

Drawing the line between dismissal for alcoholism (incapacity) and dismissal for drunkenness (misconduct). Are the *boni mores* compromised?

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In South Africa employees are protected by various pieces of legislation. Section 23 of the Constitution of the Republic of South Africa 1996 provides for a right to fair labour practice. In its preamble the Labour Relations Act 66 of 1995 (hereafter referred to as the LRA) states that the purpose of the Act is to advance economic development, social justice, labour peace and democratisation of the workplace. The LRA also states that one of its objectives is to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution. The Occupational Health and Safety Act as amended by the Occupational Health and Safety Amendment Act 181 of 1993 provides for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery. The LRA provides for dismissal for incapacity and dismissals for misconduct. It also differentiates between the two. The LRA provides for both substantive and procedural fairness when dismissing an employee for incapacity and misconduct. This paper will examine the rationale behind differentiating between dismissal for drunkenness and dismissal for alcoholism.

Keywords: incapacity, misconduct, drunkenness, alcoholism, alcohol abuse, no fault dismissal, substantive fairness, procedural fairness

1 Introduction

In South Africa employees are protected by various pieces of legislation. Section 23 of the Constitution of the Republic of South Africa 1996 provides for a right to fair labour practice. The section states that everyone has a right to fair labour practice. This section has a major impact on employment and labour relations. In its preamble the Labour Relations Act 66 of 1995 (LRA) states that the purpose of the Act is to advance economic development, social justice, labour peace and democratisation of the workplace. The LRA also states that one of its objectives is to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution. The Occupational Health and Safety Act, as amended by the Occupational Health and Safety Amendment Act 181 of 1993, provides for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery. The Act also provides for the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with activities of persons at work.

The LRA provides for dismissal for incapacity and misconduct. It also differentiates between dismissals for misconduct and dismissals for incapacity. The LRA provides for both substantive and procedural fairness when dismissing an employee for incapacity and misconduct.

2 Misconduct

Misconduct is one of the grounds in law that justifies an employer's terminating the contract of employment of an employee. According to the Oxford dictionaries, misconduct is unacceptable or improper behaviour. According to Harrison (1995:279), misconduct as a reason for dismissal covers a wide range of circumstances, including such matters as lateness, absenteeism, insubordination and drunkenness. If the misconduct is of a serious nature it may be reasonable for the employer to dismiss the employee summarily.

For dismissal for reasons of misconduct to be fair, the dismissal must be both substantively fair and procedurally fair. Item 7 of the Code of Good Practice: Dismissal states that any person who has to determine whether a dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard regulating conduct in the workplace. It should also be established whether the rule that was contravened was valid, reasonable and consistently applied and whether the employee was aware of the rule. In terms of procedural fairness, the LRA requires that before an employee is dismissed, a proper procedure must be followed. The first element of the guideline on procedural fairness is an investigation into whether there are grounds for dismissal (Van Niekerk & Smit et al 2015:288). In *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration* (2006) 27 ILJ 1644 (LC) the court held that the word “investigation” indicates inter alia that an investigation into the factual circumstances of the case, notice of allegations to the employee and the employee’s right to state his or her case should be considered. An employer should therefore make sure that before an employee is dismissed the facts of the case are established and the employee is made aware of the allegations against him or her. The employee should also be given a chance to state his or her case.

3 Incapacity

According to McGregor et al (2012:139), incapacity involves some form of behaviour, conduct or inability which is either intentional or negligent. Dismissal for incapacity is called a no fault dismissal because the dismissal is not due to any fault of the employee’s.

Section 10 of the Code of Good Practice: Dismissal sets out the guidelines that must be followed by an employer if an employee becomes incapacitated either temporarily or permanently through ill health.

In terms of recent court decisions a line has been drawn between dismissal for incapacity due to alcoholism and dismissal for misconduct due to drunkenness. The courts have treated alcoholism as a form of incapacity and drunkenness as a form of misconduct.

4 Alcoholism

The Oxford dictionaries define alcoholism as addiction to the consumption of alcoholic drink. It is also defined as alcohol dependency. Someone who is dependent on alcohol needs it to get through the day. They also have a high tolerance, which means that they need more drinks to feel any effect. Alcoholics suffer from withdrawal symptoms which include anxiety, tremors, sweating insomnia, nausea, depression, fatigue, headache and irritability (www.addiction.com/addiction). It is well known that alcoholism has disastrous effects on individuals, including cirrhosis of the liver, high blood pressure, heart attacks and many other health hazards. Alcoholism is classified by many as a disease.

