. Rationale**

The employer should distinguish between misconduct and incapacity as intoxication amounts to misconduct because an employee who consumes alcohol at the workplace whether drunk or not commits a misconduct who should be taken through a disciplinary hearing. On the other hand if alcoholism relates to illness and lead to inability to do the work such employee is considered to be ill and should be dismissed through incapacity procedures.

### **1.6. Research methodology**

The study relies on reviews of literature on intoxication and alcoholism in the workplace. The other sources are legislation, decided cases, journal materials, text books, electronic materials and materials from other disciplines.

## CHAPTER TWO

### 2. Examining intoxication and alcoholism

It is trite that being under the influence of alcohol is not desirable in a work situation as it was held in *Naik v Telkom*.<sup>9</sup> In this case Mr. Naik was employed by Telkom as a joiner, although a heavy drinker for years, he had no alcohol problems at work until 1998. In 1997 he came to occupy a vital administrative and coordinator position in the construction department. During 1998 he was admitted at a rehabilitation center at his own costs and benefited from the programme, however he suffered relapses. One day was working, but during his counselling period, he was found to be under the influence of alcohol at work, and threatened his manager with a panga. He was issued with a final written warning.

After this incident fewer days after, when he had to attend an important meeting with the management, he was found intoxicated and passed out in his car. After a disciplinary enquiry he was dismissed. He then approached the CCMA. At the CCMA the commissioner held that employees may be dismissed if they consume alcohol or narcotic drugs to the extent that they are rendered unfit to perform their duties. However there may be a thin demarcating line between cases in which intoxication can be treated as misconduct, and those cases in which it should be treated as a form of incapacity.<sup>10</sup>

Basically alcohol abuse is misconduct in the workplace, but an alcoholic's inability to control his abuse of liquor in the work situation is enough symptom of a disease to make him to be considered incapable of working.<sup>11</sup> Item 10 (3) of schedule 8 of the Code of Good Practice Dismissal in the LRA,<sup>12</sup> specifically

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<sup>9</sup> (2000) 21 ILJ 1266 (CCMA).

<sup>10</sup> Item (10) of the Code of Good Practice: Dismissal for conduct & incapacity (schedule 8 in the Labour Relations Act 66 of 1995); John Grogan workplace Law (7 ed) 2003 p 167.

<sup>11</sup> Ibid at 9.

<sup>12</sup> Labour Relations Act 66 of 1995 of the Republic of South Africa.

singles out alcoholism or drug abuse as a form of incapacity that may require counselling and rehabilitation. The purpose of this research is to reinforce the importance of following the correct procedure in addressing the problem of alcohol/drugs consumption at work as a disciplinary offence and as a form of incapacity.

## **2.1. What is Misconduct?**

The Code of Good Conduct defines<sup>13</sup> misconduct as a contravention of the rule or standard regulating conduct in the workplace. The rule or standard contravened should have been valid; reasonable; the employee should have been aware or reasonably expected to have been aware and the rule or standard should have been consistently applied by the employer to all previous employees who contravened the same rule or standard. The employee who commits misconduct can be held accountable for his/her actions.<sup>14</sup> The sanction that results from breach of the rule must be clear and fair.<sup>15</sup>

The employer should make the employees aware of the rules regarding intoxication. The standard may be the same for all workers or it could vary according to the degree of complexity, danger or responsibility.<sup>16</sup>

The evidence required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depends on the offence with which the employee is charged.<sup>17</sup>

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<sup>13</sup> Item 7 of the Code of Good Conduct: Dismissal in the Labour Relations Act 66 of 1995.

<sup>14</sup> *Cholata v Trek Engineering (Pty) Ltd* (1992) 13 ILJ 219 (IC) p 223.

<sup>15</sup> John Grogan workplace Law (7 ed) 2003 p 169.

<sup>16</sup> *Tanker Services v Magudulele* (1997) BLLR 1552 (LAC).

<sup>17</sup> *Ibid* at 16.

## 2.2. What is incapacity?

In terms of the Code of Good Conduct: Dismissal<sup>18</sup> for incapacity relates to incapability of an employee to perform his/her work due to his ill health or injury; the extent to which the employee is able to perform the work; the extent to which the employee's work circumstances might be adapted to accommodate the disability, or where this is not possible; the extent to which the employee's duties might be adapted; and the availability of any suitable alternative work.

There is a thin demarcating line or an overlap between cases of dismissal for misconduct and cases of dismissal for incapacity as decided in the case of *Naik v Telkom*.<sup>19</sup> Employers are obliged to investigate both the extent of an employee's disability and possible ways of adapting the employee's work to accommodate the employee. This clearly entails consultation with the employee, and examining how such disability impacts on the employee's performance.<sup>20</sup>

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<sup>18</sup> Schedule 8 of the Code of Good Practice Dismissal in the Labour Relations Act 66 of 1995.

<sup>19</sup> (2000) 21 ILJ 1266 (CCMA).

<sup>20</sup> *Davis v Clean Deale CC* (1992) 13 ILJ 1230 (IC).

### 2.3. What Is Intoxication On Duty?

Intoxication is easily identifiable where the employee drank to the extent that his/her drunkenness interferes with his/her work, or is unable to do the work expected of him or where his drunkenness impedes his relationship at work. In *Tanker services v Magudulela*,<sup>21</sup> Mr. Magudulela was working for the Tanker Services company as the driver of the heavy vehicle, one day when Mr. Magudulela came to work, the supervisor suspected that he consumed liquor because he could not walk properly, an alcohol test was conducted and the results found to be under the influence of alcohol. The disciplinary hearing was conducted and Mr. Magudulela was dismissed. Then Mr. Magudulela took the matter to the CCMA for unfair dismissal and the CCMA found the dismissal to be substantively unfair as the alcohol test was not consistently applied to all employees. The company appealed the decision and the question before the court was whether Mr. Magudulela's faculties had been impaired to the extent that he could no longer perform the skilled, technically complex and highly responsible task of driving an extraordinarily heavy vehicle carrying a dangerous substance.

The court found that he couldn't do so and concluded that his offence amounted to an offence serious enough to justify dismissal. But the fact that you can be drunk at work without interference with your duty, does not necessarily mean you are not committing misconduct. In the case of *Numsa obo Davids v Bosal (Pty) Ltd Africa's case*,<sup>22</sup> Mr. Davids was working for the company as a crane driver. The company was not having the policy prohibiting the employee from taking alcohol while on duty. Then one of the employee got an accident with the crane driver, then the company took him for blood test and the results found that he was under the influence of alcohol and later dismissed. He took the matter to the CCMA claiming that he has been unfairly dismissed. The CCMA found that the dismissal was fair as the blood test results was found to be reliable. Then through his trade union, he appealed the

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<sup>21</sup> (1997) 12 BLLR 1552 (LAC).

<sup>22</sup> (1999) 10 BALR 1240 (IMSA).

matter. The court followed a partial approach, and found that the, dismissal of a crane driver was found to be justified, even though he had operated the crane without mishap for a number of hours.

