

## **How to determine whether the abuse of alcohol or drugs by an employee is misconduct or incapacity**

The question often arises as to when alcohol abuse by an employee is misconduct and when it is incapacity.

The Labour Court has held that there are two broad categories relating to alcohol:

1. If an employee is an alcoholic or dependent on drugs and needs help, then this must be dealt with as incapacity.
2. If an employee is not an alcoholic or drug-dependent but has breached a rule relating to alcohol or drugs, the appropriate approach would be to discipline the employee.

In the case of *Transnet Freight Rail v TBC and Others C644/2009* the Labour Court said that:

“Where an employee is suffering under incapacity as a result of their alcoholism, the employer is under an obligation to counsel and assist the employee in accessing treatment for their disease. The purpose of placing such a duty on an employer is based on the current medical understanding of alcoholism - that it is a diagnosable and treatable disease. This disease results in the incapacity of the employee.”

The court further said, “In terms of how to deal with the employee, the distinguishing feature in such cases of alcoholism appears to be, as with all instances of incapacity, that the employee is not at fault for her behaviour- the employee cannot be blamed for their disease and its impact on their behaviour, and discipline would be inappropriate in the circumstances.”

Also, the court said “The category of misconduct for reporting for duty under the influence of alcohol has not been extinguished by the incapacity classification for employees with alcoholism. An obligation to assist an employee who does not suffer under such incapacity does not rest on the shoulders of an employer. Such an employee is responsible for their actions, and can, and should be held accountable for any misconduct they commit.”

In a case that came before the CCMA involving alcohol, the arbitrator found that the dismissal of the employee for misconduct was fair. The employee, a bus driver was found to have consumed some eight times more than the limit of alcohol permitted for driving on roads. The employee denied that he had been drinking and stated that the breathalyser was unreliable. The company had previously counselled the employee, but he had said that he did not require assistance and that he had no alcohol problem.

The Labour Appeal Court has held that an employee is under the influence of alcohol if he / she is unable to perform the tasks entrusted to him / her with the skill expected of a sober person. The nature of the work performed by the employee is a factor which should therefore be taken into consideration. The Court went on to state that a breathalyser test is not necessary, as normal observations in respect of speech, red eyes, the smell of alcohol in the breath and the like could be used to determine intoxication.

### **The abuse of drugs**

Unlike alcohol, the effects of drug use may be harder to identify in performance or behaviour. This makes the employer’s position very difficult. Another complicating fact is that some drugs can be present in an employee’s blood stream for up to six weeks after an employee last consumed the drug. Where an employee does test positive the employer cannot know with any certainty that the employee is “under the influence” to the extent of not being able to perform his/her job. This will have to be determined by empirical evidence (observation).

As with alcohol abuse, the same question as to whether the abuse should be treated as incapacity or misconduct arises with drug abuse. It is therefore advisable that the same test be used.

### **General considerations when dealing with alcohol or drug abuse**

It is not always easy for an employer to know when an employee has an actual drug or alcohol dependency problem or whether it is just a case of isolated acts of misuse. While most employers do not have the required knowledge and expertise to determine whether clinical dependency exists, they can at least form an opinion of the extent of the problem that they as employers are dealing with and how best to manage this.

If the employer is uncertain as to whether there is a genuine dependency, an option is to send the employee for assessment at an alcohol / drug treatment facility. If the employee refuses to undergo such assessment to determine the extent of the dependency, the employer will be entitled to treat the matter as one of misconduct.

### **The following questions may be of assistance in this regard:**

- What are the circumstances of the use of alcohol/drugs, i.e. did the employee have a once off binge or does s/he need to use alcohol/drugs every day?
- What is the degree of intoxication?
- Has the employee previously had problems with alcohol/drugs?
- Is there evidence of a long-term dependence on the substance?
- Does the employee acknowledge that s/he has an alcohol/drug problem?
- How did the issue come to the employer's attention? Did the employee come forward of his/her own volition?
- Does the employee want to be helped?
- How is the employee's use of alcohol/drugs impacting his/her ability to work?
- Does the employee's behaviour place his/her own safety or the safety of others in jeopardy?

Where the majority of the answers lean towards a pattern of alcohol/drug abuse and drunkenness at the workplace, the likelihood of there being a dependency problem is greater and the situation should be managed as a form of incapacity.

See CCMA Information Sheet: Drunkenness or drug-induced conduct on duty