

**DEALING WITH ALCOHOL-RELATED OFFENCES IN THE  
WORKPLACE:  
CURRENT ISSUES OF MISCONDUCT AND INCAPACITY**

by

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**DECLARATION**

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Masters of Laws in Labour Law has not been submitted previously by me for a degree at this University or any other University, that it is my own work and execution, and that all material contained herein has been duly acknowledged.

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Date.....

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## **DEDICATION**

I dedicate this research to my late father Katametsa Mathwala Clement Manamela and my mother who is still alive Nare Lina Manamela for parental love, guidance, wisdom and prayers. I am greatly blessed and privileged to have been brought up by such loving, caring and dedicated parents. To both of them I say praises be to our God through Christ our saviour.

Finally I would like to express word of gratitude to my wonderful wife Ramokone Monica, my four children professor advocate Elias Manamela, professor advocate pastor Ernest Makwana Manamela, Nare Reinett and Matlou Cathrine Manamela for their love, kindness, encouragement and moral support throughout my studies.

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## **ABSTRACT**

Dealing with alcohol-related offences in the workplace as well as current issues of misconduct and incapacity are serious problems encountered in the workplace. The abuse of alcohol as well as intoxicating substances have been adverse impact on an employee's ability in many ways ranging from acute hang over on Monday to prolonged struggle with alcoholism as a debilitating disease. This is why nearly all disciplinary codes discourage or prohibit the use of alcohol during working hours. Most disciplinary codes usually assume certain forms: a total prohibition on the possession of alcoholic beverages in the workplace; a prohibition on being under the influence of alcohol during working hours; a prohibition on under the influence of alcohol to the extent that work performance is impaired, and a rule precluding the alcohol content of employee' bloodstream from exceeding certain range. All these rules are regarded as reasonable by labour lawyers, trade unions, HR mangers and occupational health professionals who must grapple with the problems of substance abuse in the workplace.

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## 1. OVERVIEW

It is beyond doubt that the use of alcohol in the workplace is frowned upon for obvious reasons.<sup>1</sup> The abuse of alcohol can have adverse impact on an employee's ability in many ways, ranging from acute hangover on Monday to a prolonged struggle with alcoholism as a debilitating disease. This is why nearly all disciplinary codes discourage or prohibit the use of alcohol during working hours. Most disciplinary codes usually assume certain forms: a total prohibition on the possession of alcoholic beverages in the workplace; a prohibition on being under the influence of alcohol during working hours; a prohibition on being under the influence of alcohol to the extent that work performance is impaired; and a rule precluding the alcohol content of employees' bloodstream from exceeding certain range.<sup>2</sup> All these rules are regarded as reasonable by labour lawyers, employers, trade unions, HR managers and occupational health professionals who must grapple with the problems of substance abuse in the workplace.

The aim of this study is to examine some of the thorny questions that have arisen in recent times concerning alcohol related offences in the workplace. The study takes two-pronged approach to the subject matter.

In the first place, there are preliminary considerations pertaining to the evolving unfair dismissal jurisprudence as well as categories of unfair dismissals of particular importance. To begin with, alcohol in the workplace is not a single, clear-cut disciplinary offence, even though it may appear to be - there is a range of situations in which alcohol may be involved in some way

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<sup>1</sup> See generally, Beaumont, P 'Trade unions, organisations and alcohol policies' (1983) 14 *IRJ* (UK) no 3 68; Note 'Alcohol and drugs' (1986) *IRLIB* no 315; Note 'Down, down, down ... and out: Drink, drugs and discipline' (1987) 3 *EL* 25; Albertyn, C 'Fair discipline and alcohol abuse' (1992) 9(2) *Employment Law* 33 and 'Alcohol abuse - The sanction' (1993) 9(5) *EL* 116; Van Jaarsveld, M 'Drinking on duty' (2002) 10(1) *JBL* 16 Albertyn, C & McCann, M *Alcohol, Employment and Fair Labour Practice* 1993).

<sup>2</sup> For detail discussion: Albertyn et al *Alcohol, Drugs & Employment* is the new edition of the popular *Alcohol, Employment & Fair Labour Practice* (2011)



or another. In the same way, employers have wide range of responses at their disposal, but, more often than not, the employer's disciplinary code will simply refer to an offence of "intoxication" or drunkenness. The basic conception here is of a single incident where the employee is too drunk to work. Also arising is the fact that disciplinary action is not always appropriate way of treating alcohol abuse. Item of 10 of the Code of Good Conduct: Dismissal dealing with dismissals on the ground of incapacity, suggests that '[I]n cases of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for the employer to consider'.

In the second place are those familiar problems often associated with disciplinary issue also surface, such as the sometimes thorny issue of proving that the employee was under the influence of alcohol at the given time and place, the employer's approach in respect of alcohol-related offences (whether the employer takes a zero tolerance or more lenient approach) and the fine distinction between intoxication as a form of misconduct and alcohol addiction or alcoholism as a form of incapacity.

## **1. PRELIMINARY CONSIDERATIONS**

### **1.1 Introduction**

The purpose of this introduction is twofold: on the one hand is to briefly outline the nature of the employment relation, and on the other hand to indicate pivotal questions that arise for a dismissal to be considered as fair. To put simply, alcohol abuse and addiction, and its ramifications on the workplace can best be understood by examining the overarching role of duty of mutual trust and confidence upon which the employer-employee relationship is founded. It is also trite that a dismissal must be for a fair reason and in accordance with a fair procedure. The 1996 Labour Relations Code recognises four permissible grounds for dismissal; misconduct by the

employee; poor work performance by the employee; the incapacity of the employee; and operational requirements of the employer. Termination of an employee's contract of employment arising out of the use of narcotic and abuse of alcohol during working hours straddles misconduct, incapacity as well as operational requirements categories of dismissals.

## 1.2 Duty of Mutual trust and Confidence

### 1.2.1 General Remarks

One of the most important features of an employment relationship is the existence of an *ex lege* fiduciary relationship between an employer and employee. It was emphasised in a decision that the relationship between an employer and employee is essentially one of trust and confidence:

'On the basis our law is the same as the English law, namely that in every contract of employment there is a duty that an employer will not conduct itself in a manner calculated or likely calculated to destroy or seriously damage the relationship of trust between the parties... The duties simply flow from *naturalia contractus* and duties.'<sup>3</sup>

A duty of good faith exists<sup>4</sup> between an employer and an employee, and when the employer acts in breach of this duty the employee may terminate the relationship if the breach of this duty has created an intolerable working environment.<sup>5</sup>

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<sup>3</sup> See *Council for Scientific Research & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 20B-D> See too *Banduch v United Tobacco Co Ltd* (2000) 21 ILJ 2141 (SCA) at 2246H-I; *Malik v Bank of Credit & Commerce International (In liquidation)* 1998] AC 30 at 45.

<sup>4</sup> *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union* (1991) 12 ILJ 340 (LAC) at 344F-I De Klerk J said the following: "In my view, it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust, which the employer places in the employee, is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee." See also *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler & another* 1971 (3) SA 866 (W) at 867H, *Ndlovu v Supercare Cleaning (Pty) Ltd* 1995 6 BLLR 87 (IC) at 94C.

<sup>5</sup> Primarily under the impulse of finding a breach of contract for constructive dismissal have emphasised the mirror-image obligation of the employer to co-operate with the employee and not to make his task in any way more difficult. Thus a breach has been identified when employers have criticized manager in front of subordinates: *Associated Tyre Specialists (Eastern) Ltd v Waterhouse* [1977] ICR 218; [1976] IRLR 386, use of foul language *R&C X-Press Freight v*

An employer is entitled to terminate the services of an employee when the latter's conduct has breached the trust and confidence in their employment relationship.<sup>6</sup> On the other hand, an employee may decide to terminate an employment relationship because of the breach of duty of trust on the side of the employer which renders the employment relationship intolerable and leaves an employee with no other option but to resign.<sup>7</sup> Earlier decisions indicate that an employee is entitled to terminate the employment contract because of a breach of a material term.<sup>8</sup> In *Denel (Pty) Ltd v Vorster*<sup>9</sup> it was argued on behalf of the appellant-employer that the constitutional right to fair labour practices implies that parties in an employment contract are obliged to act fairly towards one another. If an employer then follows a different disciplinary procedure provided for in the employment contract, his conduct should still be regarded as fair despite the fact that he followed a different procedure. Nugent JA found that if the new constitutional dispensation does

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*Munro* (1998) 19 ILJ 540 (LAC); made groundless accusations of theft: *Robinson v Crompton Parkinson Ltd* [1978] ICR 401, [1978] IRLR 61 and failed to show proper respect for a senior employer: *Garner v Grange Furnishings Ltd* [1977] IRLR 206. Bosch, C 'Implied term of trust and confidence' (2006) 27 ILJ 28 at 51 states, correctly in my view, that the implied term of trust and confidence is a means whereby courts can realise fundamental rights in the employment context without employees having to rely directly on those rights in addition to this implied term that may provide a remedy where labour legislation does not.