### **2.3.1. Proof of intoxication and alcoholism?**

The validity and the reliability of alcometer, alcohol test, urine test and breathalyser have been supported by employers, trade unions and the CCMA in proving the intoxication on duty whereas in the case of alcoholism a medical report is used to prove alcoholism.<sup>23</sup>

In the case of *Protea Garden Hotel (Pty) Ltd v Commercial Catering & Allied Workers Union of South Africa case*,<sup>24</sup> Mr. Raphalani was working for the company as a waiter and he was regularly coming to work under the influence of alcohol and broke some glasses and plates while on duty. The customers were sometimes complaining to the manager. He was charged with misconduct of reporting on duty under the influence of alcohol and later dismissed. He took the matter to the CCMA and the the company led evidence that Mr. Raphalalani was drunk late on Saturday night, while on duty as a waiter. Evidence of three separate company's witnesses were led to confirm the intoxication and this evidence was not disputed.

However, the union argued that because the company had not produced evidence of a breathalyser test establishing the drunkenness, it had not sufficiently proved the charge against Mr. Raphalalani. The arbitrator held that:

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<sup>23</sup> Alcometer (alcotest) is a device used to measure the concentration of alcohol in a man expirate or concentration of alcohol in blood of a man. Alcohol urine test is a device that shows if alcohol has been consumed within 80 hours after the alcohol has been metabolized in the urine. Breathalyzer is a device for estimating blood alcohol content from a breath sample. Also [www.doza.net.ua](http://www.doza.net.ua). *Numsa & others v Henred Fruehauf Trailers (Pty) Ltd* 15 (1994) ILJ 1257 (A).

<sup>24</sup> *Protea Gardens Hotel (Pty) Ltd and Commercial Catering & Allied Workers Union of South Africa*, CCMA Arbitration Award 1986/20/03.

"In cases of disputed drunkenness, it is obvious that a breathalysers can provide evidentiary material, possibly weighty, to justify a conclusion of drunkenness. However, the fairness of a dismissal on an allegation of drunkenness will always depend on the strength of all evidence presented, whether this evidence includes or excludes breathalysers test results. The arbitrator in this case relied on the evidence by three company's witnesses and upheld the decision to dismiss him."<sup>25</sup>

In the case of *Blue Ribbon Meat Corporation (Pty) Ltd v Retail and Allied Workers Union case*,<sup>26</sup> the company had a policy prohibiting the employees to come to work under the influence of alcohol. All the employees including Mr. Lukhele were undergoing a breathalyser test while reporting on duty. Then Mr. Lukhele reported on duty and refused to undergo a breathalyser test. He was not cooperative and walking properly while asked to undergo a breathalyser test. He was charged with a misconduct and dismissed. He took the matter to the CCMA. At the CCMA, there was a conflict between the evidence led by the company and evidence led by the union as to whether Mr. Lukhele was intoxicated while on duty. Having heard the evidence, the arbitrator rejected the union's evidence and accepted the company's evidence in its entirety. The union argued that the company failed to produce evidence of breathalysers test. Although the company was in possession of a breathalysers, Mr. Lukhele had refused to submit to a breathalysers test when requested to do so, the arbitrator held that:

"On the evidence before me, I'm of the view that Mr. Lukhele was under the influence of alcohol at work on the day in question. Although a positive finding following a breathalysers test will assist in confirming personal observation, I believe that the observations of the witnesses who appeared before me established on a balance of a probabilities that Mr. Lukhele was indeed under the influence of alcohol, his bad

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<sup>25</sup> Ibid at 24 p 6.

<sup>26</sup> *Blue Ribbon Meat Corporation (Pty) Ltd and Retail and Allied Workers Union*, CCMA Arbitration Award 1986/23/12.

language and refusal to obey managerial instructions to undergo a breathaliser test must be assessed".

In the case of *Price Club v Commercial Catering and Allied Workers Union of South Africa*,<sup>27</sup> there was a dispute between the company and the union as to whether the breathaliser test positively confirmed that Mr Mkhwanazi had been under the influence of alcohol. The assistant manager of the company, who had never before conducted such test, conducted the breathaliser test.

Although the assistant manager stated in his evidence that the result of the test was positive, when more closely questioned, it appeared that his understanding of what constituted a positive test was uncertain. The worker on the other hand denied that a positive result had been obtained. The arbitrator noted that:

" There is no reason why (breathalysers) should not be utilised at work and why employees suspected to be under the influence of alcohol should not be subjected to a breathaliser test. It is essential, however, the test should be conducted, and be seen to be conducted fairly. When a breathalyser is used it would seem to be essential that a witness be present for the employee, and it would also be desirable that there be a witness for the management".<sup>28</sup>

From the above mentioned arbitration awards it is crystal clear that the use of instruments in proving intoxication especially the breathaliser test is preferred and found to be reliable, but are not the only evidence reliable to prove intoxication, other evidence will also be taken into consideration depending on the value and reliability of a such evidence.<sup>29</sup>

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<sup>27</sup> *Price Club and Commercial Catering and Allied Workers Union of South Africa*, CCMA Arbitration Award 1988/02/09.

<sup>28</sup> Ibid at 27 p 44.

<sup>29</sup> *Numsa & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A).

## 2.4. Misconduct due to intoxication

Intoxication as a misconduct is not measured at work by the bad things which the employee may be doing while intoxicated.<sup>30</sup> At common law, misconduct, which has been held to justify summary dismissal, includes *inter alia* drunkenness. Section 212 (10),<sup>31</sup> allows the Minister of Justice to prescribe in respect of any measuring instrument by notice in the Gazette. The conditions and requirements, which must be complied with before the reading made by such instruments, may be accepted. Once the conditions are complied with the measuring devices shall be accepted as proving the fact recorded unless the contrary is proved.<sup>32</sup> Once the employee has not properly tendered his services in terms of the employment contract and he is not entitled to be paid for mere arrival at work in an unfit state to work, there is a '*sickness presence*' as opposed to '*sickness absence*'.<sup>33</sup>

In *Naik v Telkom*<sup>34</sup> it was held that being under the influence of alcohol, and certainly being drunk, is not desirable at workplace situation. In the case of *Rosenberg v Mega Plastic case*,<sup>35</sup> the applicant, a truck driver, had been upon a proper notice by the respondent *inter alia* for being under the influence of alcohol at the respondent premises contrary to the provision of the agreed disciplinary code, which made this a competent sanction even in cases of a first offence.

The applicant was dismissed after a proper enquiry had been held. He thereafter appealed against the dismissal but his appeal was also rejected because the whole procedure took place in accordance with the respondent's

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<sup>30</sup> *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1992) 13 ILJ 304 (LAC) at 3123.

<sup>31</sup> Criminal Procedure Act 51 of 1977, see also Principles of Evidence 5<sup>th</sup> Edition 2001, Juta p 276.

<sup>32</sup> C Albertyn & M McCann Alcohol, Employment and Fair Labour Practice (1993) p 17.

<sup>33</sup> *Ibid* at 32.

<sup>34</sup> *Ibid* at 9.

<sup>35</sup> (1984) 5 ILJ 29 (IC).

disciplinary procedure, ultimately the inference drawn was that the applicant received a fair hearing.

