

INTOXICATION RELATED OFFENCE

In the 2nd quarter of 2015/16 we covered an article on 'Intoxication Problem' in the workplace and in 3rd quarter of 2015/16 article we covered 'Preventing the Mishaps of Substance Abuse' in the workplace. We conclude the series, in this 4th quarter of 2015/16 by covering 'Offences Relating to Intoxication in the workplace.

Workplaces have disciplinary codes and procedures as well as rules designed to discourage or prevent the use or abuse of drugs and alcohol during working hours or prohibit being under the influence of such during working hours. These rules usually assume one or a combination of four forms:

- An absolute prohibition on the possession of alcoholic and/or drug beverages in the workplace;
- A prohibition on being under the influence of alcohol and/or drugs during working hours;
- A prohibition on being under the influence of alcohol to the extent that work performance is impaired;
- Precluding the alcohol content of employees' bloodstreams from exceeding a certain level.

All these rules are regarded as reasonable.

It was mentioned in the previous articles that in the case of certain incapacities; for example alcoholism and substance abuse, counselling and rehabilitation may be appropriate steps for an employer to consider as alcoholism and substance abuse are regarded as progressive diseases which could lead to death or incapacity. Therefore, the requirement to treat alcoholism as a disease cannot be extended to employees who do not suffer from alcoholism or substance abuse simply by virtue of the fact that their misconduct involves alcohol.

The employer, therefore, has no obligation to assist an employee who does not suffer under such incapacity (alcoholism and/or drug abuse). Such an employee is responsible for their actions and can, and should, be held accountable for any misconduct they commit; and such an employee is, in all but most sinister of situations, in control of their consumption of alcohol and are fit to be held accountable for it (***Steenkamp J: Transnet Freight Rail v Transnet Bargaining Council and Others***).

Being intoxicated during working hours involves an element of choice, because an individual, knowing very well the probability of the consequences of their actions and the dangers in their behaviour, deliberately and wilfully chooses to behave in such a manner regardless of the consequences (***Steenkamp J: Transnet Freight Rail v Transnet Bargaining Council and Others***).

However, proving the alcohol content in the employee's bloodstream remains a challenge as it requires the administration of, amongst others, blood and breathalyser tests. These tests must be administered by relevant qualified professionals. Grogan (2014:235) indicates that proof of the alcohol content in the employee's bloodstream may be provided by properly conducted breathalyser tests, however; physical observation is sufficient. In that regard, we use a four point test based on visual observation to establish, on the balance of probabilities, that an employee is intoxicated during working hours.

That visual observation four-point test involves:

- **Blood-shot eyes,**
- **Smell of alcohol on an employee's breath,**
- **Staggering/stumbling when he/she walks, and**
- **Slurring speech.**

Not all these elements need to be present at once to prove intoxication. Any one or combination of these elements is sufficient to prove intoxication on the balance of probabilities. It is of utmost importance that a supervisor applying this test must do so in the presence of a witness (preferably, another supervisor), and the employee concerned must not be allowed to start work or continue working, instead they be escorted out of the employer's premises and sent back home. This is in relation to the employer's risk management responsibility; to deter other employees from committing the same misconduct as there could be disastrous consequences potentially resulting in death, injury, or damage to employer's property.

The matter can only be addressed with the employee at work on the following day when the employee is sober. This will require the strict application of the rule forbidding the influence of intoxication at work.

The employee may say that they are using medication which causes their breath to smell like alcohol. In that case, the onus is on them to produce proof that they are on such medication; otherwise they can be regarded, on the balance of probabilities, as being intoxicated as such can be subjected to misconduct proceedings which requires the application of the law relating to misconduct.

In conclusion, as it was indicated in the 2nd quarter (2015/16) employee relations article; it is very important to distinguish between an employee with an intoxication problem and an occasional drinker as addressing such problem requires different approaches. Normally, the former is ill with a dependency problem and possibly operationally incapacitated thus needing the employer's assistance whereas the latter is guilty of wilful misconduct which requires strict application of the rules to forbid them from behaving in that manner.

***(An opinion from the Employee Relations desk
4th quarter 2015/16 employee relations article)***