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EMPLOYMENT ALERT

Keep off the grass: Dismissed for testing positive for cannabis at work

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In terms of s95(5)(p) of the Labour Relations Act, No 66 of 1995 (LRA) trade unions and employers' organisations are required to conduct a secret ballot amongst its members before calling a strike or lock-out in respect of such members.

Private Arbitration or the CCMA?

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Keep off the grass: Dismissed for testing positive for cannabis at work

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In Mthembu and Others v NCT Durban Wood Chips [2019] 4 BALR 369 (CCMA), the arbitrator had to decide whether the dismissal of employees who tested positive for cannabis at work was fair.

In this matter, the employees were employed in a workplace that is fraught with danger. The employer's business involves dangerous machinery and vehicles, and the conveying of large logs weighing between 30 and 100 kgs. An error in the workplace could cause fatalities. The employer, as part of its workplace safety regulations, adopted a zero-tolerance stance on substance abuse. This was clear from its substance abuse policy and the regular "toolbox" safety talks it held with employees.

In the middle of 2017, the employer conducted drug tests on all its employees. Laboratory tests on the urine samples confirmed that four of the employees had tested positive for cannabis use. The employer charged them with being "under the influence of intoxicating substances whilst on duty".

The employees admitted to having smoked cannabis, however, they maintained that they had done so in their spare time at home and not at work.

The arbitrator in his award took into account that the Constitutional Court has decriminalised the private use of cannabis. Nonetheless, this does not give employees licence to attend at work under the influence of cannabis. Like with alcohol, where consumption of cannabis impairs an employee's ability to work to the standard, care and skill required by the employer, the employer is entitled to take disciplinary action against the employee.

The arbitrator found that due to the dangerous nature of the workplace, it was reasonable for the employer to have in place rules prohibiting the consumption of cannabis at work and reporting to work under the influence of cannabis. He found that the employees were aware of the employer's safety requirements and the substance abuse policy. The employer had given them ample opportunity to adjust their private use of cannabis in accordance

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Keep off the grass: Dismissed for testing positive for cannabis at work...*continued*

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with their work requirements and it was up to them to make sure that when they smoked cannabis for private use that it should result in them not reporting for work under the influence.

The arbitrator held that the employees, by being under the influence of intoxicating substances whilst on duty, had wilfully disregarded the employer's safety rules. They were aware of the employer's zero-tolerance policy and the possibility of dismissal if they tested positive. Accordingly, he found that dismissal was the appropriate sanction.

The consequences of the private use of cannabis in the workplace is a new and developing area of our labour law. Cannabis may be detected in the bloodstream and in urine long after it has been consumed. Employers are advised to rely on more than just a drug test to show that an employee was under the influence of cannabis at the workplace. Being under the influence, may not always be a sufficient reason to dismiss an employee and each case will have to be evaluated on its own merits. However, this case illustrates that even though the private use of cannabis has been decriminalised, employers can still discipline and dismiss employees who report for duty under the influence of cannabis where they may pose a risk to themselves and others.

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Secret ballot required prior to engaging in a strike

The Labour Court clarified that the requirement to conduct a secret ballot did not constitute an infringement on the right to strike.

In terms of s95(5)(p) of the Labour Relations Act, No 66 of 1995 (LRA) trade unions and employers' organisations are required to conduct a secret ballot amongst its members before calling a strike or lock-out in respect of such members.

The new Labour Relations Amendment Act, No 8 of 2018 (Amendment Act) sets out transitional provisions in s19 which require trade unions and employers' organisations to provide for secret strike ballots in circumstances where their constitutions do not already provide for same. The transitional provisions require trade unions and employers' organisations, which are in the process of amending their constitutions to give effect to s95(5)(p) of the LRA, to conduct a secret ballot of members before engaging in a strike or lockout.

The Labour Court recently considered the validity of a strike which was not preceded by a secret ballot in the matters of *Mahle Behr SA (Pty) Ltd v NUMSA and Foskor (Pty) Ltd v NUMSA* (D448/19 & D439/19). The respondents, NUMSA and its members who were employed by the applicants, were engaged in a strike. NUMSA's constitution did not provide for a recorded and secret ballot to be held prior to a strike in terms of s95(5)(p) of the LRA.