The court held further that employees who were drunk at work, especially those operating potentially dangerous machinery or equipments and those who drive as part of their employment duties, commit serious disciplinary offence, and dismissal on the first offence has been held by the Industrial Court to be fair. *Erasmus SC said at 33A-B*

“It is clear in the Code that sanction for a first offence for being under the influence on the respondent's premises warrants a dismissal. If one considers the applicant's offence, it becomes apparent that his offence in comparison to that of a drunk on the premises is extremely serious. By driving a heavy-duty vehicle whilst under the influence of alcohol, the applicant had not only risked severe damage to the respondent's vehicle but also jeopardise the lives of the users of the road as well as that of two loaders. In addition thereto it must be borne in mind that he was also in charge of the other two loaders and that he had also permitted them to consume intoxicating liquor. In these circumstances the respondent decided not to lenient on the applicant. It seems to the Court that the respondent did not act in manifestly unjust manner in dismissing the applicant.”

In the case of *Albany Bakeries (Pty) Ltd Natal Banking Industry Employees Union*,<sup>36</sup> the arbitrator's terms of reference were to determine whether the dismissal of Mr.Pillay was fair. It was common cause between the parties that on Friday 4 December 1987, Mr Pillay had been arrested while on duty by members of the South African Police Service and charged with possession of dagga. He had pleaded guilty to the charge and was convicted, It was also a common cause that clause 16.10.1 of the agreed disciplinary code in operation at the company stated that...an employee may be dismissed without a final

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<sup>36</sup> *Albany Bakeries (Pty) Ltd and Natal Banking Industry Employee Union*, unreported CCMA, arbitration award, 1988/16/03.

warning being issued if he commits any of the following ...possession of drugs or liquor on company premises without permission.<sup>37</sup>

Mr. Pillay had already been punished for the possession of dagga by the Criminal Court. He was employed as a driver for more than five years by the company and that he had a good work record; and that his possession of dagga was not for the purpose of casual pleasure but for the purpose of a religious duty. However, the arbitrator held that in order for the agreed disciplinary Code to be effective, the company must be entitled to enforce its rules. His dismissal for breaching the rule was considered fair.

The substantive fairness of the dismissal for misconduct is assessed according to a number of criteria. These are set out in item 7 of the Code of Good Conduct: Dismissal. This reads:

Any person who is determining whether a dismissal for misconduct is unfair should consider -

- (a) Whether or not the employee contravened the rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened , whether or not -
  - (i) the rule was a valid or reasonable rule or standard;
  - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (iii) the rule or standard has been consistently applied by the employer; and
  - (iv) dismissal was appropriate sanction for the contravention of the rule or standard.

An employee who has brought liquor on the employer's premises in contravention of an express rule may be dismissed from employment.<sup>38</sup> In the

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<sup>37</sup> Ibid at 36 p 122.

<sup>38</sup> *Philemon Sithole v Welcome Service Station* (Unreported industrial court decision, 1986/05/01 GF) 114.

case of *Tanker Services (Pty) Ltd v Magudulela*,<sup>39</sup> the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to his employer. The Court held that an employee is under the influence of alcohol if he is unable to perform the tasks entrusted to him with skill expected of a sober person.<sup>40</sup>

The evidence required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depends on the offence with which the employee is charged.<sup>41</sup> If the employees were charged with being under the influence, evidence must be led to prove that their faculties were impaired to the extent that they were incapable of working properly, in this case Mr Magudulela's faculty was found to have been impaired.<sup>42</sup> What transpired in this case was, the court was not concerned, to the intoxication *per se*, but to the repercussions of the intoxicated employee with regard to the task the employee is supposed to perform.

The Court ruled that the evidence is required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depend on the offence, which the employee is charged.<sup>43</sup>

In the case of *Numsa obo Davids / Bosal Africa (Pty) Ltd*,<sup>44</sup> the dismissal of a crane driver was found to be justified, even though he had operated the crane without mishap for a number of hours before it was discovered that the alcohol content in his bloodstream was three times the legal limit for driving a vehicle on a public road.

This case clearly shows that an employee under the influence of alcohol will not, only be dismissed for failure to perform the work entrusted on him/her, but the mere fact of being intoxicated or exceeded a particular prohibited degree was sufficient to warrant dismissal, which I deem to be the correct approach,

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<sup>39</sup> (1997) 12 BLLR 1553 (LAC).

<sup>40</sup> (1997) 12 BLLR 1554 (LAC).

<sup>41</sup> (1997) 12 BLLR 1554 (LAC).

<sup>42</sup> (1997) 12 BLLR 1555 (LAC).

<sup>43</sup> John Wiley & Sons in 'Psychology & Social Problems' ( An Introduction to Applied Psychology) p231.

<sup>44</sup> Ibid at 22.

because the employee contravened the valid, reasonable rule which he was aware of, and to be serious to warrant dismissal. In *W A Devilliers v Servier Laboratories*,<sup>45</sup> the applicant had attended a lunch at a restaurant with a private sector representative (Mr van Bergen).

The purpose of the lunch had been the meeting of representatives and management on a social level; he consumed a few cans of beers. On leaving the restaurant, applicant had noticed that keys to the car had gone missing. . It is, furthermore, common cause that the applicant did not work during that afternoon of the 20 March 1992, but had spent the entire afternoon in a restaurant, *inter alia*, consuming approximately 6 cans of beer.

The applicant and van Bergen spent the afternoon of 20 March 1992 in a restaurant where a certain amount of alcohol was consumed by both of them. According to the applicant, he consumed approximately 6 cans of beer during the period (13h20-21h00) that he was at the restaurant.

He was suspended and later dismissed. The applicant raised various complaints against the fairness of his dismissal, namely, that his suspension was unfair as he had not been given the opportunity to state his case; that respondent had automatically presumed his guilt in that the disciplinary enquiry was a mere formality and that the decision to dismiss had already been made before the hearing even took place.

Although it is accepted that representatives are generally not tied to fixed office hours and usually worked flexible hours, the court cannot accept that an employer will allow an employee to spend an entire afternoon, during normal working hours, in a restaurant where the meeting was, in the first place, only intended to be a lunch.

As the respondent was unable to place other evidence before the court to indicate that applicant had consumed more than 6 cans of beer, the court accepted the version of the applicant.

It was submitted on behalf of the applicant that he was entitled, as a representative, to work fairly flexible hours and that representatives were not tied to any fixed working time. It was, furthermore, submitted on his behalf that as he had completed his duties for the day he could afford to take time off work

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<sup>45</sup> (1993) 4 SALR 20 (IC).

that day because it is not acceptable for an employee to consume alcohol in such quantities during a time, which fell within normal working hours.

The principles established by the court in this case was that although the court may accept that representatives generally are not tied to fixed office hours and usually work flexible hours, the court will not accept that an employer will allow an employee to spend an entire afternoon, during working hours, in a restaurant where the meeting which the representatives was scheduled to attend, was only intended to be a lunch.<sup>46</sup> The court upheld the dismissal.

In the case of *General Industrial Union Of SA & Sebate case*<sup>47</sup> the applicant had served in respondent's employ since 1988 until his dismissal on the 2<sup>nd</sup> February 1993.

Applicant alleged that his dismissal was both substantively and procedurally unfair and constituted an unfair labour practice.

The following grounds were, *inter alia*, relied on!

