



CITY OF CAPE TOWN
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Drug Alcohol Misuse: Misconduct vs Incapacity

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Drug and/or Alcohol Misuse Misconduct vs Incapacity Legal Framework

- **Common Law duties:** Employees have a general duty to make their services available in a competent manner and to refrain from misconduct;
- **The Labour Relations Act Schedule 8 Code of Good Practice clause 2 (2)** recognize 3 grounds on which termination of employment might take place.
 - **Conduct;**
 - **Capacity;**
 - **Operational Requirements.**
- **The Disciplinary Procedure Collective Agreement** recognizes misuse of substances as a **misconduct issue**;

Drug and/or Alcohol Misuse Misconduct vs Incapacity Legal Framework

- **Clause 1.2.13 of the DPCA** states that employees should “Refrain from consuming alcohol or using intoxicating drugs whilst on duty”;
- **Clause 2.7 of the DPCA** states as a guideline an employee could be dismissed on the first occasion for, amongst others:
- **Clause 2.7.3** being under the influence of alcohol or intoxicating drugs whilst on duty such that performance is seriously impaired or diminished.
- **Clause 2.7.4** the consumption of alcohol or intoxicating drugs whilst on duty if the nature of work to be performed is such that intoxication endangers the safety of the Employee or that of others.

Drug and/or Alcohol Misuse Misconduct vs Incapacity Legal Framework

- **Section 2A (1) of the General Safety Regulations of the OHS Act** states, amongst others, that an employer **shall not permit** any person **who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at the workplace.**
- **Section 2A (2)** states that no person at a workplace shall be under the influence of or have in his/her possession or partake of or offer any other person intoxicating liquor or drugs.
- **Section 2A (3)** states that an employer shall in the case where an employee utilize medicine, only allow such person to perform duties at the workplace if the side effects of such medicine do not constitute a threat to the health and safety of the employee or other persons at such workplace.
- **The Labour Relations Act in Schedule 8 Clause 10 (3)** also recognizes alcohol or drug misuse as a form of incapacity that may require counselling and rehabilitation. **(Incapacity issue).**



Drug and/or Alcohol Misuse Misconduct vs Incapacity Legal Framework

- **In Scientific and Medical circles**, alcoholism is regarded as a diagnosable and treatable disease which result in the **incapacity** of the employee.
- **The Dispute Resolution forums** (CCMA, Bargaining Council & Labour Court) have accepted that alcoholism is categorized as an illness.
- Employers are required to activate the **Incapacity Ill Health Procedures** where employees are assisted through the provisioning of counselling and rehabilitation.
- **Section 7(1)(b) of the EEA** allows for **medical testing** if it justifiable to do so and in the instance of substance abuse the testing would be in line with the conditions of employment and or inherent requirements of the job.

Drug Alcohol Misuse Misconduct vs Incapacity Legal Framework

- **Common Law duties**: Require that employees are both willing and able to fulfill their employment contracts.
- **Misconduct**: Refers to an employee's unwillingness to comply with the employer's standards and conditions.
- **Incapacity**: Refers to an employee's un-ability to comply with the employer's standards and conditions.
- Where employees are found under the influence of alcohol or an intoxicating substance, Line Management must determine the appropriate forum to engage the employee in.

Appropriate Forum to deal with the Drug/Alcohol Misuse

- Line Management need to ascertain whether a **dependency problem exists** which would determine the appropriate forum.
- The **dependency factor** would be influenced by:
 - **the employee's past conduct/history of alcohol/substance misuse;**
 - **the employee's acknowledgement that he/she suffers from a substance abuse problem/is an addict;**
 - **Employee's request to Line Management for assistance with alcohol or drug misuse;**
 - **Employee's willingness to be rehabilitated;**

Appropriate Forum to deal with the Drug/Alcohol Misuse

- **Employee's acknowledgement that he/she was under influence of alcohol/drugs as per specific incident in question;**
- **Line Management's knowledge that alcoholism is a diagnosable and treatable disease;**
- **Line Management's acceptance that the alcoholism/drug misuse is regarded as a no-fault conduct by the employee as he/she cannot be blamed for the disease he/she is suffering from.**
- **The CCMA, BC and Courts' acceptance that in scientific and medical circles alcoholism is a diagnosable and treatable disease which result in the incapacity of the employee.**



Appropriate Forum to deal with the Drug/Alcohol Misuse

- **NB: Line Management should guard against employees hiding behind dependency as a defense in disciplinary hearings.**
- Where Line Management accepts that a **dependency problem exists**, the **incapacity ill health** procedure is activated.
- The Incapacity Process requires that the employer must assist the employee by referring him/her for **Counselling** (Employee Assistance Program) and **Rehabilitation**.