<sup>6</sup> See e.g. *Christiaan Benjamin van Staden v ABSA Bank Beperk* (1993) 4(4) SALLR 1 (IC); *Lubbers v Santech Engineering (A Division of Scaw Metals)* [1994] 10 BLLR 124 (IC); *FAWU obo Maleke v SA Breweries* [1998] 10 BALR 1330 (AMSSA); *SALSTAFF obo Van Niekerk v SA Airways* [1999] 2 BALR 218 (IMSSA); *NASECGWU obo Visser v De Beers Consolidated Mines (Farm Division)* [2000] 4 BALR 379 (CCMA); *HOSPERSA obo Swanepoel v SA Post Office* [2003] 1 BALR 43 (CCMA); *Devine v SA Breweries* [2003] 2 BALR 130 (CCMA); *Miller v Rand Water* [2003] 7 BALR 817 (CCMA). *Canada Duguay v Maritime Welding & Rentals Ltd* (1998) 28 C.C.E.L. 126, 100 N.B.R. (2d) 212, 252 A.P.R. 212 (Q.B.); *Jewitt v Prism Resources* (1980) 110 DLR (3d) 713 (B.C.S.C.); *Alschnul v Tom Davis Management Ltd* (1985) 6 C.C.E.L. 180; *Ivanore v Canadian Imperial Bank of Commerce* (1983) 3 C.C.E.L. 26.

<sup>7</sup> See *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC); *Smithkline Beecham (Pty) Ltd v CCMA & others* (2000) 21 ILJ 988 (LC).

<sup>8</sup> See eg *Ferrant v Key Delta* (1993) 14 ILJ 465 (IC). In *Jooste v Transnet Ltd t/a SA Airways* (1995) 5 BLLR 1 (LAC) referred to principles of the English law in terms of which it is implied term of an employment contract that an employer will not conduct himself in a manner that is likely to destroy or seriously damage an employment contract without reasonable cause. See generally *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413 (CA); *United Bank Ltd v Akhtar* [1989] IRLR 507 (EAT); *Sita (GB) Ltd v Burton & others* [1997] IRLR 501 (EAT).

<sup>9</sup> (2004) 25 ILJ 695 (SCA). In the present case the appellant had provided for a particular disciplinary procedure in the respondent's employment contract but failed to follow it

have the effect of introducing into the employment relationship a reciprocal duty to act fairly, it cannot have the effect that a fair contract is deprived of its effect.<sup>10</sup>

It is trite that an employer is entitled to satisfactory conduct and work performance from employees.<sup>11</sup> The legislature has also placed a premium of the efficient and profitable running of the business. Accordingly, it distinguished three broad categories of potentially fair reason for which an employer may dismiss namely misconduct, incapacity and the operational requirements of the business.<sup>12</sup> The employer may dismiss for any these three categories of reasons provided that such a dismissal is both *substantively and procedurally fair*.

### **1.3 Current Issues of Substantive Fairness and Fair Procedure in Dismissals based on Misconduct and Incapacity**

#### **1.3.1 General remarks**

The legislature's aim with its requirements of *substantive fairness* is to ensure that a dismissal is not effected arbitrarily. The employer must prove that there is a reason for dismissal and this proffered reason is fair under the circumstances.<sup>13</sup> Generally, a reason will be fair if the employer can prove it exists; that is a serious reason; that the employee knew that he could be dismissed for that reason and that the penalty of dismissal is the appropriate penalty under the circumstances.<sup>14</sup>

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<sup>10</sup> *Denel* at 665D. Implied duties of fairness may have the effect of improving the effect of unfair terms in an employment contract, or even of supplementing the contractual procedure provided for was fair contract of its legal effect. Since the procedure provided for was fair, the employee was entitled to insist that the employer abide by its contractual undertaking to apply it.

<sup>11</sup> See Item 1(3) of the Code.

<sup>12</sup> See s 188(1) of the Labour relations Act, 1995. This distinction is taken from the ILO's Convention 158 of 1982 entitled Termination of Employment at the Initiative of the Employer.

<sup>13</sup> See s 188(1) of the Labour Relations Act, 1995.

<sup>14</sup> For a sustained account see Okpaluba, C 'Employee's misconduct, employer's reasonableness and the law of unfair dismissal in Swaziland' (1999) 32 *CILSA* 386, 393-394 esp. note 56; Myburgh, J & Van Niekerk, A 'Dismissal as a penalty of misconduct: The

Procedural fairness is aimed at ensuring that the affected employee is afforded an opportunity to either state his version or to explain<sup>15</sup> or to make suggestions.<sup>16</sup> This, in turn, ensures that the employer's decision to dismiss is a considered and informed one.

The Code sets out the guidelines for substantive and procedural fairness regarding dismissal for misconduct<sup>17</sup> and for incapacity.<sup>18</sup> These guidelines are fairly extensive. They are, however, mere guidelines and not hard and fast rules.<sup>19</sup> This means that the employer's non-compliance with a particular guideline will not necessarily make the dismissal unfair.<sup>20</sup> The question of whether or not non-compliance with a particular guideline is in order will depend on the facts of the matter.<sup>21</sup> Nevertheless, an employer should carefully consider whether or not circumstances are such that non-compliance will be in order, as the Labour Relations Act, 1995 specifically requires that

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reasonable employer and other approaches' (2000) 21 *ILJ* 2145; Cohen, T 'The "reasonable employer" test - Creeping in Through the Back Door?' (2003) 15(2) *SAMLJ* 192; Grogan, J 'Death of reasonable employer: the seismology of review' (2000) 16(2) *EL* 4.

<sup>15</sup> Consider the requirements for a procedurally fair dismissal for incapacity where the employee must be afforded an opportunity to explain why his work is below the required standard.

<sup>16</sup> In the case of dismissal for operational reasons, the employee must be afforded an opportunity to make suggestions regarding alternatives to dismissal or regarding the timing of dismissals or to suggest which selection criteria must be used. For discussion: Grogan, J 'Unilateral Change: How is it to be effected?' (2000) 18(4) *EL* 15 and 'Chicken or egg: Dismissals to enforce demands' (2003) 19(2) *EL* 4; Note 'Dissecting an automatically unfair dismissal from a valid operational requirements dismissal' (2004) 13(4) *LLN* 2; Irvine, H 'Dismissal based operational reasons and the jurisdiction of courts- *National Union of Metalworkers and others v Fry's Metal (Pty) Ltd*' (2005) 14(9) *CLL* 81.

<sup>17</sup> See item 3(4)-(6) and 7 of the Code.

<sup>18</sup> See Item 9 and 11.

<sup>19</sup> See Item 1(1) which stipulates that the Code is "intentionally general: and that "[e]ach case is unique, and departures from the norms established by this Code may be justified in proper circumstances".

<sup>20</sup> This is in line the Labour Appeal Court's decision in *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union* (1990) 11 *ILJ* 504 (LAC) at 507H-I where held that the courts developed mere guidelines and that the parties could depart from them under appropriate circumstances.

<sup>21</sup> See Item 2(1) of the Code.

the fairness of a dismissal must be judged against the guidelines of the Code.<sup>22</sup>

The legislature has set out the requirements for a fair dismissal for operational reasons in the Labour Relations Act, 1995 itself.<sup>23</sup> This was probably done as the guidelines for a dismissal for this reason were not as developed and clear as those for the other two reasons for dismissal.<sup>24</sup> The requirements are not mere guidelines<sup>25</sup> and non-compliance makes the dismissal statutorily unfair. The employer's decision-making power regarding dismissal for this reason, therefore, appears to be more restricted than in the case of misconduct and incapacity. This was probably motivated by the fact "operational reasons" is an extremely wide concept which affords employers with virtually limitless scope for dismissal.<sup>26</sup>

The onus is on the employer<sup>27</sup> to prove that there has been substantial compliance with either guidelines or the statutory provisions and it must prove this on balance of probabilities.<sup>28</sup> When considering whether there has been sufficient compliance, the commissioner and the labour court will probably take all facts into consideration; including those that only became known after the dismissal.

