15 AUGUST 2016

# EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS **ISSUE**

## DRUNK ENOUGH TO BE DISMISSED?

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## SEXUAL HARASSMENT IN THE WORKPLACE - DISCIPLINARY ACTION ALONE IS NOT ENOUGH

It is not enough to take disciplinary action against an employee who sexually harasses a fellow employee. An employer is obliged to take proactive and reactive steps to eliminate harassment in the workplace. Failure to do so may result in the employer being required to pay the employee subjected to the harassment compensation for injury to their dignity.

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# DRUNK ENOUGH TO BE DISMISSED?

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**One would think that if an employee is found to be under the influence of alcohol at work it is a straightforward dismissible offence. Recent case law has shown that this is not necessarily so. Employers often operate under the mistaken belief that testing positive for alcohol equates to the employee being under the influence of alcohol.**

*In Tosca Labs v CCMA 2012 33 ILJ 1738 (LC) the Labour Court found that a positive test result on a breathalyser test is not sufficient proof to indicate that the employee was under the influence of alcohol.*

Alcohol and drug abuse is a form of misconduct. Schedule 8 of the Code of Good Practice of the Labour Relations Act, No 66 of 1995 (LRA) recognises misconduct by an employee as a fair reason for dismissal.

There are two scenarios in which an employee may be charged for their use of alcohol at the workplace:

The first scenario is where the employee's drunkenness can be proven by sight, smell and/or the conduct of the employee. Factors showing drunkenness include aggressive behaviour from the employee, slurred speech and bloodshot eyes. The degree of drunkenness has to be to such an extent that it impairs the employee's ability to work. The onus is on the employer to prove this. No expert witness is required for such purposes.

The second scenario is where an employee tests positive for alcohol on a breathalyser apparatus. A positive outcome does not necessarily prove that the employee is under the influence of alcohol or that the employee's ability to work has been impaired. Employers often mistakenly believe that a positive test result is sufficient proof to show that the employee was under the influence of alcohol and then mistakenly charge the employee for being under the influence of alcohol. Recent case law has confirmed that a positive test result is not necessarily sufficient to dismiss an employee. In *Tosca Labs v CCMA* 2012 33 ILJ 1738 (LC) the Labour Court found that a positive test result on a breathalyser test is not sufficient proof to indicate that the employee was under the influence of alcohol. The court referred to *Tanker Services (Pty) Ltd v Magudulela* 1997 12 BLLR 1552 (LAC) which stated that the real test is whether the employee's competence to perform their work has been impaired. In this case the employee was able to perform his tasks and the court held that the dismissal was substantively unfair.

### What should an employer do?

- The employer should adopt a zero tolerance in terms of its alcohol policy in the workplace. Such policy should be specific and also provide for a summary dismissal, even when the employee has just been tested positive for the use of alcohol or drugs. The rational for such policy should be



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# DRUNK ENOUGH TO BE DISMISSED?

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*The employer should always ensure that all employees are aware that there is a zero tolerance policy and that if they test positive for any usage of alcohol, they will be in breach of the policy and may be subjected to disciplinary action and possible dismissal.*

based on the safety considerations of the employer. This means that an employee may be summarily dismissed irrespective of whether his/her ability to work is impaired or not. To adopt such a policy depends on the status thereof and may sometimes simply require consulting with the employees before the implementation of such policy. The employer should always ensure that all employees are aware that there is a zero tolerance policy and that if they test positive for any usage of alcohol, they will be in breach of the policy and may be subjected to disciplinary action and possible dismissal.

- In addition to the above, the breathalyser apparatus should be properly calibrated and the person administering the test should be trained to do so correctly. The test should also always be done in the presence of a witness.
- However where possible and applicable, evidence should preferably be obtained to show that the employee's ability to work was impaired – if that was indeed the case.
- If it emerges that an employee is dependent on alcohol the employer has an obligation to consider providing counselling and assist the employee as is set out in item 10 of Schedule 8 of the LRA.