Appropriate Forum to deal with the Drug/Alcohol Misuse

- Where Line Management determines that **no dependency problem exists**, the **disciplinary procedure** is activated.

The decision to proceed with Disciplinary action should be based on the following factors:

- **No history of substance abuse pertaining to employee exists;**
- **No acknowledgement of being an alcoholic or a drug addict by employee;**
- **Employee denying that he/she was intoxicated as per incident in question;**

Appropriate Forum to deal with the Drug/Alcohol Misuse

- **Employee failing to comply with rehabilitation requirements.**
- **Employee claiming he/she suffers from dependency after being caught.**
- **Employee in control of his/her consumption of alcohol and are fit to be held accountable for it.**
- The Disciplinary Process requires that the **Verdict** be ascertained and a **Sanction** be issued.
- Where an employee is not addicted to drugs or alcohol or denies that he/she was under the influence of an intoxicating substance as per incident in question, counselling and rehabilitation is not required.

Dagga Judgement: Minister of Justice and Constitutional Development and others v Garreth Prince and others

- Court declared the **use**, **possession**, **purchase** and **cultivation** of dagga, by adults in a private place and for private purposes, as legal.
- Court declared that dagga can only be consumed in a private place, **this excludes a workplace.**
- Dagga should be dealt with similarly to alcohol as both are legal but contains intoxicating substances and are therefore not allowed in the workplace.

Dagga Judgement: Minister of Justice and Constitutional Development and others v Garreth Prince and others

- Dagga cannot be treated the same as **(e) - cigarettes** as cigarettes do not contain an intoxicating substance.
- **Section 2A (2) of the OHS Act** states that **no person** at a workplace shall **be under the influence of or have in his/her possession or partake of or offer any other person intoxicating liquor or drugs.** [..\..\..\..\Desktop\IMPISA\Prohibition of dagga in the workplace.msg](#)
- The use of dagga will result in either disciplinary action or incapacity procedures.

Process followed in CCT dealing with Substance Abuse

- Employees found under the influence of alcohol or an intoxicating substance are **immediately subjected to an observation test.** (Checklist) ..\..\..\..\Desktop\IMPISA\Substance Abuse Checklist_SA1.doc
- Employees found to be under the influence of an intoxicating substance are **immediately booked off work** with **the resulting loss of remuneration** for the remainder of the day.
- The employee will, in all probability, be **subjected to disciplinary action** and if found **guilty, employee would in all probability be penalized with either a final written warning, penalty short of dismissal/dismissal.**
- City of Cape Town applies either corrective or punitive disciplinary action in line with clause 2.2 of the DPCA for substance abuse.

Process followed in CCT dealing with Substance Abuse

- Factors that will influence the appropriate penalty are:
 - The nature of an employee's job;
 - The risk to the safety, death, injury of the staff member, fellow employees or other parties and risk to property;
 - Whether current/previous related penalties exists against employee.

Please note: The fact that an employee worked undeterred, **for two hours**, whilst under the influence without an incident having occurred **cannot be a mitigating** factor **[Exactics-Pet (Pty) Ltd v Petalia No & other (2006) ILJ 1126 (LC) referring to NUMSA obo Davids v Bosal Africa (Pty) Ltd (1999)]** where heavy vehicle crane driver operated crane for **3 hours** without mishap. **Dismissals fair.**

Relevant Case Law

- In the case of **Transnet Freight Rail v Transnet Bargaining Council & others Labour Court (Judge Steenkamp) 2011**, the Court found that the Commissioner committed misconduct when he/she **imported incapacity requirements** (employee to be sent for rehabilitation) **where clear misconduct occurred**, on the part of **Ms. Louw** who **reported for duty under the influence of alcohol**.
- **The arbitrator committed a gross irregularity in extending the requirement to treat alcoholism as a disease (i.e. an incapacity) to employees who are not alcoholics and who do not suffer from alcoholism (or any other medical illness) simply by virtue of the fact that their misconduct involved alcohol.**
- The Court established the principle that an employer does not have a duty to treat an instance of alcohol-related misconduct as incapacity where there is no evidence of such incapacity.



Relevant Case Law

- **Transnet Freight Rail v Transnet Bargaining Council & others Labour Court Cont...**
- The nature of the employee's job (yard official responsible for coupling and directing trains) was designated as safety critical and any employee under the influence of alcohol committed misconduct.
- The Commissioner **overlooked the valid 12 month final written warning** the employee was on and the fact that the **employee was not an alcoholic when he incorrectly reinstated employee.**
- The Court confirmed that the employee's dismissal for misconduct of being under the influence of alcohol was fair.