#### 1.4 The Requirements for a Fair Dismissal for Misconduct

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<sup>22</sup> See s 188(2).

<sup>23</sup> See 189 read with ss 16 and 196.

<sup>24</sup> See chapter 6 of the *Explanatory Memorandum* by the Ministerial Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995.

<sup>25</sup> See, for example, s 189(1) where it is stipulated that the employer "must" consult. See also s 189(2)-(3) and (5)-(7) as well as 196(1) of the Labour Relations Act, 1995.

<sup>26</sup> See generally Du Toit, D 'Business restructuring and operational requirements dismissals: *Algorax* and beyond' (2005) 26 *ILJ* 595; Thompson, C 'Bargaining, business restructuring and the operational requirements dismissal' (1999) 20 *ILJ* 755 and 'The changing nature of employment' (2003) 24 *ILJ* 1793.

<sup>27</sup> See s 192 of the Labour Relations Act, 1995.

<sup>28</sup> Neither the Labour Relations Act, 1995 nor the Code stipulates the standard by which the employer must prove this.

### 1.4.1 Substantive Fairness

Substantive fairness in misconduct cases revolves around the disciplinary rule which the employee has allegedly contravened.

In terms of the Code, the employer must prove that the rule existed<sup>29</sup> and that the employee has contravened the rule.<sup>30</sup> The employer must also prove that the rule or standard was valid and reasonable.<sup>31</sup> In general terms, a rule or standard will be valid or reasonable if the facts indicate that it is lawful and that it can be justified with reference to the needs and circumstances of the business.

In addition, the employer must prove that the employee was aware, could reasonably be expected to have been aware, of the rule or standard. The rationale for this guideline is obvious; an employee should only be penalised for actions or omissions which he knew were unacceptable. Also implied in this requirement is that the employee must have known that a transgression of this rule may lead to dismissal.<sup>32</sup>

Furthermore, the employer must prove that it has applied this rule consistently.<sup>33</sup> The reason for this guideline is that an employer, as far as possible, must treat its employees the same where they have committed the

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<sup>29</sup> See Item 7(1) of the Code. If there is a written disciplinary code which contains the relevant rule, or if it is contained in the contract of employment or in a notice board, the employer's task is fairly easy. However, even where it is not contained in such documents, the employer's task may remain fairly easy, particularly where the rule appears to be one founded on the common law (see Item 3(1)).

<sup>30</sup> See Item 7(a) of the Code.

<sup>31</sup> See Item 7(b)(i) of the Code.

<sup>32</sup> *Left v SA Breweries* (1999) 20 ILJ1327 (CCMA).

<sup>33</sup> See Item 7(b)(iv) of the Code. Two types of inconsistency can be differentiated namely historical and contemporaneous inconsistency. Historical inconsistency occurs where the employer has in the past, as a matter of practice, not proceeded against its employees when they have contravened a certain rule but then suddenly decides to proceed against an employee for contravening that particular rule. Contemporaneous inconsistency takes place where employees who breach the same rule at roughly the same time are not at all disciplined, or where they are all disciplined receive different penalties.

same or similar offences. In other words, the employer must be consistent in the meting of discipline.<sup>34</sup>

Lastly, the employer must prove that dismissal was appropriate sanction for the contravention of the rule or standard.<sup>35</sup> The Code lists a number of factors which must be taken into consideration when determining this question<sup>36</sup> namely the gravity of the misconduct,<sup>37</sup> the employee's circumstances,<sup>38</sup> the nature of the job,<sup>39</sup> the circumstances of the infringement itself<sup>40</sup> and the consistency with which the employer has dismissed other employees for the same offence in the past.<sup>41</sup>

None of these factors in isolation can determine the appropriateness of dismissal as a penalty. They must all be considered and weighed up against each other. To decide whether or not dismissal is the appropriate penalty may be fairly difficult task, particularly where factors such as consistency and the personal circumstances of the employee must be balanced.<sup>42</sup>

In addition, the commissioner determining the fairness of a dismissal is enjoined by item 7(b)(iv) of the Code to consider whether dismissal is an

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<sup>34</sup> See *SACCAWU & others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC); *Cape Town City Council v Masitho & others* (2000) 21 ILJ 1957 (LAC); *SVR Mills Services (Pty) Ltd v CCMA* (2004) 25 ILJ 135 (LC).

<sup>35</sup> See Item 7(b)(ii).

<sup>36</sup> See Item 3(5) and (6).

<sup>37</sup> The Code subscribes to the concept of progressive discipline (see item 3(2)) and stipulates that dismissal is not appropriate for a first offence, except where the misconduct is serious (see item 4(4)).

<sup>38</sup> Such as the length of service, previous disciplinary record and personal circumstances (see item 3(5) of the Code).

<sup>39</sup> Consider, for instance, *BAWU v One Steak House* (1988) 9 ILJ 326 (IC) at 330G-I where the Industrial Court took into account the fact that efficient and quick service was essential in a restaurant functioning on the principle of low price and high turnover, and decided that the employees' disobedience and slack and inefficient service constituted a fair reason for dismissal.

<sup>40</sup> Surrounding circumstances may have a tempering effect, not on the seriousness of the offence as such, but on the severity of the penalty.

<sup>41</sup> See item 3(6) of the Code.

<sup>42</sup>



"appropriate" sanction.<sup>43</sup> The authors of *The Labour Relations Act of 1995* suggest that the term "appropriate" must be read in the light of the purpose of the Labour Relations Act, 1995. They argue that<sup>44</sup>

'[I]t would be difficult to maintain that the aims set out in section 1, in addition to the constitutional right to fairness, permit the arbitrator to require no more than 'reasonableness' on the part of the employer. It is submitted that the arbitrator must also consider whether the employer's sanction was fair, thus broadening the scope for legal intervention and the protection extended to employees'

#### 1.4.2 Procedural Fairness

Item 3 of the Code sets out the requirements for a procedurally fair dismissal for misconduct. It is here, arguably, the Code adopts a different approach<sup>45</sup> from that of the jurisprudence developed by the Industrial Court.<sup>46</sup> Although there were differing approaches, generally speaking, the Industrial Court required fairly high standards of procedural fairness.<sup>47</sup> It appears that the Code does not subscribe to this approach. It requires a substantially fair procedure rather than compliance with prescribed formalities.<sup>48</sup> As A van

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<sup>43</sup> See generally, *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* (2006) 27 ILJ 2076 (SCA); *Minister of Correctional Services v Mthembu NO & others* (2006) 27 ILJ 2114 (LC).

<sup>44</sup> Du Toit, D, Woolfrey, D, Murphy, J, Godfrey, S, Bosch, D & Christie, S *The Labour Relations Act of 1995* (1996) 354.

<sup>45</sup> Van Niekerk, A & Le Roux, PAK 'Procedural fairness and the New Labour Relations Act' (1997) 6(6) CLL 51 where they state, "One of the most important but understated changes introduced by the 1995 Labour Relations Act relates to procedural fairness in dismissal. The precise nature and extent of these changes will have to be determined by the labour courts in due course, but the wording of the Act and in particular, the Code of Good Practice on unfair dismissal, suggest that they are far reaching".

<sup>46</sup> For a discussion of the court's jurisprudence, see Le Roux, PAK & Van Niekerk, A *The Law of Unfair Dismissal* (1994) 152-176; Rycroft, A & Jordaan, B *A Guide to South African Law of Unfair Dismissal* (1994) 203-210; Cameron, E "The right to a hearing before dismissal - Problems and puzzles" (1986) 7 ILJ 183 and "The right to a hearing before dismissal - Part 1" (1988) 9 ILJ 147.

<sup>47</sup> For an overview of the Industrial Court's requirements for a procedurally fair dismissal, see Van Niekerk, A & Le Roux, PAK 'Procedural fairness and the New Labour Relations Act' (1997) 6(6) CLL 51; Du Toit, D, Woolfrey, D, Murphy, J, Godfrey, S, Bosch, D & Christie, S *The Labour Relations Act of 1995* (1996) 357.