*Hugo Pienaar and Elizabeth Sonnekus*





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# SEXUAL HARASSMENT IN THE WORKPLACE - DISCIPLINARY ACTION ALONE IS NOT ENOUGH

*In terms of the Employment Equity Act, No 55 of 1998 (EEA) harassment of an employee is a form of unfair discrimination and is prohibited.*

**It is not enough to take disciplinary action against an employee who sexually harasses a fellow employee. An employer is obliged to take proactive and reactive steps to eliminate harassment in the workplace. Failure to do so may result in the employer being required to pay the employee subjected to the harassment compensation for injury to their dignity.**

*The employer was found to have taken insufficient steps to avoid employer liability in terms of s60 of the EEA.*

In terms of the Employment Equity Act, No 55 of 1998 (EEA) harassment of an employee is a form of unfair discrimination and is prohibited. The Labour Appeal Court has characterised sexual harassment as "the most heinous misconduct that plagues a workplace" [*Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR (LAC)].

Harassment triggers the following obligations under s60 of the EEA:

- The conduct must be brought to the attention of the employer immediately.
- The employer must consult all relevant parties and take the necessary steps to eliminate the harassment and comply with the provisions of the EEA.
- If the employer fails to take the abovementioned necessary steps and it is proved that the employee has breached the relevant provisions of the EEA, the employer must be deemed also to have breached the provisions of the EEA.
- An employer is not liable for the conduct of the employee if the employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in breach of the EEA.

The above obligations were considered in a recent CCMA decision in which an employee's request for a day off was granted by her manager, subject to her granting him sexual favours. The act of sexual harassment was not in dispute. What was in dispute was the liability of the employer, if any, for the supervisor's misconduct. In relation to the obligations in terms of s60, the commissioner found as follows:

- The employee had discharged the obligation to notify the employer of the conduct immediately.
- The employer appreciated the seriousness of the conduct, advised the employee of the formal and informal approach that could be taken, followed the formal approach and convened a disciplinary hearing resulting in the supervisor being issued with a final written warning and removed from a position of authority over other employees.
- In addition, the employer had implemented a sexual harassment policy before the incident and had communicated the terms of the policy to its employees. It had also offered the employee assistance through the employee assistance programme. The employee was given time off to see a doctor and she was transferred to another department where she would not be required to work alone, as recommended by her doctor.



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# SEXUAL HARASSMENT IN THE WORKPLACE - DISCIPLINARY ACTION ALONE IS NOT ENOUGH

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*The award is a clear warning to employers that taking disciplinary action against an employee who is accused of sexually harassing a fellow employee may not be sufficient and that proactive and reactive steps are necessary to avoid liability under s60 of the EEA.*

- Notwithstanding the above steps taken by the employer, the employer was found to have taken insufficient steps to avoid employer liability in terms of s60 of the EEA. As the EEA does not provide guidance as to what constitutes necessary steps to avoid this liability, the commissioner had regard to the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace issued in terms of the EEA (Code). The Code encourages employers to develop and implement policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity, dignity, privacy and equality. The commissioner found that the duty on the employer is both reactive and proactive. The commissioner found that notwithstanding the steps that the employer had taken, there appeared to have been a shift in the employer during the course of the disciplinary hearing, and that it appeared that the employer became more intolerant of the employee. By way of example, the employee asked for an apology, which the employer did not require the supervisor to give, on the basis that the supervisor had been sufficiently humiliated. The shift on the part of the employer was not explained by the employer.
- The commissioner found the employer liable for the conduct of the supervisor and compensated the employee for loss of dignity flowing from the unfair discrimination in the amount of R10,000.

Without pronouncing on the merits or otherwise of the case, the award is a clear warning to employers that taking disciplinary action against an employee who is accused of sexually harassing a fellow employee may not be sufficient and that proactive and reactive steps are necessary to avoid liability under s60 of the EEA. The EEA empowers a commissioner to make an appropriate award to give effect to the provisions of the EEA which may include payment of compensation, payment of damages and/or an order directing the employer to take steps to prevent the same or similar unfair discrimination from occurring in the future.

*Gillian Lumb and Anli Bezuidenhout*



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## Our Employment practice's new EMPLOYMENT STRIKE GUIDELINE answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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CHAMBERS GLOBAL 2014 - 2016 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2016 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2016 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.

Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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**BBBEE STATUS:** LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.




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