The applicants applied to the Labour Court to interdict the respondents from engaging in this strike until a secret ballot was conducted by NUMSA.

The Labour Court considered whether the transitional provisions in the Amendment Act applied to the respondents and, if they were applicable, whether the application of the transitional provisions required a recorded and secret ballot before the respondents could embark upon a strike.

NUMSA argued that the transitional provisions infringed the constitutional right of the union and its members to strike. The Labour Court clarified that the requirement to conduct a secret ballot did not constitute an infringement on the right to strike.

The respondents' second argument against the application of the transitional provisions rested on the specific interpretation of the transitional provisions. NUMSA argued that the obligation in s19(2) to conduct a recorded and secret strike ballot only arose after the registrar issued NUMSA with a s19(1)(b) directive. NUMSA argued that since no directive had been issued, it was not obliged to conduct a secret ballot. The Labour Court held that this interpretation of s19(2) was unfounded as the purpose of s19 is ultimately to create a uniform requirement of a recorded and secret ballot before a strike by a union, or a lockout by an employer's organisation and that s19(2) seeks to regulate the position before the registrar completes the s19(1)(a) and (b) consultation and directives processes.

The Labour Court also clarified that the transitional provisions applied to all trade unions where their constitutions are silent on the requirement of a recorded and secret strike ballot. Accordingly, a recorded and secret ballot is always required before a strike, and as NUMSA did not hold such a ballot, the union was not entitled to engage in a strike and was therefore interdicted from doing so.

The *Mahle Behr* judgment clarifies the position that a strike can be interdicted as a result of the failure to conduct a recorded and secret ballot.

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Private Arbitration or the CCMA?

The Labour Court was recently required to determine whether the CCMA lacked jurisdiction to entertain an unfair dismissal dispute in circumstances where the parties agreed to refer such dispute to private arbitration.

The Arbitrator found that the CCMA did not have jurisdiction to hear the matter and that the employee was entitled to refer to matter to private arbitration.

In the matter of *Krean Naidoo v Liberty Holdings* (JR558/16) [2019] ZALCJHB 56 (19 March 2019), the Applicant, a senior employee, was dismissed for misconduct and subsequently referred an unfair dismissal dispute to the CCMA despite being required to refer his dispute to private arbitration. At the arbitration before the CCMA, the Arbitrator found that the employee's contract of employment incorporated the Employee Relations Handbook and as such the Handbook constituted a condition of employment. The Arbitrator found that the CCMA did not have jurisdiction to hear the matter and that the employee was entitled to refer to matter to private arbitration.

On review at the Labour Court, the employee claimed that he was never provided with a copy of the Handbook upon commencement of employment; that he never agreed to refer disputes to private arbitration; and that he did not relinquish his right to refer an employment dispute to the CCMA. The employee further claimed that private arbitration meant automatic legal representation and possible arbitration costs as the employer would only pay the initial R30,000. The employee further contended that, in terms of s147(6) of the Labour Relations Act, the CCMA arbitrator erred by not directing that the matter be referred to private arbitration but reminded the employee of his election to refer the matter to private arbitration if he chose to do so.

The employer contended that despite the wording of the Handbook, the employer would, according to established practice, pay for all the costs associated with the private arbitration; the chairperson of the disciplinary hearing was one of nine arbitrators and the parties were in a position to choose an alternative; that the rules on natural justice would still apply during the private arbitration and that the employee would be entitled to apply to the Labour Court to review the decision of the arbitrator if he was dissatisfied with the outcome. Ultimately, the employer submitted that the decision to refer the matter to private arbitration in terms of s147(6) of the Labour Relations Act ,1996 lay solely with the Employee and not the CCMA Arbitrator.