<sup>48</sup> Du Toit, D, Woolfrey, D, Murphy, J, Godfrey, S, Bosch, D & Christie, S *The Labour Relations Act of 1995* (1996) 357.

Niekerk AJ put it in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*:<sup>49</sup>

'The rules relating to procedural fairness introduced in the [the Labour Relations Act] 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.'

The Code states that the employer should conduct an investigation, which does not need to be a formal enquiry, to determine whether there are grounds for dismissal.<sup>50</sup> Van Niekerk and Le Roux<sup>51</sup> point out that although the word "enquiry" is used in the Code, it is clear that what was envisaged by the Code is not the formal disciplinary enquiry often contemplated by the Industrial Court.<sup>52</sup>

Firstly, the employer must notify the employee of the allegations using a form and language that the employee can reasonably understand.<sup>53</sup> Secondly, the employee should be afforded the opportunity to state a case in response to the allegations against him.<sup>54</sup> Thirdly, the employee should be allowed a reasonable

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<sup>49</sup> (2006) 27 ILJ 1644 (LC) at para 32.

<sup>50</sup> See item 4(1).

<sup>51</sup> 'Procedural fairness and the New Labour Relations Act' (1997) 6(6) CLL 51, 57.

<sup>52</sup> See, for instance, *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC).

<sup>53</sup> See item 4(1). See also Le Roux, PAK 'Providing information to an employee facing a disciplinary inquiry' (2005) 14(9) CLL 86; Mischke, C 'The right to an interpreter: When must the employer provide an interpreter for disciplinary proceedings?' (2004) 14(3) CLL 21.

<sup>54</sup> See item 4(1).

time to prepare his response<sup>55</sup> and, fourthly, he should be entitled to the assistance of trade representative or fellow employee.<sup>56</sup>

After investigation, the Code requires the employer to communicate the decision taken and preferably furnish the employee with written notification of that decision.<sup>57</sup>

The Code contains special provisions in the case of disciplinary action against trade union representatives<sup>58</sup> or an employee who is an office-bearer<sup>59</sup> or official of a trade union.<sup>60</sup> It requires the employer not to institute such disciplinary action against these employees without first informing and consulting the trade union.<sup>61</sup> The aim of this provision is probably to afford these employees a measure of protection against bias or victimisation by the employer.

If the employee is dismissed, the Code requires that the employee should be given the reason for dismissal<sup>62</sup> and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute

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<sup>55</sup> See item 4(1)

<sup>56</sup> See item 4(1).

<sup>57</sup> See item 4(1).

<sup>58</sup> A trade union representative is defined in s 213 as "a member of a trade union who is elected to represent employees in a workplace".

<sup>59</sup> An office bearer of a trade union is defined in s 213 of the Labour Relations Act, 1995 as a person who hold office in a trade union and who is not an official.

<sup>60</sup> An official of a trade union is defined in s 213 of the Labour Relations Act, 1995 as a person employed as the secretary, assistant secretary or organiser of a trade union, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity.

<sup>61</sup> See item 4(2). The Labour Court in *National Construction Building & Allied Workers Union v Masinga & others* [2000] 2 BLLR 171 (LC), held that the provisions of item 4(2) are merely a guideline and that failure by the employer to comply will not necessarily render the dismissal unfair. See also *Mondi Paper Co Ltd v Paper Printing Wood & Allied Workers Union & another* (1994) 15 ILJ 778 (LAC); *SA Clothing & Textile Workers Union & another v Ninian & Lester (Pty) Ltd* [1994] 12 BLLR 67 (LAC); *Mazingi/Department of Health - Eastern Cape* [2006] 5 BALR 481 (PHWSBC); *NUMSA obo Pension Biliman/Coatek CC* [2005] 6 BALR 646 (MEIBC); *NUMSA obo Sekgoeng and Impala Platinum Ltd* (2006) 27 ILJ 2187 (CCMA); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC).

<sup>62</sup> Le Roux, PAK & Van Niekerk, A *The Law of Unfair Dismissal* (1994) 169; Rycroft, A & Jordaan, B A *Guide to South African Law of Unfair Dismissal* (1994) 208.

resolution procedures established in terms of a collective agreement.<sup>63</sup> It is imperative that the employee be informed of the reason for dismissal, particularly, if he intends to pursue the matter in terms of the Labour Relations Act, 1995, as the Act prescribes different dispute resolution procedures for the various reasons for dismissal.<sup>64</sup>

The Code does not make provision for an appeal against a dismissal to a higher authority in the hierarchy of the enterprise.<sup>65</sup> This is to the advantage of the employer as it entails saving in production hours and manpower. However, it also advantageous for the (dismissed) employee as he will be able to refer the matter to the Commission<sup>66</sup> for speedy settlement by an objective third party.<sup>67</sup>

Lastly, the Code provides that the employer may dispense with pre-dismissal procedures in exceptional circumstances where the employer cannot reasonably be expected to comply with the Code's guidelines regarding a fair procedure.<sup>68</sup> The question of whether or not exceptional circumstances are present is a factual one. Nevertheless, it is suggested that the exceptional circumstances distinguished by the Industrial Court, namely the so-called crises-zone cases<sup>69</sup> and the instances where the employee has waived the right to an enquiry,<sup>70</sup> will serve as guidelines for the commissioners of the CCMA.

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<sup>63</sup> See item 4(3).

<sup>64</sup> See s 191.

<sup>65</sup> Compare with this Industrial Court which often required that an employee had to be afforded an appeal (see, for example, *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC) at 357A-F).

<sup>66</sup> See s 191(1)(b) of the Labour Relations Act, 1995.

<sup>67</sup> See s 191(1) in terms of which the employee must refer the dispute within 30 days of the dismissal as well as s 191(5) in terms of which the commissioner must endeavour to conciliate the dispute the dispute within 30 days of receipt of the referral.

<sup>68</sup> See item 4(4). The Industrial Court also identified exceptional circumstances where the employer could dispense with a hearing (*Le Roux, PAK & Van Niekerk*, *A The Law of Unfair Dismissal* (1994) 174-176).

<sup>69</sup> See, for instance, *Lefu & others v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 307 (IC) at 313C and *NUM v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division)* (1988) 9 ILJ 341 (IC) at 348A-D.

<sup>70</sup> See *Mfazwe v SA Metal and Machinery Co Ltd* (1987) 8 ILJ 492(IC) at 493D; *De Vos and Denel Personnel Solutions (Pty) Ltd* (2006) 27 ILJ 203 (BCA) at para 25.

## 1.5 The Requirements for a Fair Dismissal for Incapacity

### 1.5.1 Substantive Fairness

The Code distinguishes two broad categories of incapacity,<sup>71</sup> namely; poor work performance<sup>72</sup> and ill health or injury. In essence, the guidelines for a substantively fair dismissal for these categories are the same.<sup>73</sup>

In the case of dismissal for poor work performance, the Code provides for a reasonable probationary period.<sup>74</sup> The aims of such period are normally twofold: to allow the employer to determine the employee's suitability for the job and to enable it to dismiss an unsuitable employee for reasons which are "less compelling"<sup>75</sup> than would be required in the case of ordinary employees. However, the guidelines for a fair dismissal of a probationary employee prescribed by the Code<sup>76</sup> are essentially the same as those for ordinary dismissal.<sup>77</sup>

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<sup>71</sup> The Industrial Court also distinguished between these two forms of incapacity. See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 219 where they discuss these forms of incapacity distinguished by the court.

<sup>72</sup> The dividing line between incapacity and misconduct in the case of poor work performance is often very fine. The cause for poor work performance must be carefully considered. If there is some measure of culpability on the part of the employee, his dismissal would probably be based on his misconduct and not on incapacity. See further See Van Niekerk, A 'Dismissal for poor work performance: Guidelines from the LRA, the CCMA and the Labour Court' (1998) (9) *CLL* 81 as well as Christianson, M 'Incapacity and disability: A retrospective and prospective overview of the Past 25 years' (2004) 24 *ILJ* 879.