- (a) No valid or fair reason existed for applicant's dismissal;
- (b) The dismissal was not in compliance with a fair procedure since no hearing had been held, applicant had not been given a "notice prior to his dismissal" and applicant had not been given a right to appeal against his dismissal. Respondent, on the other hand, alleged that a valid and a fair reason existed for the termination of applicant's services due to his state of intoxication and that he had been subjected to a visible test for being under the influence in that he entered the yard he had carried on in a straight direction and collided with the vehicle. He had then noticed that the applicant was under the influence of alcohol and asked the applicant to get out of the vehicle. When the applicant had reached the ground he had detected the smell of alcohol and noticed that the applicant had difficulty staying on his feet.
- (c) The Court found the dismissal to constitute unfair labour practice. The fairness of the decision, that dismissal was the appropriate sanction. In deciding whether dismissal was the appropriate sanction in a given

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<sup>46</sup> Ibid at 45.

<sup>47</sup> (1994) 5 SALR 1 (IC).

situation, the test most often applied was whether the conduct of the employee had had the result that the employment relationship was seriously damaged or destroyed and /or whether its continuation was possible or tolerable for the employer. Even though a disciplinary rule might provide that an employee could be dismissed if he were caught drinking on duty, the employer had still to show that it was reasonable to dismiss the employee in the circumstances.

The penalty of dismissal should not be rigid but inflexibly applied. What was of further importance was that the workers affected by the rule should be properly informed of the rule; its effectiveness and sanction.<sup>48</sup> The rule against alcohol-intake had also to be clear and unambiguous, for example, that no -one might be intoxicated at work or no one in specific work categories (for example drivers) might not have any alcohol in their blood while at work.<sup>49</sup> In the present case, there was no evidence to suggest that applicant had been aware at the time of the sanction that he might face the conduct of this nature.

There had also been no evidence before the court as to what the exact provisions of Respondent's code were in this regard. Applicant's past disciplinary record also did not reflect any previous incidents of a similar nature and, in the absence of evidence relating to the degree to intoxication and previous warnings issued to the applicant in this regard, the court concluded that it was not possible to make an inference that the employment relationship could not be expected to continue.

Given all these factors, the court was found that the applicant's dismissal was substantively unfair.<sup>50</sup> As far as the procedure was concerned, the court stated that the courts had generally required that a fair procedure be followed prior to dismissal for misconduct.<sup>51</sup>

In the case of *Castle Lead Works (Pty) Ltd v National Union of Metalworkers of SA*<sup>52</sup> the case the grievant returned to work after lunch, the works foreman

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<sup>48</sup> Ibid at 47.

<sup>49</sup> *Cholata v Trek Engineering (Pty) Ltd* (1992) 13 ILJ 219 (IC).

<sup>50</sup> Ibid at 47.

<sup>51</sup> Item 7 (b) (ii) of schedule 8 in the LRA.

<sup>52</sup> (1989) 10 ILJ 776 (CCMA).

noted that his breath smelt of alcohol and he sent Mr Nyamakazi to the factory foreman for a breathalisher test, in light of this, the question was whether it was appropriate for the company to have dismissed Mr Nyamakazi in the circumstances. The arbitrator noted that:

“The degree with the company has treated alcohol intake as being serious is open doubt and certainly the company has not been consistent. No action was taken on previous occasion against Mr Nyamakazi.

This case furthers the principle of consistency, in the sense that an employer who fails to discipline, the employees abusing alcohol presently will have to tolerate the other abusers in future.”

The labour Court has for many years stressed the principle of equality of treatment of employees - the so-called parity principle.<sup>53</sup>

The final general requirement for a fair dismissal is probably the most problematic. This is that the sanction of dismissal must be 'appropriate for the contravention of the rule or standard'. The Code of Good Conduct: Dismissal reinforces the view adopted by the labour courts that dismissal should be reserved only for the gravest of infractions, and should be an action of last resort. Item 3(5) provides that:

When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and circumstances of the infringement itself. It is unfair to dismiss an employee for an offence, which the employer has habitually or frequently condoned in the past (historical inconsistency), or to dismiss some of a number of employees guilty of the same infraction (contemporaneous inconsistency).<sup>54</sup>

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<sup>53</sup> *National Union of Metal Workers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC).

<sup>54</sup> *Trompetter & 'N Ander v Barnard h/a Plaas Kruisaar* (1995) 16 ILJ 745.

The principle that the penalty must fit the offence requires an employer to consider alternative sanctions before taking the decision to dismiss.<sup>55</sup>

It would be unfair and inappropriate for an employer to require an employee to attend a disciplinary hearing while still under the influence of alcohol.<sup>56</sup> The employee must be given an opportunity to attend the enquiry once sober.<sup>57</sup> Different disciplinary codes in different workplaces may prescribe different penalties for different categories of work.<sup>58</sup> The disciplinary enquiry should occur as soon as reasonably practicable when the employee has returned to the workplace sober.<sup>59</sup>

## **2.5. Incapacity due to alcoholism**

Albertyn<sup>60</sup> talks about a medical theory, which takes the view that alcohol dependence is a disease or illness, which requires a cure, like any other sickness. Its premise is that any cure requires medical or clinical intervention. An employee incapacitated by alcohol is the employee who habitually relies upon or addicted to the consumption of excessive quantity of alcohol, or an inability to limit alcohol consumption, within reasonable limits. Incapacity arising from ill health or injury is a legitimate ground for dismissal, provided it is done fairly. The code of good conduct: Dismissal<sup>61</sup> engages all persons

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<sup>55</sup> *Durban Integrated Municipal Employees Society & Others v Durban City Council* (1988) 9 ILJ 1085 (IC).

<sup>56</sup> *Koyini v Strand Box* (1985) 6 ILJ 453 (IC) at 470H-I and the English decision *Charles Letts & Co Howard* (1976) IRLR 248.

<sup>57</sup> A Rycroft & B Jordaan A Guide to South Africa Labour Law (1990) 157-162, see also *Supra* at 14.

<sup>58</sup> M Olivier Industrial Dismissal in *Brassey at al*, *The New Labour Law* (1987) 440.

<sup>59</sup> *Ibid* at 35.

<sup>60</sup> C Albertyn & M McCann Alcohol, Employment and Fair Labour Practice (1993).

<sup>61</sup> Schedule 8 of the Code of Good Practice Dismissal in the LRA.

(including arbitrators and the courts) to consider the following when determining the fairness of dismissal arising from ill health or injury is fair:

- (a) whether or not the employee is capable of performing
- (b) if the employee is not capable
  - (i) the extent to which the employee is able to perform the work
  - (ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability, or where this is not possible, the extent to which the employee's duties might be adapted; and
  - (iii) the availability of any suitable alternative work

Looking at the nature of incapacity, special mention is made of employees who are addicted to drugs or alcohol, in which cases the employer is enjoined to consider counselling and rehabilitation.<sup>62</sup> These steps are generally considered unnecessary if employees deny that they are addicted to drugs or alcohol or deny that they were under the influence at the time.