According to the American Psychological Association’s *Diagnostic and statistical manual of mental disorders* (DSM-IV-TR) (Carr 2006), alcohol dependence is diagnosed when three of the following criteria are present at any time during any twelve-month period.

- Tolerance as defined by either of the following:
 - a need for increased amounts of alcohol to achieve intoxication or the desired effect; or
 - markedly diminished effect with continued drinking of the same amount of alcohol as in the past.
- Withdrawal as manifested by either of the following:
 - the characteristic withdrawal syndrome for alcohol; or
 - the same substance is taken to relieve or avoid withdrawal symptoms.
- Alcohol is often taken in larger amounts or over a longer period than was intended.
- There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.
- A great deal of time is spent on activities to obtain alcohol, use alcohol or recover from its effects.
- Important social, occupational or recreational activities are given up or reduced because of alcohol use.
- Alcohol use continues despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol (e.g. continued drinking despite recognition that an ulcer is being aggravated by alcohol consumption).

4.1 Causes of alcoholism

There many factors that cause alcoholism. It can run in families and may have a genetic basis. Family attitudes towards alcoholism are also a factor that can lead to alcoholism. Sometimes stressful events such as bereavement or losing a job can cause alcoholism (www.drinkaware.co.uk).

5 Drunkenness

Drunkenness is defined by the Oxford dictionaries as the state of being drunk. It is also referred to in the same dictionary as intoxication. Drunkenness means having one’s faculties impaired by alcohol. It is

having a level of alcohol in the blood that exceeds a maximum prescribed by law (www.meriam-webster.com). A person is said to suffer from alcohol intoxication when the quantity of alcohol the person has consumed produces abnormal behaviour or physical abnormalities. In other words, the person's mental and physical abilities are impaired. In addition to the signs of physical and mental impairment, alcohol levels can be measured in the blood (www.medicinehealth.com). It is clear that drunkenness is a temporary state while alcoholism is recurrent and persists over a considerable time.

6 The Occupational Health and Safety Act 1993: General safety regulations and company policy

Intoxication

2A (1) Subject to the provisions of subregulation (3), an employer or user 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 a workplace.

(2) No person at a workplace shall be under the influence of or have in his possession or partake of or offer any other person intoxicating liquor or drugs.

(3) An employer or user shall in the case where a person is taking medicines, 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 or safety of the person concerned or other persons at such workplace.

The Act imposes duties on the employer. The employer has a duty to make sure that employees who are intoxicated and those who appear to be intoxicated do not enter or remain at the workplace. For example, an employee who operates heavy machinery while drunk is a danger to himself or herself and other employees.

The employer should also ensure that no employees are in possession of or partake of or offer any other person intoxicating substances at the workplace.

The above duties are in line with common law duties of employees to provide a safe working environment to the workers. An employer can therefore initiate a zero tolerance policy towards alcohol in the workplace to protect other workers and the employer's machinery. It is an employer's duty to keep employees safe at the workplace. Employees also owe a duty of care towards each other.

7 Dismissal for incapacity due to alcoholism

Section 10(3) of the Code of Good Practice: Dismissal specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures for a company to take in assisting such employees. The requirement that employees should be assisted by providing them with treatment has been widely accepted.

In *Transnet Freight Rail v Transnet Bargaining Council and others* (C644/2009) [2011] ZALCJHB the judge referred to Grogan, who stated that when an employee is suffering from incapacity as a result of his or her alcoholism, the employer is under an obligation to counsel and assist the employee in accessing treatment for his disease. The purpose of imposing such a duty on an employer is based on the current medical understanding of alcoholism as a diagnosable and treatable disease which results in incapacity.

Addiction to alcohol or other habit-forming substances results in incapacity. In such cases, consideration should first be given to counselling and rehabilitation. Only if this fails should termination be considered (Bendix 2015:312). It would seem that an employer cannot force an unwilling employee to participate in counselling and rehabilitation. The employer's duty is to make such an option available to employees but the employer cannot make it compulsory.