Relevant Case Law

- In the case of **Superstone Mining (Pty) Ltd v CCMA & others Labour Court (Judge Steenkamp) 2013**, the Court found that the Commissioner committed misconduct when he ruled that the **incorrect disciplinary forum was proceeded with** to deal with the employee being under influence of alcohol instead of the incapacity procedures and that employee **(Mr. Kuebu)** should be subjected to rehabilitation.
- **The Court considered the following factors:**
 - The employee never alleged dependency on alcohol until after he had committed the misconduct;
 - Employee pleaded guilty and/but alleged alcohol dependency;
 - Employee used dependency as a defense in the disciplinary hearing and after the incident as he alleged he was in denial of being an alcoholic;

Relevant Case Law: Superstone Mining (Pty)

- Disc Chairperson rejected employee's defense of dependency as he only raised such after being caught.
- Employee knew about the employer's rule and zero tolerance;
- Employee was aware of the employer's Alcohol Dependency Code (incapacity processes) but never made use of it;
- Employee went to SANCA 3 weeks after the dismissal;
- Commissioner ignored the importance of safety in the workplace.
- The Court confirmed that the employee's dismissal for misconduct of being under the influence of alcohol was fair.

Relevant Case Law

- In the case of Tanker Services (Pty) Ltd v Magudulela Labour Appeal Court [1997], The Court confirmed the dismissal of employee for driving a 32 ton truck containing hazardous material under the influence of alcohol and the Court indicated that the real test is whether the competence to perform has been impaired and confirmed that it was.
- In the case of Jizana/Abbeydale Building & Civils [2012] 11 BALR 1152 (CCMA), the Commissioner found that observations (reek of alcohol, unsteady on feet & bloodshot eyes) made by a witnesses as to the employee's sobriety were sufficient to prove the employee's inebriation (drunkenness) **para 18** and confirmed the dismissal. In this case, **employee denied being drunk on day in question.**
- In the case of Tosca Labs v CCCMA & others [2012] Labour Court, the Court found that a breathalyzer test on its own is not conclusive.



Relevant CoCT Arbitrations

- In the arbitration of **SAMWU obo Gladden SALGBC [2012]**, **Commissioner Jacobs** confirmed the employees' dismissal for dishonest conduct in a disciplinary hearing though the employee claimed that he suffered from a substance abuse problem.
- The Commissioner noted that employee failed to accept diagnosis nor co-operate with the City's (EAP) treatment procedures.
- **Before the incident of dishonest conduct which occurred during January 2011, the employee in various sessions with Line Management 9 April 2010, 28 July 2010 and 5 August 2010 failed to admit that he had a substance abuse problem.**

Relevant CoCT Arbitrations

- **SAMWU obo Gladden SALGBC [2012], Commissioner (Cont.)**
- **Post the incident January 2011, the employee informed his Line Manager that he had a substance abuse problem.**
- Employee used his substance abuse problem as a defense in the arbitration and **unsuccessfully argued** that the incapacity procedures had to be invoked.
- His medical condition of substance abuse was not directly linked to the charge of dishonesty as no evidence was submitted that he suffered from an illness/condition of dishonesty (**Mythomania/c**) or stealing (**Kleptomania/c**).
- His dismissal for misconduct due to dishonesty was confirmed.

Relevant CoCT Arbitrations

- In the arbitration of **IMATU obo I Ahmed SALGBC 2016, Commissioner Singh** confirmed the employees' dismissal for smelling of alcohol though employee is a recovering alcoholic.
- The Commissioner noted that the employee was supported and received assistance from the City (EAP Matrix System) but was also progressively disciplined. He did not attend regularly and file was closed;
- The witnesses observed the employee talking louder than usual, reeking of alcohol, slurred speech and being over-friendly;
- **The Commissioner considered the following factors:**
 - **The employee denied that he was drinking on the day;**
 - The employee did not show remorse;
 - **An employee who cannot admit to his mistakes cannot be rehabilitated;**
 - The rule with regard to alcohol use was clear.

Relevant CoCT Arbitrations

- In the arbitration of **SAMWU obo Fredericks , Lotte and Jacobs v City of Cape Town, SALGBC 2016, Commissioner Bosch** confirmed the employees' dismissal for smoking a marijuana pipe during working hours on 30 May 2013.
- The Commissioner noted that Mr. Lotte testified that he is a drug user and is rehabilitated. **He did not use drugs on the day but under cross examination conceded.**
- The Commissioner noted that Jacobs **denied that they smoked on the day**, but admitted to having smoked previously. He previously went for treatment in 2012 and in January 2013 sent a letter that he no longer needed treatment;
- The then/and now Disciplinary Code states that dismissal may be appropriate when employees consume intoxicating drugs on duty where such endangers the safety of employees and others.