Employers are obliged to investigate both the extent of an employee's disability and possible ways of adapting the employee's work to accommodate the employee. This clearly entails consultation with the employee, and examining how such disability impacts on the employee's performance.<sup>63</sup>

The right of incapacitated employees to state a case before a decision is made on whether to dismiss them ends the debate on whether a hearing or inquiry of some sort is necessary before dismissing an employee for incapacity. But employees should at least be afforded the chance to persuade the employer that their disability is not as serious as to justify dismissal, or to

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<sup>62</sup> On the approach to be adopted when an employee is incapacitated by medication taken to alleviate psychological stress, *Spero v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210 (IC).

<sup>63</sup> *Davis v Clean Deale CC* (1992) 13 ILJ 1230 (IC).

suggest alternatives to dismissal.<sup>64</sup> Possible alternatives to terminate include adapting incapacitated employees' current duties, providing them with reasonable assistance and/or equipment to help them to cope, or finding them alternative work.<sup>65</sup>

If the latter course is adopted, it is not necessarily unfair to reduce the employee's salary to that attached to the alternative position. The substantive fairness of dismissal depends on the question of, whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include *inter alia* the nature of the incapacity; the cause of the incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on the other employees; and the employee's work record and length of service.<sup>66</sup>

In the case of *Spero v Elvey International*<sup>67</sup> the respondent had employed The applicant, who had not informed the respondent of his history of depression, for about seven months when he was hospitalised after taking an overdose of antidepressant medication.

On his return to work it was decided that the applicant would obtain certain psychiatric reports to assess his continued ability to perform his duties. After receipt of one psychiatrist's report the respondent dismissed the applicant on the ground that his severe depression and the unpredictable effects of his medication rendered him incapable of carrying out his duties.

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<sup>64</sup> It has been held that an employer cannot rely on the so-called no difference principle for its failure to consult in these circumstances: *Carr v Fisons Pharmaceuticals* (1995) 16 ILJ 179 (IC).

<sup>65</sup> *Ibid* at 64.

<sup>66</sup> *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1992) 13 ILJ 304 (LAC) at 312I-J. See also *AECI Explosive Ltd (Zomerveld) v Mambalu* (1995) ILJ 1505 at 1510C-E.

<sup>67</sup> (1995) 16 ILJ 1210 (IC).

The court found that the respondent had no valid reason to dismiss the applicant. The psychiatrist's report did not support the conclusion of the respondent that the applicant was unable to carry out his duties.<sup>68</sup>

The court held that the applicant's absence from the work was clearly temporary and did not exceed the period of six weeks which respondent had been prepared to allow for his treatment. The (ILO) Convention,<sup>69</sup> and the ILO Recommendation,<sup>70</sup> provides that temporary absence from work because of illness or injury shall not constitute a valid reason for termination. This sound principle requires no further comment.

When one analyses the 'findings' of the director of the respondent in the light of his testimony, the reason for dismissal of applicant is shown to be operational. It was respondent's view that;

- Applicant's behaviour on 31 January had been caused by an overdose of medication;
- The medication had been prescribed for a major depressive disorder;
- The prognosis for applicant's recovery from the disorder was uncertain.
- There was consequently a risk that applicant would again abuse his medication and render himself incapable of maintaining the 'high standards of performance and appearance' which respondent demanded from his sales representative; and
- Such risk could not be taken in the 'sensitive' security industry in which respondent traded.

The justification which respondent has advanced for the dismissal of the applicant is that of the sensitivity of its operations. The facts did not, support the respondent and the court held further that it couldn't accept that it could

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<sup>68</sup> Ibid at 67.

<sup>69</sup> Article 6 of Convention 158 of 1982.

<sup>70</sup> Paragraph 5 of Recommendation 166 of 1982.

ever be reasonable and fair that a junior employee, charged with quite ordinary duties in a mundane and common commercial activity.

*Labuschagne AM* held that:<sup>71</sup>

“the applicant be reinstated in the respondent's employment on conditions similar to those which pertained at the time of his dismissal, subject, however, to a provision that he shall be liable to summary dismissal should he at any time abuse any medicinal substance to the extent that it impairs his capacity to perform the duties which are normally and reasonably expected from him by respondent.”<sup>72</sup>

What transpired from this case is that the respondent managed to recognise that, the employee was incapacitated, what the respondent has failed to do was to follow the consequences of incapacity by looking at the extent to which the employee is able to work, and the extent to which the employee's work circumstances might be adapted to accommodate the disability, instead predicted that the employee will not be able to work anymore.<sup>73</sup>

In the case of *Erasmus v BB Bread Ltd*<sup>74</sup> on a similar procedure for senior managerial employees Landman AM expressed the following view:

‘I have no doubt in my mind that a disciplinary code does not normally apply to a person in the position of a manager. It is sufficient that there should be a proper enquiry in which the principles of natural justice are observed. Such an enquiry may well take the form of meetings between the employee involved and his superiors and need not be as formalised as is generally the case where employees of a lower rank are involved’.

But in the case of *Visser v Safair Freighters*,<sup>75</sup> it was held that the most important requirements in a case where a manager is dismissed on the basis

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<sup>71</sup> Ibid at 67.

<sup>72</sup> *Spero v Elvey International* (1995) 16 ILJ 1210 (IC) at 1214.

<sup>73</sup> ‘The Right to a hearing before Dismissal’ (1988) 9 ILJ 147 at 171.

<sup>74</sup> (1987) 8 ILJ 537 (IC) at 544.

of incapacity is that he must receive warnings, that he must be properly informed of the allegations against him, that he must be given a fair trial where the requirements of fairness imply that the rules of natural justice must be observed and that he is consequently entitled to representation and an opportunity to state his case.

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<sup>75</sup> (1989) 10 ILJ 529 (IC) at 535C-E.

## CHAPTER THREE

### 3. The grey line between misconduct & incapacity

An employer confronted with an intoxicated employee might be, an employee abusing alcohol is purely committing misconduct, whereas an employee dependant on alcohol must be dismissed via incapacity procedure, but case law has shown that dependent employees are often confused with employees committing misconduct.

In *Naik v Telkom*<sup>76</sup> Mr. Naik was employed by Telkom as a joiner, although a heavy drinker for years, he had no alcohol problems at work until 1998. In 1997 he came to occupy a vital administrative and coordinator position in the construction department. During 1998 he admitted himself at a rehabilitation centre at his own costs, and benefited from the programme, but still suffered relapses.

The applicant one day when he was working, but during his counselling period, was found to be under the influence of alcohol at work, and threatened his manager with a panga. He was issued with a final written warning.

After this incident fewer days after, when he had to attend an important meeting with the management, he was found intoxicated and passed out in his car. After a disciplinary enquiry he was dismissed, then the applicant appealed at the CCMA. His wife, who is also the employee of the respondent, represented the applicant. The employee and his wife, who gave evidence as a person living with an alcoholic, contended that alcoholism is a disease that cannot be cured or controlled overnight. Recovering inevitably included relapses (she was then referring to the panga and management meetings, being incidents transpired during counselling period).

The applicant was in a continuing rehabilitation programme. Because of his long service and the fact that alcoholism was a disease, the company should have given him more time while treatment was in progress.

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<sup>76</sup> *Ibid* at 9.