The Labour Court ultimately found that, as a senior employee, the applicant ought to have understood that by signing a contract of employment which incorporated conditions set out in the Handbook, bound him to the terms of the Handbook. The Labour Court held further, that in terms of s147(6) of the LRA, where the parties are bound by agreement to resolve a dispute by way of private arbitration, the commission may refer the dispute to the appropriate person or body for resolution through private arbitration or appoint a commissioner to resolve the dispute in terms of the LRA. As such, the arbitrator was correct in finding that the decision to refer the matter to private arbitration (or not to refer a dispute at all), lay with the employee once it was determined that the parties were bound by the private arbitration clause.

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Private Arbitration or the CCMA?

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The CCMA has the discretion to either refer the dispute to the relevant private arbitration agency or to appoint a commissioner to hear the dispute.

This case illustrates that employees are bound to refer an unfair dismissal dispute to private arbitration, if they have agreed to do so in terms of the contract of employment. The CCMA may not have jurisdiction to hear the dispute and the employee has the choice to either refer the dispute to private arbitration or not at all. It is however important to note that if, at any stage during an arbitration referred to the CCMA or relevant bargaining council, it becomes apparent that the matter ought to have been referred to private arbitration, the CCMA has the discretion to either refer the dispute to the relevant private arbitration agency or to appoint a commissioner to hear the dispute. In circumstances where an employee who earns below the Earnings Threshold of R205,433.30 per annum, the CCMA must appoint a commissioner to hear the dispute if that employee was required to pay the costs of private arbitration or part thereof.

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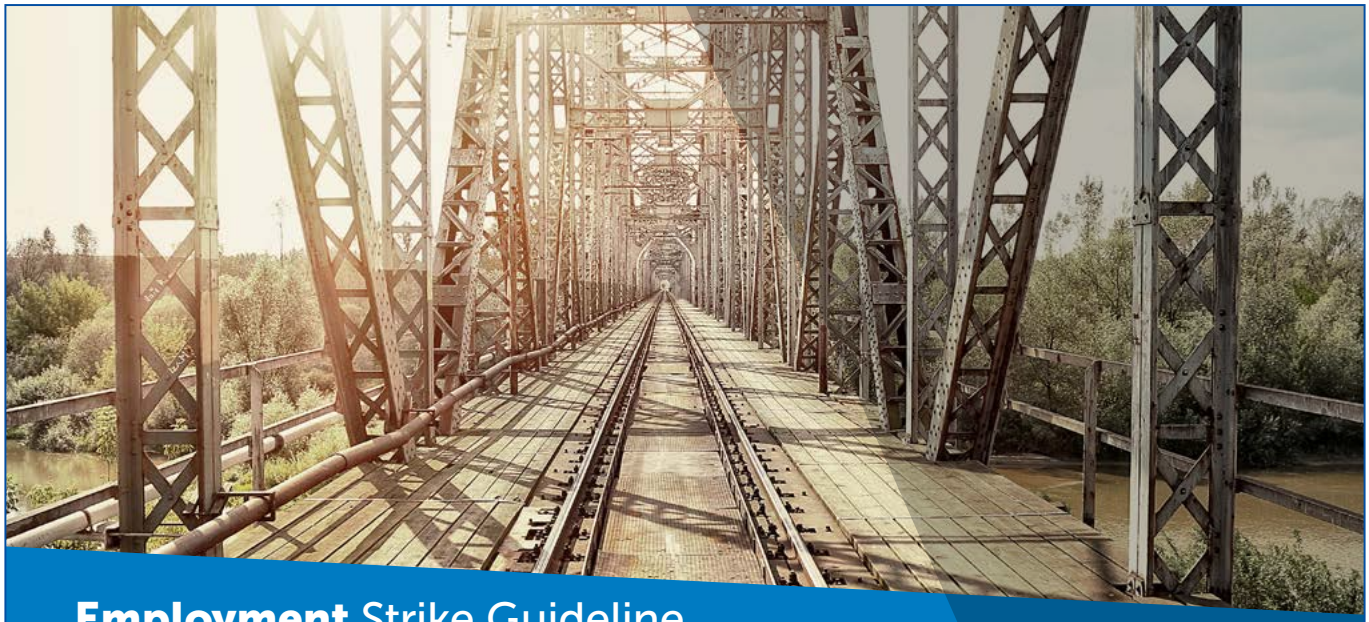

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