<sup>73</sup> The employer must be careful that a dismissal for permanent or serious temporary incapacity does not amount to an automatically unfair dismissal (see) The employer will be able to avoid this where it can prove that it is not the employee's disability which is the reason for his dismissal but rather the inherent requirements of the job which make the disabled person incapable of doing the work. The employer may also possibly dismiss a disabled person for operation reasons. Under such circumstances, the emphasis will be on the harm which the employee's incapacity is inflicting on the economic well-being of the business and not on the incapacity as such.

<sup>74</sup> See clause 8(1).

<sup>75</sup> Grogan, J *Workplace Law* (1996) 114.

<sup>76</sup> See clause 8(1).

<sup>77</sup> This is largely in line with the view expressed in the majority of Industrial Court decisions namely that the requirements for a substantially fair dismissal during probation are essentially the same as those for an ordinary dismissal. See Grogan, J *Workplace Law* (1996) 113-114.

An employer who wants to dismiss an employee for poor work performance<sup>78</sup> must firstly prove that there was a performance standard and that the employee failed to meet the required performance standard.<sup>79</sup> In the second instance, the employer must prove that the reason for dismissal was fair under the circumstances. In this regard, it must prove that the employee knew what was expected of him;<sup>80</sup> that he was given a fair opportunity to meet the required standard<sup>81</sup> and that dismissal was the appropriate sanction.<sup>82</sup>

In relation to dismissal for ill-health or injury<sup>83</sup> the employer will have to prove that the employee was ill or he was injured and that this made the employee incapable of doing his work.<sup>84</sup> In the second instance, the employer must prove that ill health or injury was a fair reason for dismissal under the

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<sup>78</sup> Essentially, the Code has codified the guidelines developed by the Industrial court for a substantively fair dismissal (See Du Toit *et al* *The Labour Relations Act 1995* (1996) 360). See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 221-22 for a discussion of the court's guidelines).

<sup>79</sup> See clause 9(a). The required stand is essentially that which is required in terms of the common law, namely that the employee is able to do the work that he has undertaken to do. However, the circumstances of the job may such that a certain amount of training or guidance or instruction is required from the employer. Under such circumstances, the employer must prove that the employee did not meet the standard demanded by the peculiarities of the job or the workplace.

<sup>80</sup> See clause 9(b)(i) read with clause 8(2)(a). Normally, it could be argued that the employee would have been aware of the requirements, as he had indicated, by accepting the job offer, that he could do the work. The Code (see clause 8(2)(a) nevertheless appreciates that circumstances may be such that the employer may be required to evaluate, instruct, guide or counsel the employee. All these actions are aimed at informing the employee what is expected of him and how he must go about achieving this.

<sup>81</sup> See clause 9(b)(ii) read with clause 8(2)(b).

<sup>82</sup> See clause 9(b)(iii) of the Code. In this regard, aspects such as the nature of the performance standard, the period given for improvement, the number of chances given for improvement, the employee's personal circumstances, his explanation for non-compliance as well as the alternatives to dismissal which have been considered, will be relevant. See also Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 227 where they suggest that the employer must show that the possibility of alternative employment was at least considered.

<sup>83</sup> The guidelines for a substantively fair dismissal are those which have been developed by the Industrial Court (See Du Toit *et al* *The Labour Relations Act 1995* (1996) 360 and 364). See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 229 for a discussion of the Industrial Court guidelines).

<sup>84</sup> See clause 11(a) of the Code. See too *Rikhotso v MEC for Education* (2004) 25 ILJ 2385 (LAC); *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 26 ILJ 947 (BCA); *CEPPWAWU obo Qhelile and First National Batteries* [2002] 12 BALR 1275 (CCMA); *Barnard and Telkom SA Ltd* WES997-02 (CCMA).

circumstances. In this regard, the employer must indicate that the extent to which the employee was unable to perform his work was substantial;<sup>85</sup> that it was not possible or feasible to adapt the employee's work circumstances or change his duties<sup>86</sup> and that no suitable alternative work was available.<sup>87</sup>

An employer who dismisses a partially disabled employee must, before the dismissal consult with the employee concerning the disablement and investigate whether the employee can be accommodated elsewhere in the employer's business.<sup>88</sup> The obligation to consider this alternative to dismissal is greater where the employee's disability or incapacity is sustained in the course of the employee's employment. However, where the employee is permanently totally disabled it serves no purpose to offer the employee alternative employment and the employer is under no obligation to keep the employee in employment.<sup>89</sup>

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<sup>85</sup> See clause 11(b)(i) read with clause 10(3) of the Code. In the case of temporary incapacity, it must prove the extent of the incapacity is so great that continued employment is not a feasible option. It may prove this where the facts show that the employee will be absent for an unreasonably long time (see clause 10(1) of the Code). Where an employee is permanently incapable, the employer must prove that it cannot accommodate his disability by adapting his duties or work circumstances or that there is no alternative employment (see clause 10(1) of the Code).

<sup>86</sup> See clause 11(b)(ii) of the code. The Code indicates that an employer's duty to accommodate an employee who is injured at work or who is suffering from a work-related illness is more onerous under these circumstances (see clause 10(4)).

<sup>87</sup> See clause 11(b)(iii) of the Code. In clause 10(4) the Code stipulates that the duty on the employer to try and find suitable alternative work is more onerous where the illness or injury is work-related.

<sup>88</sup> See *IMATU v City of Cape Town* (2005) 26 ILJ 747 (LC); See also Dupper *et al Employment Discrimination Law* (2004) 161 as well as Christianson, M 'Incapacity and disability: A retrospective and prospective overview of the Past 25 years' (2004) 24 ILJ 879.

<sup>89</sup> See *Free State Consolidated Gold Mines Bpk h/a Western Holding Goudmyn v Labuschagne* (1999) 20 ILJ 2823 (LAC). See also *NUMSA obo White and Lear Automotive Interiors (Pty) Ltd* (2005) 26 ILJ 1816 (BCA); *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 26 ILJ 947 (BCA)

### 1.5.2 Procedural Fairness

The Code does not provide a structured list of procedural guidelines in respect of poor work performance or ill health or injury. This is probably because procedural fairness is linked to substantive fairness.<sup>90</sup>

The overlap between substantive and procedural fairness in cases of poor work performance from item 8(2)(b).<sup>91</sup> It states that the procedure leading to dismissal should include an investigation to establish the reasons for unsatisfactory work performance and that the employer should consider alternatives to dismissal. In terms of item 8(4) the employee is also entitled to be heard and to be assisted by a trade union representative or a fellow employee during the investigation process.<sup>92</sup>

Where the employee is incapable because of ill health or injury, the employer must also enter into an investigative process and hold discussions with the employee.<sup>93</sup> During these discussions, the employee must be informed what impact his incapacity has on his job security.<sup>94</sup> Provision may also be made for further discussions<sup>95</sup> during which progress regarding his physical well being is considered<sup>96</sup> and, where relevant, alternatives to dismissal or the adaptation

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<sup>90</sup> See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 222 where they state, "The requirement of fair procedure ... is inextricably linked to that of substantive fairness; the process of assessment, advice, guidance, and ultimately warning are an integral part of the dismissal". See Du Toit *et al The Labour Relations Act 1995* (1996) 365.

<sup>91</sup> See also Campanella, J 'Dismissal for Misconduct for incapacity - What is the difference?' (1995) 4(7) *Labour Law News and Court Reports* 1; Van Niekerk, A 'Absence illness incapacity and operational requirements' (1993) 3(4) *CLL* 31.

<sup>92</sup> Van Niekerk < A 'Dismissal for poor work performance: Guidelines from the LRA, the CCMA and the Labour Court' (1998) (9) *CLL* 81.

<sup>93</sup> This is implied in item 10(1) and (2) of the Code. See, for instance, *Tshaka and Vodacom (Pty) Ltd* (2005) 26 *ILJ* 568 (CCMA).

<sup>94</sup> See item 10(1) of the Code.

<sup>95</sup> See item 10(2) where mentioned is made of the "process" of the investigation.

<sup>96</sup> Item 10(3) enjoins employers to consider counselling and rehabilitation in the case of alcoholism and drug abuse.



of his duties is discussed.<sup>97</sup> In the process of investigation, the employee should be given an opportunity to state his case and to be assisted by a trade union representative or fellow employee.<sup>98</sup>

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<sup>97</sup> See item 10(1) of the Code. Item 10(4) states that the duty on the employer to accommodate the incapacity of the employee is more onerous where the employee was injured at work or is suffering from a work-related illness.