The CCMA upheld the appeal on the ground that when someone is sick and displays the symptoms of sickness, this is not usually a cause for dismissal. When suffering from an illness that interferes with an employee's capacity to work, such an employee is allowed a chance to recover away from work. Diseases that interfered with the employee's capacity to perform satisfactory at work and which are chronic or take longer to cure or bring under control, do not automatically justify dismissal. The commissioner held that the applicant had submitted to a treatment for his alcohol dependence. He is still in treatment. I find therefore the dismissal of the applicant to be substantively unfair, instead of dismissal the respondent, which is a large and sophisticated employer, ought to have at least attempted to offer the applicant the option of placement in a position where an occasional absence from work might be less significant, even if this meant a demotion. Only in the event in that all reasonable alternatives placements were refused or totally impossible, ought the applicant to have been dismissed.<sup>77</sup>

The manager in this case was more negligent in the sense that he was aware about the applicant dependence on alcohol because is the one, who together with the applicant's wife encouraged the applicant to admit himself to the rehabilitation centre, following this the applicant was also instructed to attend the employer's wellness centre for counselling, he attended one counselling session and thereafter advised the counsellor that he did not wish to attend the centre as he had his own doctor at the rehabilitation centre.

The counsellor confirmed this with the applicant doctor and visited the period, and she was satisfied with the centre. The employee has made it clear during the disciplinary enquiry that he is willing to be transferred or to be demoted as an alternative to dismissal; the employer disregarded all these facts and dismissed the employee.

Employing a worker for 17 years, who did not have a bad record, this should have alerted the employer that the employee might be having problems, and the fact that the employee was the one who admitted his dependence and took a further step to undergo a counselling at his own costs. A prudent employer would not punish a sick employee, but rather assist him/her. In the case

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<sup>77</sup> Ibid at 76.

of *Automobile Association of SA v Govender*.<sup>78</sup> The applicant Mr. Naidoo who was employed as a driver, took an overdose of medication, he was dismissed after being found guilty of reckless and negligent driving, endangering the public; bringing the employer business (AA) into disrepute and acting aggressively by pointing a firearm at the member of the public.

Enquiry was held and the employee was dismissed. He was dissatisfied with the outcome and the dispute was held at the CCMA.

The commissioner called Dr. Lalla, a general practitioner who was treating Mr. Naidoo to give evidence. He stated that Mr. Naidoo was being treated for depression and migrane and received medication, and that depression and combination of medication, if aggravated, could result in memory loss. ultimately the commissioner found that Mr. Naidoo established on a balance of probabilities that he was under the influence of medication that affected him both physically and mentally.

The dismissal was found not to be the appropriate sanction in these circumstances.

The CCMA held that the applicant committed misconduct but was not in his proper senses when the misconduct was committed; the applicant had been under the influence of medication when he perpetrated the acts of misconduct. The employee was reinstated on condition that should he be negligent when taking medication and result in acts of prejudicial to the employer within the next six months, he could be dismissed.

The employer then applied to the labour court to review the arbitration award in terms of section 145 of the Labour Relation Act 66 of 1995. The Labour Court per Landman J held that:<sup>79</sup>

"I have however some difficulty with the sanction imposed by the commissioner. Mr. Naidoo's action caused his employer financial harm and damaged the reputation of the AA, which is a customer-orientated service. The commissioner recognised this. But the sanction imposed by the commissioner would not prevent another disastrous repetition of the

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<sup>78</sup>(1999) 20 ILJ 2854 (LC).

<sup>79</sup>Ibid at 78.

events Mr. Naidoo caused while his mental and physical illness persists. The commissioner was obliged to take the interests of the employer and the employee into account. The sanction imposed does not do this adequately and, I am of the view that the sanction is unjustifiable. The commissioner should have considered whether it was feasible for the AA to have offered Mr. Naidoo leave of absence or a transfer to a position that would not involve driving even if it amounted to a demotion. I have decided to remit the matter to the commissioner to take them into account.”

Looking at this case Mr. Naidoo problems of stress and depression were known to the employer, managers and fellow employees for some time. But the employer did nothing to help the employee because his drunkenness did not affect the smooth running of the business was, but the time the employee acted negatively and detrimental to the company, that was the time the employer instead of helping the employee, he punished the employee.

The employee might have contravened the rule, but the mere fact that he was not in his proper senses when the misconduct was committed because he had been under the influence of medication which affected him both physically and mentally when he perpetrated the acts of misconduct is the reason which rendered the sanction of dismissal unfair.<sup>80</sup>

The employer failed to investigate the extent of incapacity and all possible alternatives short of dismissal. Item 10( 3 ) of code of Good Practice: Dismissal provides that in the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

The employer had failed to take all these above mentioned into cognisance; it was against that background that the dismissal was unfair.

The commissioner held that the dismissal was unfair but failed to take into consideration the interests of the employer by securing the employee an alternative job, in removing Mr. Naidoo from driving position to a different position where his depression and stress could be minimally felt.

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<sup>80</sup> *Automobile Association of SA v Govender* (1999) 20 ILJ 2854 (LC).

The Labour Court concurred with the commissioner that the dismissal was substantively unfair but differed on the conditions of reinstatement due to the commissioner's failure to take the interests of the employer into account by returning the employee on the same position which could cause the employer further loss.

This case differ slightly with the *Naik* case in the sense that in *Naik*, the employer was aware that the employee is undergoing counselling, that the counselling is still in process and that the employee indicated that he is willing to be transferred or demoted as an alternative to dismissal but nevertheless he was dismissed.

In the case of *Castle Lead Works*<sup>81</sup> the employer dismissed a worker for reporting to work under the influence of alcohol. It appeared from the evidence that the grievant was dependent on alcohol because at the arbitration proceedings the grievant volunteered that he had a drink of sondela (a kind of Bantu beer) every day and he stated that without this drink he could not cope as it made him strong. This had been the case for the full five years of his employment with the company and indeed he volunteered that before the arbitration hearing commenced he had drunk some sondela for him to be strong.

It was clear that if the grievant were reinstated he would resume alcohol consumption because of his dependence.

The employer indicated that it would be willing to reinstate the worker save for his alcoholic dependence. In these circumstances, the arbitrator reinstated the grievant on condition that he report to an alcohol rehabilitation programme for a period of eight weeks.

The CCMA held that the consumption of alcohol on the job is considered to be a danger both to other workers and to the worker himself and this were not disputed by the union. The disciplinary code includes amongst the offences which warrant dismissal: 'Being under the influence of alcohol or drugs whilst on duty, or being consuming, selling these on the company's property', but the

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<sup>81</sup>*Castle Lead Works (Pty) Ltd v National Union of Metal Workers of SA* (1989) 10 ILJ 776 (CCMA); *Schneier and London v Bennet* 1927 TPD 346; *Boon v Vaughan & Co Ltd* 1919 TPD 77.

personnel manager of the employer made it clear, on behalf of the company that we are dealing with a situation of alcohol dependence and not a simple situation of drinking in disobedience of the company's rules.

The General Manager also agreed that the grievant had a drinking problem.