In *Jansen and Pressure Concepts* (2005) 26 ILJ 2064 (BCA) the employee was employed as a welder on 2 March 2004 and was dismissed for poor time-keeping in February 2005. He also received a final written warning on 9 November 2004 for arriving at work under the influence of alcohol and was sent home on 24 January 2005 for being under the influence of alcohol. The employee's records showed a long history of late coming and absence without leave, which the employer alleged had precipitated the decision to take disciplinary action against the employee. The employee maintained that his daughter had developed a drug problem, which had precipitated his drinking and his absences while seeking help from social workers and that he had notified his employer of this problem and had sought help. He claimed his dismissal was therefore unfair. In considering whether the dismissal was an appropriate sanction, the arbitrator found that the reason advanced by the employee for his poor time keeping indicated that he was suffering from an alcohol-related problem, and that the employer had a duty to manage the disciplining of the employee on the basis of incapacity.

The court held that an employer has a duty to consider an alcohol-related problem and assist an alcoholic employee. In the same case the court also held that an employer can be expected to attempt

to seek out and provide some form of counselling for an employee once it has become aware that the employee's problem is alcohol related.

In *Naik v Telkom SA* (2000) 21 ILJ 1266 (CCMA) the facts of the case were that the employee with 17 years' service was dismissed for being under the influence of alcohol while on duty and challenged the fairness of the sanction of dismissal. A year before the incident leading to his dismissal he had himself admitted to a rehabilitation centre and benefited from the programme, despite relapses. After he threatened his manager with a panga he was given a final warning. The incident which led to his dismissal was that he was found in his car after he had passed out when he should have been at an important meeting. The CCMA held that alcoholism is a form of incapacity and that reinstatement was fair.

In the same case the court held that when considering how to deal with an employee's incapacity, the employer must take into account the nature of the job, the extent to which the illness incapacitates the applicant, the length of time for which the applicant would have to be away from work for purposes of rehabilitation and the possibility of securing a temporary replacement. Before a dismissal can be effected, the extent of the disability suffered as well as the availability of alternative work must be considered.

In *Spero v Elvey International (Pty) Ltd* (1995) 16ILJ 1210 (LC) the court stated that employers are obliged to investigate both the extent of an employee's disability and possible ways of adapting the employee's work to accommodate him or her.

8 Dismissal for misconduct due to drunkenness

At common law drunkenness constitutes misconduct and an employee who is found to be drunk at work can be summarily dismissed. In *Naik v Telkom* it was held that being under the influence of alcohol at the workplace is undesirable. Drunkenness constitutes misconduct and warrants severe disciplinary action, including dismissal. This is particularly so in places where there is a need for compliance with health and safety rules. In such places drunk employees may be a danger to themselves, other employees and company equipment.

In *Transnet* the court referred to Grogan, who stated that employees may be dismissed if they consume alcohol or narcotic drugs to the point where they are rendered unfit to perform their duties. An employee who reports for duty under the influence of alcohol or drugs may be charged with misconduct. An employer has no obligation to assist an employee who does not suffer from such incapacity. Such an employee is responsible for his or her own misconduct.

In *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC) the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer. The court held that an employee is under the influence of alcohol if he is unable to perform the task entrusted to him with the skill expected of a sober person. 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. If employees are charged with being "under the influence" evidence must be led to prove that their faculties were impaired to such an extent that they were incapable of working properly. This may be done by administering breathalyser tests.

In *Transnet* the court tried to answer the question whether an employee who is caught before any serious incident occurs should be treated more favourably than another who was caught after a mishap. The court referred to *NUMSA obo Davids/Bosal Africa (Pty) Ltd* [1999] 10 BALR 1240 (IMSSA) in which the arbitrator was of the opinion that the dismissal of a crane driver was justified despite the fact that he had operated the crane without mishap for some time before the level of alcohol in his bloodstream was discovered to be three times the legal limit for driving a vehicle.

In *Metal and Electrical Workers Union of South Africa obo Setshedi /Scaw SA* (2012) 20 MEIBC 8.11 the applicant was dismissed after reporting for duty under the influence of alcohol. The applicant had worked for the company for 32 years and had a clean record. The commissioner stated that even if the applicant had had a clean record for 32 years he should not expect to get away with breaking an important fundamental rule as a first offence. The arbitrator commented that if this were permitted it would be setting the wrong precedent.