<sup>98</sup> See item 10(2).

## 23. INTOXICATION FROM MISCONDUCT TO INCAPACITY

### 2.1 General remarks

Although the distinctions between the various grounds of dismissals are useful in practice, and while categorisation of various forms of dismissals has certain legal consequences, the division between dismissals related to alcohol related conduct during working hours and those related to employee's addiction to alcohol as a form of incapacity, is not absolute. Some individual cases clearly fall into one or other category; others may straddle two categories. For example, a disciplinary action may be inappropriate, if the employee suffers from addiction to alcohol.<sup>99</sup> Similarly, where problematic employee denies he or she has addiction problem or is not co-operating with a treatment plan to address his or her alcohol dependency problem, then the employer will be left with no option but to follow a disciplinary approach.<sup>100</sup> Whether intoxication on duty should be cast as a dismissal for misconduct or a dismissal for incapacity therefore depends on the facts peculiar to each case.

What has been stated before can be repeated with equal force: the ultimate ground for justifying all dismissals, including alcohol-related offences, is the operational requirements of the business. The ultimate reasons why an employee is dismissed for misconduct or incapacity is not so much that the employee has transgressed a disciplinary rule or that the employee cannot do the job, but rather that their continued employment threatens the economic success of the enterprise.<sup>101</sup> The foregoing considerations may well be most amplified at the point of termination induced by alcohol abuse and addiction of a wayward employee.

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<sup>99</sup> See Albertyn, C 'Fair discipline and alcohol abuse' (1992) 9(2) *EL* 33 and 'Alcohol abuse - The sanction' (1993) 9(5) *EL* 116.

<sup>100</sup> See Note 'Alcohol and drugs' (1986) *IRLIB* no 315; Note 'Down, down, down ... and out: Drink, drugs and discipline' (1987) 3 *EL* 25

<sup>101</sup> Hugh Collins *et al Labour Law: Text and Materials* (2001) at 479. See also R Mcreadie 'Insecurity at Work' in *Comparative Labour Law*, W.E Butler, B. A Hepple, & A.C Neal (eds), at 161 where he says 'The sanction that ensures obedience to his commands is his ability to discipline and ultimately dismiss the employee who does not act in his interest'.

The remainder of the study deals with the delicate and controversial issue of fairness of a dismissal of employees in response to alcohol related offence at the workplace, on the one hand, and alcohol addiction as form of incapacity, on the other. The purpose is to explore pervasive questions that confront management in dealing with intoxication and addiction at the workplace.

## 2.2 Intoxication as a disciplinary offence

It is trite that being under the influence of alcohol while on duty is a disciplinary offence.<sup>102</sup> The challenge for modern management in dealing with alcohol in the workplace lies, primarily, in the appropriate formulation of rules and the consistent application of those rules. The nature of rules imposed and the severity of the penalty attached thereto, will depend on a range of factor, including the nature of the employer's business and the work done and the risks that attach to employees being under the influence of alcohol whilst on duty.<sup>103</sup> A vexed and complex problem that confronts modern management is whether is whether dismissal for misconduct or some other form of disciplinary action is appropriate in a specific case.

## 2.3 The question of proving intoxication

The nature of the dilemma, which confronts modern management decision-making process in alcohol-related disciplinary matters, manifests itself where an employee is found to be under the influence of alcohol while on duty, but management is unable to marshal evidence necessary or sufficient to serve as a factual basis for dismissal.<sup>104</sup> The question is as follows: Is it always

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<sup>102</sup> See generally *Albertyn et al Alcohol, Drugs & Employment* is the new edition of the popular *Alcohol, Employment & Fair Labour Practice* (2011).

<sup>103</sup> See e.g. *Naik v Telkom SA* (2000) 21 ILJ 1266 (CCMA).

<sup>104</sup> In *Radebe/Way Industries* [2000] 8 BALR 921 (CCMA) the dismissal of the applicant employee for being under the influence of alcohol while on duty was duty to be unfair because the employer failed to satisfy the commissioner that the applicant was intoxicated at

obligatory for the employer to conduct blood-alcohol tests, use breathalysers, or would other evidence such as evidence from fellow employees regarding the wrongdoer's conduct be enough.

According to Mischke the answer to this crucial question is determined by the offence with which the culprit has been charged:<sup>105</sup>

'If the employee has been charged with possession of alcohol in the workplace, it would be sufficient for the employer to prove, on a balance of probabilities, that the employee has possession of alcohol at the relevant time in the workplace. Evidence from security staff who had conducted searches on the employee's entering or leaving the premises, or evidence from other employees, would be sufficient in this case. The same would apply to a charge of "drinking on duty".

If, however, an employee is charged with having a certain blood-alcohol level, some form of test to determine this level, some of form of test to determine this level would be necessary. Whilst the most accurate of these tests would be a blood test, in practice this may be difficult (and expensive) to administer. Most employers make use of breathalysers to give indication of blood-alcohol level. If this is the method utilised, an employer should ensure that the breathalyser test is properly administered and that the equipment used is reliable and properly calibrated.'

In order to minimise arguments as to the accuracy of the breathalyser test, modern management do not charge employees with having a certain level of alcohol in their blood but rather with the offence (worded in various ways) of an employee being found to have a specific level of alcohol in the blood as measured by a breathalyser.<sup>106</sup>

#### 2.4 Refusal to take alcotest

There has been number of decisions where an intoxicated employee refuses to take a breathalyser test and this refusal may itself be relevant to some degree.

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the relevant times. See also *SANWU/Black Steer* [2000] 8 BALR 925 (CCMA); *SATAWU/Metrorail Services* [2002] 4 BALR 392 (AMSSA); *CAWU obo Klaas/La Farge SA (Pty) Ltd* [2000] 12 BALR 1370 (CCMA).

<sup>105</sup> 'From intoxication to addiction: dealing with alcohol-related offence in the workplace' (2005) 14(10) *CLL* 91 at 93.

<sup>106</sup> *Albertyn et al Alcohol, Drugs & Employment* is the new edition of the popular *Alcohol, Employment & Fair Labour Practice* (2011) 59.

The refusal to take a test does not amount to an admission by the employee that he or she is intoxicated. This was made clear by the Labour Appeal Court in *Tanker Services (Pty) Ltd v Magudulela*<sup>107</sup> that the only inference that can be drawn from such a refusal is that the employee, realising that he may be under the influence of alcohol, declined to take the risk of having this established. The employee will then seek to argue that he or she had some other reason for refusing to submit other than that he or she feared the result would be conclusive. The employee may argue, for instance, that he simply refused to take the test in the absence of a witness or a trade union representative. Take for example, the applicant in *Ramoitshane/Dixon Batteries (Pty) Ltd*<sup>108</sup> who arrived at work with inflamed eyes and was accused of being full of alcohol, he asked for a breathalyser test. Since there was no breathalyser kits about the applicant was told to go home. He refused to do so for some time, but when a kit was ultimately found, he had disappeared. Although the applicant protested that he had not been drinking and had an eye infection, he was dismissed. The arbitrator found that the applicant's indignation at not being tested was justified because his eyes were red when he appeared at the arbitration proceedings, and he had clearly not been drinking then. The applicant was reinstated with full retrospective effect.

It has been noted that where an employee arrived reeking of alcohol and with bloodshot eyes and refused to take breathalyser test, in such circumstances the employee's physical condition and his refusal to take the test would be sufficient to prove that he was under the influence of alcohol.<sup>109</sup> In *NUM obo Nkuna v Western Deep Levels*<sup>110</sup> the employee was dismissed for being under

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<sup>107</sup> [1997] 12 BLLR 1552 (LAC).

<sup>108</sup> [2010] 3 BALR 283 (NBCCI).

<sup>109</sup> The applicant in *SACCAWU obo Peter/Hessels Cash 'n Carry* [2001] 1 BALR 48 (CCMA) claimed that he was unfairly dismissed for being under the influence of alcohol whilst on duty. The commissioner held that the applicant's excuse for refusing to blow into a breathalyser was inadequate. Moreover, the applicant was already on a final warning for a related offence. His dismissal was upheld. See also *NUM obo Sebolao/HC Van Wyk Diamonds Ltd* [2008] 5 BALR 459 (CCMA).