The arbitrator held that:<sup>82</sup>

'The modern tendency is to treat alcoholism as an illness rather than as culpable misconduct. The criterion here is: did the employee's drunkenness materially affect his performance of, or suitability for, the task in question. If the answer is affirmative then the drunkenness will usually be a valid ground for dismissal. However, the prudent employer will also have regard to the personal circumstances of the employee and in particular the reason for his being on duty'.

The principle envisaged by this case was, the employer who overlooked the previous transgression of employer who abuses alcohol would have to tolerate or face the consequences of drunkenness in future.

The employer had a rule prohibiting consumption and intoxication of drugs and alcohol being offences warranting dismissal. But the degree with which the company has treated alcohol intake as being serious is open to doubt and certainly the company has not been consistent.

No action was taken on previous occasions against the grievant and this is the reason why reinstatement was ordered because the employer failed to discipline while the employee could have been disciplined, the condition has changed now, the employee is dependent, and he needs help not punishment. It is against that background that the sanction of dismissal was rendered unfair.

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<sup>82</sup>*Castle Lead Works (Pty) Ltd v National Union of Metal Workers of SA* (1989) 10 ILJ 776 (CCMA (1989) at 780.



## CHAPTER FOUR

### APPROACHES IN OTHER JURISDICTIONS

#### 4. AUSTRALIAN APPROACH

##### 4.1. Drugs and alcohol in the workplace

The impact of drugs and alcohol on workplace safety, performance, relations and productivity is increasingly becoming an issue for Australian employers.<sup>83</sup>

Drugs and alcohol usage are major public health issues in Australia and imposes costs in other areas of government and adversely affects workforce participation which ultimately impinges on employee performance.<sup>84</sup> Misuse of drugs and alcohol are associated with a range of negative human resource and productivity effects such as absenteeism, turnover, decreased performance and lower levels of job satisfaction.<sup>85</sup>

Drugs and alcohol misuse also imposes costs on employers as a trigger for other forms of liability and litigation including sexual harassment and termination of employment claims.<sup>86</sup>

##### 4.1.1. Individual responsibilities

Identifying the nature of the problem provides some basis for developing solutions. Solutions to the problems start with individual responsibility and can be supported by

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<sup>83</sup>*Medical Journal Australia* (MJA) a Journal of the Australian Medical Association (2006), volume 184 of Number 8.

<sup>84</sup>In November 2006 ACCI convened a meeting of occupational health and safety experts from employer organisations to work on national policy guidance for employers on drug and alcohol usage in the workplace.

<sup>85</sup> Ibid at 82

<sup>86</sup>*Medical Journal Australia* (MJA) a Journal of the Australian Medical Association (2006), volume 184 of Number 9.

collective community action in the form of education, enforcement and rehabilitation. Employees should present themselves at work for work in a state that is safe and productive.<sup>87</sup>

#### 4.1.2. Employer duties

While many employers would prefer not to interfere in an issue which is often seen as being the preserve of the private lives of employees, there are statutory obligations on employers that require some level of active management of drug and alcohol issues.<sup>88</sup> Employers in particular industries undertake drug and alcohol testing to ensure that no employees perform work whilst under the influence of drugs and alcohol.<sup>89</sup> In a broader sense, the general duties of employers under State/Territory occupational health and Occupational Health and Safety (OHS) laws provide safe workplaces to ensuring that employees who operate plant or equipment or perform work are not impaired by drugs or alcohol.<sup>90</sup> Employers in particular need to be aware of the stricter standards,<sup>91</sup> which apply to information classified as health information which is particularly relevant in the context of drug and alcohol policies.<sup>92</sup>

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<sup>87</sup>The ACCI ModernWorkplace: Safer Workplace blueprint. Employer organisations, through the leadership position of ACCI on the tripartite Australian Safety and Compensation Council, also have the opportunity to engage in national discussion and strategy on these issues with senior representatives of all governments and the trade union movement.

<sup>88</sup> A Monash University Journal on Drugs and Alcohol of 2006 p 35.

<sup>89</sup>Ibid at 86.

<sup>90</sup>As highlighted in the ACCI OHS Policy Blueprint *Modern Workplace:Safer Workplace*, published in 2005.

<sup>91</sup>The ACCI Modern Workplace: SaferWorkplace blueprint.

<sup>92</sup>National Centre for Education and Training on Addiction in June 2006.. Policy Blueprint *Modern Workplace:Safer Workplace*, published in 2005.In December 2006 the *Medical Journalof Australia* published a report by the National Centre for Education and Training on Addiction at Flinders University. That report dealt with the issue of

### 4.1.3. Dismissal legislation

*Workplace Surveillance Act*<sup>93</sup> regulates the termination of employment in Australia. Applying drug and alcohol policy in a way that does not give rise to termination litigation is not an easy task. Some lawyers and litigants even argue that an employee's addiction is a disability, giving rise to employer obligations under discrimination or workers' compensation laws.<sup>94</sup> Employers, particularly those in unionized businesses, should consider consulting with trade unions on these issues, with a view to assisting in the development and implementation of policy. Equally, employers cannot and should not abrogate their responsibility for managing these issues, should trade union consultation not be effective or appropriate.<sup>95</sup>

The challenge of addressing and managing drug and alcohol impacts on the workplace is an emerging issue being faced by employers, but not all.<sup>96</sup>

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excessive alcohol consumption and its impact on the workplace. In December 2006 the *Medical Journal of Australia* published a report by the National Centre for Education and Training on Addiction at Flinders University. That report dealt with the issue of excessive alcohol consumption and its impact on the workplace.

<sup>93</sup>Workplace Surveillance Act 2005 (NSW); New South Wales (NSW)

<sup>94</sup>In June 2006 ACCI presented a paper to the National Centre for Education and Training on Addiction.

<sup>95</sup> Supra at 87.

<sup>96</sup>A recent ACCI survey of 549 union and non union agreements shows that almost 25 per cent specifically address the drug and alcohol issue.

## 4.2. UNITED KINGDOM (UK) APPROACH

### 4.3. Introduction and rationale for drugs and alcohol policies

Northern Ireland's strategies on Drugs and Alcohol aim to reduce the harm caused to individuals and society through the misuse of alcohol and the use of illicit drugs.<sup>97</sup> Both strategies are implemented through the Northern Ireland Drugs and Alcohol Campaign which addresses the specific needs of the working community.<sup>98</sup>

Alcohol and illicit drugs have infinitive impacts on health, safety, work performance and absenteeism can jeopardise productivity, deny businesses the leading edge and curtail competitiveness.<sup>99</sup> Effectively implemented drugs and alcohol policies will help employers in their legal duty to safeguard the health, safety and welfare of their employees and may, in some instances, influence the scale of insurance premiums and the availability of cover.<sup>100</sup>

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<sup>97</sup> Northern Ireland Strategies on Drugs and Alcohol releases as New Releases by the Department of Health, Socioal Services & Public Safety on the 08<sup>th</sup> October 2003.

<sup>98</sup>Statement of Intent: Healthier Workplaces DETI, DHSSPS March 2001, Investing for Health DHSSPS 2002. 3 Working for Health: A long-term workplace health strategy for Northern Ireland: HSENI 2003. Raising Awareness Early Recognition Support.

