

# How zero-tolerance policies may affect an employee's right to privacy

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## INTRODUCTION

The case of *Bernadette Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd* highlights how zero tolerance policies may infringe on the right to privacy of employees.

## BACKGROUND

Bernadette Enever ("Appellant") signed an alcohol and substance policy ("policy") with Barloworld Equipment South Africa ("Respondent"), which included a so-called zero-tolerance approach to the possession and consumption of drugs and alcohol in the workplace. The policy subjected every employee to drug testing.

The Respondent emphasised that cannabis is prohibited at their workplace after the landmark *Minister of justice and Constitutional Development and Others v Prince; National Director Prosecutions and Others v Acton* case ("Prince case"), that decriminalised the use of cannabis at private homes. The Appellant suffered from anxiety and to avoid the side effects of her prescribed medication, she resorted to the use of cannabis products after the ruling in the Prince case.

The Appellant was required to undergo a medical test, which returned a positive result for (only) cannabis. The Appellant was subsequently denied access until she could return a negative result as per the policy, but further positive results were recorded as she did not stop consuming cannabis. This resulted in her dismissal.

## LABOUR COURT

The Appellant approached the Labour Court ("LC") on the basis that her dismissal was automatically unfair, and the Respondent's zero-tolerance policy discriminated against her. The LC found the policy to be fair as it was consistently applied to all employees who tested positive for any substance in the workplace. The LC also rejected the Appellants automatically unfair dismissal claim as the LC was of the view that this was a case of misconduct rather than discrimination and that the dismissal of the Appellant was fair because she knowingly breached the policy.

## LABOUR APPEAL COURT

The Appellant brought an appeal before the Labour Appeal Court ("LAC"). The LAC was required to consider four issues which were, briefly, whether the Respondent treated the Appellant differently to other employees, whether there was a direct causal connection between the Appellant testing positive for cannabis and her dismissal which would constitute an act of unfair discrimination under section 187(1)(f) of the LRA, whether the policy was indeed unfair and discriminatory and, finally, whether the approach taken by the Respondent insulted, degraded and impaired the Appellant's dignity due to the unfair discrimination.

## EVALUATIONS BY THE LAC

1. The LAC considered the fact that cannabis users were immediately sent home for a minimum of seven days, whereas alcohol users could return a negative result the next day due to the alcohol not staying in the blood for too long compared to cannabis, this means that an employee who used cannabis could not return the following day as they would not return a negative result the next day.
2. The importance of the Prince case was considered, as the court held that an employer may not disregard an employee's privacy when implementing its policies, which meant that the Respondent's zero-tolerance policy may not interfere with the Appellant's right to consume cannabis at her home.
3. The LAC found that the Appellant's dignity and privacy was violated because there was no proof of impairment at the workplace, rather the positive result from the blood test. The Appellant's use of cannabis did not affect the Respondent in any way, yet the Respondent's policy put her in a situation where she had to choose between her job and exercising her right. Furthermore, the Respondent had no evidence of the Appellant being "stoned" or intoxicated at the workplace, which negatively affected her work or make the work environment unsafe for her or her colleagues.

4. It would have been different if the Appellant was impaired at the workplace or if she operated dangerous machinery. In this case the Appellant worked at a desk with no PPE required and the Respondent did not allege that Appellant was impaired while performing her duties.
5. The LAC concluded that the policy was overbroad and infringed on the Appellant's right to privacy. It was found to unfairly discriminate between cannabis users and alcohol users, especially when what they do in their private home does not pose a risk for their employer.
6. The appeal was upheld as the LAC found that the policy was irrational and violated the right to privacy envisioned by section 14 of the Constitution.
7. Furthermore, the LAC found that the Appellant was unfairly discriminated against in terms of section 6(1) of the Employment Equity Act and her dismissal was automatically unfair in terms of section 187(1)(f), this resulted in the Appellant being awarded 24 months compensation by the Respondent.

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#### **IMPORTANT CONSIDERATIONS FLOWING FROM THE LAC DECISION FOR EMPLOYERS**

1. Zero-tolerance policies should consider the employee's duties within the workplace.
2. A zero-tolerance policy must not infringe on an employee's ability to exercise her rights, especially when it will not be a risk to the employer.
3. Careful consideration must be taken when dealing with subsequent tests for cannabis users compared to alcohol users who test positive in the workplace.
4. Employers ought not only rely on a positive blood test or breathalyzer test, but rather prove that the employee is impaired during her working hours, which could adversely impact her work and the safety of the other employees.
5. It is important to note that the LAC could have ruled differently if the Appellant was found to be "stoned" at work or if the employee operated heavy machinery at the workplace. The courts will decide each case based on its own facts.
6. The LAC decision is currently the subject of a leave to appeal application before the Constitutional Court.