<sup>110</sup> [2000] 1 BALR 72 (IMSSA).

the influence of alcohol during working hours. She refused to take a breathalyser test, and was dismissed after a disciplinary hearing. The arbitrator found her dismissal was justified, but that the grievant had been treated unfairly at the disciplinary hearing because she had not been given an opportunity to find a representative, and because an interpreter had not been provided until the grievant had complained.

The applicant in *NUMSA obo Mbali/Schrader Automotive SA (Pty) Ltd*<sup>111</sup> was subjected to breathalysers test after he was reported to be "reeking with alcohol". The test registered positive and he was dismissed for being under the influence of alcohol on duty. The commissioner ruled that mere proof that the applicant had alcohol in his bloodstream was insufficient to prove the charge that the applicant was under the influence of alcohol; additional proof that the applicant was indeed incapable of performing his duties was required. The applicant was reinstated, but without retrospective effect.

The award in *Golden Arrows Bus Service/ SATAWU*<sup>112</sup> is also instructive in this regard. There grievant was dismissed after he was found to be smelling of alcohol and refused to undergo alcotest. The negotiated disciplinary code prescribed dismissal in such cases. The grievant claimed that he was unaware of the company's strict policy on alcohol. The arbitrator held that the fact the grievant was a painter, and not a driver, was irrelevant. The union agreed to the code being applied strictly to all classes of employees. The grievant, who has been a shop steward for many years, was aware of the consequences of refusing to take the alcotest. The union's argument that the code was too strict may have had some force if the union had not agreed to it. Finally, the grievant could not escape the consequences of his action by pleading depression and stress. The grievant's dismissal was confirmed.

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<sup>111</sup> [2006] 2 BALR 143 (MEIBC).

<sup>112</sup> [2000] 12 BALR 1447 (IMSSA).

Particularly important to the issue of arriving at work under the influence of alcohol and the proof of presence of alcohol in the bloodstream after breathalyser test, is the question whether the employee's ability to perform his work was *actually impaired*. There is a decision of the Labour Appeal Court (in terms of the old Labour Relations Act 1956) to the effect that it is not sufficient for the employer to rely on the results of a breathalyser test alone to establish that the employee was under the influence of alcohol whilst at work.

In *Mondi Paper Co v Dlamini*<sup>113114</sup> the court has to decide whether the employer could prove, on a balance of probabilities, that the employee was drunk on duty - not whether the employee had consumed alcohol or whether he was, to a greater or lesser extent, under the influence of alcohol. The Court stated that:

'In my opinion, the evidence goes no further than to establish that the respondent had consumed alcohol and was smelling of alcohol at the time when tests of alcohol and was smelling of alcohol at the time the tests were taken. The fact that his speech was slurred is, in itself, not indicative of intoxication. It may be an indication of intoxication and it is one of the recognised methods of determining intoxication, but unless one excludes any other possibilities such as tiredness or the fact that the person has a natural tendency to slur his speech, it is not itself proof of intoxication. The tests carried out with the apparatus, although they tended to show a level of about 0,08 percent are also not conclusive, and as I understand the evidence, ought not to be regarded by the appellant as conclusive, because slightly lower blood/alcohol level than that would have meant a totally different attitude by the appellant towards the person to be disciplined. Unless the equipment was totally reliable and completely accurate, it would be unfair, in my view, simply to rely on the reading in order to determine whether a person should be dismissed or sent home with a warning.'

In *Bera Anglo Operations Ltd t/a Bank Colliery*<sup>115</sup> the arbitrator held that that the employer had failed to discharge the onus imposed by its own disciplinary

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<sup>113</sup> *Mondi Paper Co v Dlamini* at para 28.

<sup>114</sup> [1996] 9 BLLR 1109 (LAC).

<sup>115</sup> [2002] 4 BALR 350 (AMSSA). The commissioner in *CWU obo Nonyathi/Telkom SA Ltd* [2001] 8 BALR 840 (CCMA) held that, in order to substantiate a charge of driving under the influence of liquor, without proof that the alcohol contents in the applicant's bloodstream was beyond the permissible limit, the respondent had to prove that his driving was *actually* affected. The respondent had merely relied on observations of the applicant's physical movements. This was insufficient. The applicant was reinstated.

code of proving that the grievant was under the influence of alcohol. The grievant had merely been a series of rote questions to which he had replied satisfactorily. The only "proof" of intoxication that had been offered was that the grievant had smelled of alcohol. No attempt had been made to establish whether he was incapable of working. The grievant was reinstated.

The commissioner *NUMSA obo Motsele/Haggie Wire & Strand*<sup>116</sup> came to the opposite conclusion. In this case, an "alcotest" prove that the applicant employee had more than 0,110 grams of alcohol per ml of blood in his bloodstream. In terms of the respondent's disciplinary code, employees were deemed under the influence if they had in excess 0,03 grams of alcohol per ml of blood. The commissioner ruled that the mere fact that the employee may have been able to perform his work adequately was no defence. The applicant's dismissal was upheld.

It is in the middle ground that issues of proof become more complex. In *Carolissen v International Brokers & Credit Control (Pty) Ltd*<sup>117</sup> the bargaining council arbitrator noted that the employee probably did not drink at the office, but that his behaviour indicated that he was, nevertheless under the influence of alcohol. It was not necessary, the arbitrator continued, for the employer to administer breathalyser tests or have blood tests done - it sufficed for the employer to provide eye-witness account of a co-worker who knew the employee well and who could tell the difference between him being sober and under the influence of alcohol. The applicant in *Tsoedi/Topturf Group*<sup>118</sup> was dismissed after being involved in an accident while driving a company vehicle. It was found on the strength of an unsworn statement by a witness, who had not testified at the disciplinary hearing, that the applicant was under the influence of alcohol at the time. The commissioner held that

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<sup>116</sup> [2006] 2 BALR 163 (MEIBC). See also *NUMSA obo Williams/Robertson & Caine (Pty) Ltd* [2005] 10 BALR 1062 (MEIBC).

<sup>117</sup> (2004) 25 ILJ 2076 (BCA).

<sup>118</sup> [1999] 6 BALR 722 (CCMA).



the applicant's inability to cross-examine the deponent amounted to a procedural irregularity. Apart from the statement, there was no evidence to indicate that the applicant had been under the influence of alcohol. He was reinstated.

The result of a breathalyser test administered to an employee is certainly relevant in providing proof that the employee was inebriated while on duty but this evidence is not, in itself conclusive.<sup>119</sup> Other relevant evidence will include a smell of liquor on the employee's breath, an unsteady gait, inflamed eyes, slurred speech and slow reactions.

As illustrated above, it is crucial that a breathalyser test be administered correctly, to obviate scope for arguments. For instance, the applicant in *Bogatsu/Xstrata-Merafe*<sup>120</sup> reported for work inappropriately dressed and his supervisor smelled alcohol on him. The employee was asked to undergo two breathalyser tests. Both proved positive, and he was dismissed. The commissioner rejected the applicant's claim that the breathalyser equipment was faulty. While sympathising with the employee's plight, the commissioner noted that he had already been sent for rehabilitation, and had returned to work with a clean bill of health. The company had a zero tolerance approach towards recidivists, which was justified given the nature of its business. The employee's dismissal was upheld. It has also been suggested that, when the test is administered, there should be witnesses for the employee and for the employer and that, when the test has been completed, a document must be signed by the person conducting the test, the employee, the employee's witness and the employer's witness.<sup>121</sup>

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<sup>119</sup> Arbitrators have not been of one mind when assessing the evidentiary value of breathalyser tests. The use of this instrument was condemned in the strongest terms in *Castle Lead Works (Tvl) (Pty) Ltd and NUMSA* (1989) 10 ILJ 776 (ARB). In *Cane Carriers (Pty) Ltd and Govender* (1989) ARB 8.11.10 the arbitrator regarded the results of a breathalyser test as insufficient in itself, but agreed that it could 'add weight' to other evidence.

<sup>120</sup> [2009] 7 BALR 641 (MEIBC).