<sup>99</sup>Parker, H, Better Managing Northern Ireland's alcohol and drugs problems. Belfast: DHSSPS, 2005. [www.dhsspsni.gov.uk/drugs-alcohol-report-ni-review](http://www.dhsspsni.gov.uk/drugs-alcohol-report-ni-review).

<sup>100</sup>Health and Safety Executive. Don't mix it! A guide for employers on alcohol at work. IND(G) 240L HSE 1996.2 Northern Ireland Civil Service (2001) Workforce Health Survey 2000. Northern Ireland Civil Service Occupational Health Service and Northern Ireland Statistics and Research Agency Belfast. 3 Personnel Today 2000. 4 Holtermann S. Burchell A. Government Economic Service Working Party. No 37.1981 DHSS. 5 Work environment, alcohol consumption and ill health. The Whitehall II Study. HSE Contract Research Report 422/2002. 6 The ESPAD Study: see Plant M. and Miller P. Drug use has declined among teenagers in the United Kingdom. BMJ 2000; 320:1536. 7 Reducing Alcohol-Related Harm in Northern Ireland. A report to the DHSS by the Project Team. Annexes Vol 1 1999.

#### **4.3.1. What are the aims and the benefits of a policy?**

The following are the aims of drugs and alcohol policies:

- To prevent drugs and alcohol problems by raising awareness and providing guidance on the symptoms, effects on work and health consequences of both drugs and alcohol;
- To seek to identify a problem at an early stage and thus minimise risks to the health and safety of the employee and potentially safeguard the health and safety of fellow employees and others;
- To recognise drugs and alcohol problems as medical conditions, which are potentially treatable and provide the means whereby those who have a problem can seek and be offered help in confidence;
- To provide competent assistance and support to employees with problems with the aim of reintegrating them back in work.<sup>101</sup>

#### **4.3.2. Helping employees who have problems**

The policy should describe sources of assistance for employees who have problem. This assistance may take the form of counselling, referral for treatment or reintegration into the workplace. Where an occupational health service is available it will probably be identified as the initial point of referral. On the side of the employer the policy will help the employer to identify employees who are abusing or dependent on alcohol/drugs and on how to deal with those employees. In the absence of human resource personnel employees should contact the local Drugs and Alcohol Co-ordination Team. Some agencies accept direct referrals whilst others will require a referral from a medical

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<sup>101</sup> Haslam C, Brown S, Hastings S, Haslam R. Effects of prescribed medication on performance in the working population. Research report 057. Health and Safety Executive 2003. 2 Where employees work with human or veterinary medicines health and safety legislation requires that safe working practices should be in place.

practitioner. It is helpful if they have experience of working with employees and employers and understand the nature of their relationship with both the employee and the employer.<sup>102</sup> Ideally all three should work in partnership with the stated aim of restoring the employee to be productive employees.<sup>103</sup>

#### **4.3.3. The Data Protection Act of the United Kingdom<sup>104</sup>**

According to the Data and Protection Act, all health and medical information is sensitive personal data and all information surrounding possible drug or alcohol problems must be handled securely and confidentially.<sup>105</sup>

#### **4.3.4. The Misuse of Drugs Act<sup>106</sup>**

This is the principal legislation in the UK for controlling the misuse of drugs. It makes the production, supply and possession of named controlled drugs unlawful.<sup>107</sup>

### **4.4. Unfair dismissal**

Employees have the right not to be unfairly dismissed.<sup>108</sup> In determining the appropriate action for an employer to take in respect of drugs or alcohol problems which can present in the workplace, the investigation of the presenting incident or pattern of behaviour is crucial.<sup>109</sup> By way of example, the remedial procedural requirements differ

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<sup>102</sup> Ibid at 99.

<sup>103</sup> The Health and Safety at Work (Northern Ireland) Order 1978 (the Order).

<sup>104</sup> Data Protection Act 1998.

<sup>105</sup> Section 2.

<sup>106</sup> Misuse of Drugs Act 1971.

<sup>107</sup> Section 2, 4 and 5.

<sup>108</sup> Guidance from the Labour Relations Agency on the Employment Rights (Northern Ireland) Order 1996 and its application to cases relating to drugs or alcohol.

<sup>109</sup> Ibid at 103.

according to the classification of the problem, so to follow an incorrect procedure in response to the problem would be to invite a clear risk of a finding of unfair dismissal.<sup>110</sup> In the case of drugs or alcohol problems simply following a disciplinary procedure to correct the behaviour could be ineffective in assisting the employee but also legally 'invalid' in terms of the subsequent tribunal analysis.

An employer who fails to recognise this can face clear legal risks and potential high damages.<sup>111</sup>

#### **4.5. No right to drink alcohol**

The case of *Whitefield v General Medical Council*<sup>112</sup> was heard before the Privy Council and concerned a doctor who had been convicted of defrauding the NHS. On release from prison the doctor who had a serious drink problem was allowed to practice provided he satisfied 14 conditions which included absolute abstinence from alcohol, submitting to blood and urine tests and attending regular Alcoholic Anonymous meetings. The doctor complained that this infringed his right to respect for his private life under Article 8(1) of the European Convention on Human Rights (ECHR) because it deprived him of the opportunity of social drinking such as at his local pub or on family occasions.

The Privy Council held that the condition to abstain from alcohol consumption did not breach Article 8(1) since the doctor could still attend his local pub or engage in social life while drinking non-alcoholic drinks. In addition as a doctor his 'right' to an unrestricted social life was subject to the wider public interest of ensuring that he did not present a risk to his patients.<sup>113</sup>

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<sup>110</sup>Section 6.

<sup>111</sup>The Employers' Handbook: Guide to Employment Law and Good Practice.

<sup>112</sup> [2002] UKPC 62.

<sup>113</sup>Ibid at 111 p 66.

## CHAPTER FIVE

### 5. Conclusions and recommendations

Prevention is better than cure. Prevention of alcoholism is cheaper than diagnosis.<sup>114</sup>The issue of when an intoxicated employee should be disciplined and when should be treated as an alcoholic, need an alcohol/drug policy agreed upon by the employer and the trade union/employees with clear objectives.If the policy prohibits the total consumption of alcohol or the use of drugs, it shouldn't be contradictory, for an example, a university prohibiting a total consumption of alcohol, but having a staff cafeteria where alcohol is sold, and later discipline lecturers and other staff members who are found to have consumed alcohol.

It is important to have Alcohol Policy which is lawful, fair and attainable, and also a fair and lawful means of testing suspects at work to ascertain the levels of alcohol in the blood, by qualified staff with approved and reliable testing equipment.<sup>115</sup>

The employer must also implement the policy and adopt measures to effectively implement that policy.<sup>116</sup> They should use instruments like breathalyser and blood tests and in the case of alcoholism medical report will be relevant. The policy must be consistently applied to avoid the risk of disciplining some at the expense of others. One key to effective intervention is timing. Several weeks of lateness or absenteeism or month's diminished productivity need to be on record.

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<sup>114</sup>John Wiley & Sons 'Psychology & Social Problems' ( An Introduction to Applied Psychology) p 235.

<sup>115</sup>*Naik v Telkom* (2000) 21 ILJ 1266 (CCMA).

<sup>116</sup>*Encyclopedia Journal of Canadian Social Work*, by Francis Joseph Turner, 2005, p 193.

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