When dismissing an employee for misconduct in the form of drunkenness, the employer should make sure that the dismissal is both substantively and procedurally fair. In terms of substantive fairness, item 7 of the Code of Good Practice: Dismissal suggests that any person who has to determine whether a dismissal for conduct is unfair should consider whether or not the employee contravened a rule or standard regulating conduct in the workplace. The employee should have been aware of the rule and it should be consistently applied. In relation to drunkenness, it would seem that employers are advised to put a zero tolerance of alcohol policy in place. This policy should be known by employees and should be applied consistently. Once an employee breaches this clear rule it would be substantively fair to

have such an employee dismissed.

In terms of procedural fairness, the correct procedure should be followed. An investigation should be carried out to determine whether there are grounds for dismissal. The employee should be given an opportunity to be heard.

Section 3 of Schedule 8 to the Code of Good Practice: Dismissal imposes an expectation on employers to apply corrective and progressive discipline in dealing with the misconduct of employees. However, gross misconduct warrants summary dismissal.

9 The United Kingdom Perspective Safety, Health and Welfare at Work Act 10 of 2005

The provisions of the Safety, Health and Welfare at Work Act are analogous to those of the South African Occupational Health and Safety Act. The United Kingdom Act also provides that the general duties of the employer include ensuring the safety, health and welfare of employees at work

Section 13(1)(b) provides that employees should not be under the influence of an intoxicant to such an extent as to endanger themselves or others. This is a duty which is imposed on employees.

9.1 *McElroy v Cambridgeshire Community Services NHS Trust ET/3400622/14*

The claimant was a healthcare assistant employed by an NHS Trust. He was employed for over 10 years before being dismissed for gross misconduct. The claimant had reported for duty smelling of alcohol. The employer's disciplinary policy provided that being unfit for work through the effects of alcohol would be regarded as gross misconduct. This was further defined in the substance misuse policy as being "incapable of functioning effectively at work". The claimant indicated that he smelt of alcohol because he had had a moderate amount of beer the evening before. The employer's policies did not restrict employees from drinking alcohol prior to attending work although it recommended that this be avoided. The claimant was therefore suspended from work.

The disciplinary investigations revealed that there had been previous concerns by managers that the claimant had reported for work smelling of alcohol. However, there were no records or negative reports about his performance at work. It was also discovered that oral advice had been given to the employee.

The employee was dismissed for offences that included reporting to work under the influence of alcohol.

The Employment Tribunal decided that the claimant had been unfairly dismissed. The Tribunal held that although it was reasonable for an employer to have found that the claimant had attended work smelling of alcohol, it was unreasonable in the absence of evidence to find that he had been "unfit for duty". It was further held that it was not reasonable to conclude that smelling of alcohol alone constituted gross misconduct or conduct justifying dismissal. It was evident that the employer's policy emphasised impaired performance at work as the basis for disciplinary action.

9.2 *Ricketts v Parson Cross Domestic Abuse Project ET /2802125/10*

In 2003 August Ms Ricketts took up employment at the Parson Cross Domestic Abuse Project, where she was a support worker for victims of domestic abuse. In 2007 she and other colleagues complained about her manager, Ms Cox, who was attending work under the influence of alcohol. The Project's disciplinary policy stated that "working under the influence of alcohol" was considered to be gross misconduct but no disciplinary measure was initiated against Ms Cox.

On January 2010 Ms Ricketts appeared to be drunk at work. Her speech was slurred and her body movements were slow and uncoordinated. Ms Ricketts was suspended on 21 January 2010. Ms Ricketts said that she had an alcohol problem and was getting help. She also said that her behaviour on the day concerned might have been due to medication she had taken the previous night. On 26 February, Ms Ricketts was dismissed for gross misconduct. She appealed the decision and the appeal officer rejected the appeal, stating that the Project had previously supported Ms Ricketts regarding her health problem but the full extent of her alcohol misuse was not made clear to her line manager and colleagues.

The Tribunal held that Ms Ricketts had been unfairly dismissed. The Tribunal found that the Project knew that Ms Ricketts had a problem with alcohol abuse that had led her to give up drinking and that she had been absent due to stress that was attributed to the workplace. The Tribunal also compared Ms Ricketts's case to Ms Cox's case. Ms Cox had attended work under the influence of alcohol but nothing had been done about the issue.