Relevant CoCT Arbitrations

- SAMWU obo Fredericks , Lotte and Jacobs v City of Cape Town, SALGBC 2016 (Cont.)
- The Commissioner stated that the **matter was not one relating to dismissal for Incapacity due to ill health** but misconduct;
 - The employees had a drug problem and had been or offered assistance;
 - They were dismissed for disobeying the respondents rules;
 - **The fact that the disobedience related to drugs did not convert this matter from one of misconduct to incapacity.**
- The employees dismissals were confirmed.

Relevant CoCT Arbitrations

- In the arbitration of **IMATU obo H September v City of Cape Town, SALGBC [2012], Commissioner Nash** confirmed the employee's dismissal for Incapacity ill health manifested through substance abuse and other illnesses.
- The Commissioner noted that the employee was provided with four rehabilitation attempts prior to her dismissal and relapsed on various occasions;
- The Commissioner confirmed that the employee had a alcohol dependency problem;
- The Commissioner noted that the alcohol abuse resulted in various spurts of sporadic absenteeism;
- The Commissioner noted that employee became unreliable.

Consistency

- **SACCWU and others v Irwin and Johnson Ltd [1999] JOL 4941 (LAC)**
- Staff members engaged in intimidating behavior during 1995.
- Certain staff members were already on final written warnings and others not which resulted in some staff being dismissed and others not.
- The Court expressed the view that Consistency is not a rule in itself but forms part of the pre-dismissal factors.
- Consistency is simply an element of disciplinary fairness;
- Some inconsistency would be the price paid for flexibility where chairpersons apply their discretion.

Consistency

- SACCWU and others v Irwin and Johnson Ltd [1999] JOL 4941 (LAC)
- Big employers (Municipalities) can only apply **reasonable consistency**.
- Employers should not be held against a wrong decision where another employee was not dismissed for serious misconduct.
- Employees who commit misconduct should not benefit from wrong decisions.
- Cases should be considered on its merits;
- LAC confirmed the original dismissals.

Consistency

- **ABSA Bank Ltd v Naidu [2015] 1 BLLR 1 (LAC)**
- Employee was dismissed for dishonesty and argued another employee was not dismissed for similar offence. The Commissioner reinstated employee and Labour Court dismissed the review application.
- The **LAC** stated the fact that another employee was not dismissed does not mean that the employer condoned dishonest conduct;
- The Court noted that the facts of the two cases were different (**One authorized a quotation without a client's consent whereas the respondent authorized a financial transaction**);
- The Court stated that the parity principle (consistency) should be applied with caution as employees who thoroughly deserve to be dismissed cannot benefit from other employees who were not dismissed.

Consistency

- **ABSA Bank Ltd v Naidu [2015] 1 BLLR 1 (LAC)**
- The case confirmed where one is faced with a large number of offending employees, the best one can hope for is reasonable consistency;
- Consistency is the price employer pay for flexibility and discretion by chairpersons;
- Employees cannot benefit from a wrong decision by a previous chairperson;
- The Parity (Consistency) principle was never intended to create chaos in the workplace.
- The Labour Appeal Court confirmed the original dismissal.

Practical Considerations

- **Line Managers need to activate the correct forum when dealing with alcohol or drug misuse;**
- **Line Managers should guard against employees wanting to make use of dependency as a defense in disciplinary hearings.**
- **Where dependency has been ascertained, Incapacity Proceedings would in all probability be the appropriate forum;**
- **Where no record of dependency exists, prior to the incident, disciplinary action would in all probability be the correct forum;**
- **All cases of substance abuse dealt with in disciplinary hearings do not necessarily result in dismissal at the first instance;**



Practical Considerations

- Where employees deny that they were under the influence of alcohol, where clear evidence of such wrongdoing exists, disciplinary procedures is the correct forum to follow. The former also applies where employees are under substance abuse treatment.
- Where employees commits general misconduct whilst on substance abuse treatment, disciplinary hearings would be the appropriate forum.
- Where employees use substance abuse as a defense for dishonest conduct he/she should prove a direct link of medical treatment before the act of misconduct which led to the disciplinary action.
- Where employees were dealt with under the Incapacity: Ill Health proceedings, rehabilitation and counselling are the correct processes to address the illness.





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Thank You

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