The Tribunal held that the Project should have made inquiries to satisfy itself as to the cause and effect of Ms Ricketts's attendance at work under the influence of alcohol on 20 January as well as the

impact of the medication she was taking. Since Ms Ricketts's general practitioner had identified her alcohol difficulties as a medical problem, the Project should not have treated the matter as a single case of misconduct. The Tribunal stated that the Project should have investigated her medical condition and its potential effects on her, particularly since it knew that she had a pre-existing condition. However, 10% was deducted from the compensation she received on account of her contributory conduct.

9.3 *Sinclair v Wandsworth Council* UKEAT/014507/DM

The employee who was an alcoholic was dismissed for twice turning up for work under the influence of alcohol. The EAT upheld the tribunal's finding that the dismissal was unfair as the Council had not given the employee a copy of its alcohol policy, which set out the circumstances in which disciplinary proceedings would be suspended pending treatment for alcoholism, and had failed to make it clear to the employee what steps he needed to take to avoid dismissal.

For dismissal for drunkenness to be substantively fair, it would appear that there should be an alcohol policy in place. The policy should have been communicated to the employees and employees should be aware that there is a policy in place. Failure to do so makes the dismissal unfair.

10 The blurred line between alcoholism and drunkenness

The line between drunkenness and alcoholism can sometimes be a bit blurred. It can be challenging to determine whether an employee is suffering from alcoholism or from an episode of drunkenness as a result of alcohol abuse. In *Transnet* it was held that when an employee who is not an alcoholic and does not claim to be one reports for duty under the influence of alcohol, he or she will be guilty of misconduct.

A distinction has been drawn between incapacity and misconduct because it has been accepted that alcoholism is a disease which is diagnosable and hence requires treatment and not dismissal, whereas drunkenness is a form of misconduct which warrants dismissal.

11 Societal convictions (*boni mores*)

Good morals are always upheld by society and they set examples of good behaviour from generation to generation. The society we live in upholds high ethical standards.

South Africa is one of the countries engaged in a struggle against the negative effects of drug and alcohol abuse. The abuse of these substances has led to an escalation in the number of criminal offences among adults and the youth as well as a breakdown in family structures. It should be noted that for these reasons society does not condone the abuse of alcohol and drugs. Employers and companies are members of the community and society and as such they owe a duty of care to the community and are required to set a good example. The question that is of concern is whether by treating alcoholic employees in the same way as employees suffering from other illnesses, they are doing justice to the good morals of society.

Some people argue that alcoholism is not a disease but a bad habit which does not emerge overnight but develops over a long period, with the alcoholic repeatedly making bad choices. If alcoholism is a bad choice/habit then giving it special treatment would seem like encouraging it, which would be in conflict with the *boni mores* of society. It would therefore seem that by giving an alcoholic employee a chance of rehabilitation and making him remain on the job while a first offender who comes to work drunk is punished by dismissal amounts to condoning and promoting alcoholism.

Alcoholism has, however, been shown to be a disease. Society upholds the moral standard of treating the sick and rehabilitating addicts in order to build a better community. In *Naik v Telkom* it was said that: "if we are to view alcohol abuse by alcoholics as incapacity then the compelling truth is that to dismiss an alcoholic merely because he turns up at work drunk for the second time after a final written warning, would be analogous to dismissing an employee suffering from cancer because he was unfit to work on a given day".

In *Transnet* the judge commented that where an employee is suffering from incapacity as a result of alcoholism, the employer is under an obligation to counsel and try to rehabilitate the employee.

It is clear therefore that alcoholism is a disease just like cancer, HIV or tuberculosis and therefore employees who suffer from alcoholism should be given counselling and rehabilitation before being dismissed. Failure by the employer to do so would compromise the good morals of society.

12 Conclusion

From the above discussion it is evident, therefore, that a line has been drawn between dismissal for alcoholism and dismissal for drunkenness and that this line is not against the good morals of society.

Employers are encouraged to treat alcoholism as a disease for which an employee should be given counselling and rehabilitation before being dismissed. Drunkenness is considered to be misconduct and an employer is justified in dismissing an employee who comes to work drunk. Employers are nevertheless encouraged to put a zero tolerance of alcohol policy in place. The policy should be in place in order to comply with substantive fairness when it comes to dismissals.

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