<sup>121</sup> See *Price Club v CCAWUSA* (1988) ARB 8.1.11.6. In *Exactics-Pet (Pty) Ltd v Patelia NO & others* (2006) 27 ILJ 1126 (LC) it held that the arbitrator set the standard of proof too high by

## 2.5 Intoxication as a disciplinary offence

Whenever the question is asked as to what constitutes "being under the influence of alcohol" to warrant disciplinary action and dismissal the answer that emerges is one of uncertainty. The flexibility of what being under the influence of alcohol entails appears to render the enquiry somewhat of a mirage epitomised by conflicting decisions of courts and arbitrators<sup>122</sup> in their attempt to answer the question over the years. It has been suggested that intoxication is a matter of degree. The nature of the employee's job will also be relevant:<sup>123</sup> while an office-worker may be able to struggle through a blue Monday; an employee operating heavy machinery<sup>124</sup> or driving a vehicle under the influence of alcohol and with impaired reaction-time may pose a real danger to himself or herself, co-worker or even persons outside the workplace.<sup>125</sup> Thus, in *Tanker Services (Pty) Ltd v Magudulela* the employee was dismissed for being under the influence of alcohol while at work and driving a heavy articulated truck. While making a delivery on behalf of his employer,

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requiring calibration of exact blood alcohol level and expert evidence. The LC found that a breathalyser test conducted by the employer together with evidence of witnesses was sufficient to show that the delinquent employee was under the influence of alcohol at work.

<sup>122</sup> See *Spoornet/SATAWU obo Sigasa* [2001] 8 BALR 815 (AMSSA); *Sekgopi/Kimberly Club* [2000] 4 BALR 413 (CCMA).

<sup>123</sup> The applicant *UASA/Kloof Gold Mining Company Ltd* [2004] 10 BALR 1248 (CCMA) was dismissed for smoking in a gaseous underground working area. The commissioner held that, despite the fact that the applicant was close to retirement age, dismissal was an appropriate sanction because of the danger the applicant had created by smoking. See too (*Messina Diamonds (Pty) Ltd v NUM (Kimberley)* [1998] 2 BALR 2000 (IMMSA).

<sup>124</sup> For example, in *MEWUSA obo Helical/Newcastle Steel* [2004] 7 BALR 5987 (CCMA) the arbitrator found that the dismissal of a crane operator was held to be fair. He had arrived at work intoxicated, damaged the crane, verbally abused management and exhorted his colleagues to down tools. The commissioner in *NUM obo Motala/Nare Diamond Mining* [2008] 9 BALR 899 (CCMA) refused to accept that the fact that a person sports dreadlocks is sufficient in itself to prove that he smokes dagga. Given that the remaining evidence led by the employer in support of the charge that the applicant employee was smoking a "zol" cigarette while driving a 40-ton dump truck was inconclusive, the commissioner gave the employee the benefit of the doubt on that score. The employer also failed to persuade the commissioner that the employee had negligently driven the vehicle off the side of a ramp. The employee was reinstated with retrospective effect.

<sup>125</sup> The commissioner in *Mokoena/Grinaker LTA* [2004] 4 BALR 495 (CCMA) held that the dismissal of the applicant for crashing a company vehicle while under the influence of alcohol.

he was asked by a security officer at the delivery point to take a breathalyser test. The employee refused to take the test, stating that he would only do so if a shop steward was present. The employer's fleet controller went to investigate and interviewed the employee who smelt of alcohol, slurred his speech and was unsteady on his feet - all typical symptoms of being under the influence of alcohol. The Labour Appeal Court remarked as follows:

'The difficulty with proving the charge brought against the respondent is that intoxication is a matter of degree. The respondent would only 'be under the influence of alcohol' if he was no longer able to perform the tasks entrusted to him, and particularly driving of a heavy vehicle, with the skill expected of a sober person.

Whether an employee is, by reason of the consumption of intoxicating liquor, unable to perform a task entrusted to him by an employer must depend on the nature of the task. A farm labourer may still be able to work in the fields although he is too drunk to operate a tractor. Consumption of alcohol would make an airline pilot unfit for his job long before it made him unfit to ride a bicycle. The question which I should ask myself is, therefore, whether the respondent's faculties were shown in all probability to have been impaired to the extent that he could no longer properly perform the skilled, technically complex and highly responsible task of driving an extraordinary heavy vehicle carrying a hazardous substance.'

In pith and substance the court's view here seems to be that the disciplinary offence for being under the influence of alcohol relates to the nature and complexity of the employee's task and responsibilities. The more complex and the greater the responsibilities involved in the task and the greater the risk of potential harm to others, the stricter the standards of what will be regarded as intoxication (and the greater the seriousness that would attach to being under the influence of alcohol) will be.<sup>126</sup> On the facts of the case, the Labour Appeal Court held that the employee transgression was sufficient to warrant dismissal.

A security guards need to be in full possession of his or her faculties and be able to respond to situations that may arise at the premises under his or her care. In the light of these considerations arising from the nature of the

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<sup>126</sup> For instance, the dismissal of a pilot for consuming excessive alcohol prior to flight was upheld in *Le Roy v SA Express Airways* (1999) 20 ILJ 431 (CCMA).

employee's job, a higher standard in respect of temperance while at work may be set. This was the view put forward by the Industrial Court in *HOTELLICA & another v Armed Response*<sup>127</sup> which came to the conclusion on the evidence that the employee was indeed drunk whilst performing his guarding duties; he was not only discourteous to a customer but made a spectacle of himself by virtually passing out on the doorstep. The court could find no fault with the employer's policy of zero-tolerance in respect of being under the influence of alcohol while at work and insisting that the guards it employs are vigilant and attentive at all times while guarding "life and property".

Earlier cases took into account not only the employee's job, but also the working environment. In *Finck & another v Ohlssons Cape Breweries*<sup>128</sup> a firm rule existed that the consumption of alcohol whilst on duty would lead to summary dismissal. The rule and its application were endorsed by the Industrial Court, one of the factors mentioned being that the employer, a brewery, was particularly anxious not to have its image tarnished by having intoxicated employees handling its products. On the other, in *Lotter v Southern Associated Maltsters (Pty) Ltd*<sup>129</sup> the Industrial Court took into consideration in coming to the conclusion that the dismissal was unfair was the fact that the dismissal was unfair was the fact that the employer made alcohol freely available to employees.

An illustration is *McBain/Afrox Ltd obo J McEvoy*.<sup>130</sup> The facts were as follows: the applicant, senior sales representative joined a number of his friends at a local pub one Friday afternoon, and was found there by his branch manager. He was dismissed after a disciplinary hearing for consuming alcohol during working hours. The applicant contended that he had left the office early because by that time he had already worked a full day, and that he regularly

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<sup>127</sup> [1997] 1 BLLR 80 (IC).

<sup>128</sup> (1985) ICD (1) 20.

<sup>129</sup> (1988) 9 ILJ 332 (IC). See also *Esau & ander v Wynland Broedery Belange (Emds) Bpk h/a Zetler Bros* [1994] 11 BLRR 127 (LAC).

<sup>130</sup> [1999] 12 BALR 1386 (CCMA).

worked longer hours than he was required to work. The employer contended that its sales representatives did not work flexitime, and that the applicant was already on final warning for abuse of sick leave. The commissioner held that, although the previous manager of the branch where the applicant worked had a relatively tolerant approach to the consumption of alcohol during working hours, the present branch manager had a different view, of which the applicant had been aware. There had been no agreement concerning working flexitime. Furthermore, the applicant had not been honest about the time he had knocked off on the day in question. The employer had a clear rule prohibiting employees from consuming alcohol while on duty. This was a reasonable rule. There was accordingly no basis for interference with the sanction of dismissal.

And in *NUMSA obo Davids/Bosal Africa (Pty) Ltd*<sup>131</sup> the grievant was dismissed for operating a heavy crane while under the influence of alcohol. He claimed that dismissal was a severe penalty because, inter alia, he had operated the crane without a mishap for some three hours before his condition was detected. The arbitrator held that when considering the fairness of a dismissal the interests of both employer and employee had to be taken into account. That the grievant had not caused a serious accident was something of a miracle. The grievant was aware of the rule prohibiting working while under the influence of alcohol and of its possible consequences. He had not pleaded that he had a dependency problem. His dismissal was justified.

The commissioner in *NUMSA obo Dlamini/Scaw Metals*<sup>132</sup> adopted a similar attitude. There the applicant was found to have operated a hot-metal crane with 0,087ml alcohol in his bloodstream. Invoking its "zero tolerance" policy on alcohol misuse, the respondent dismissed him. The commissioner noted that the applicant had retracted his initial claim that he was unaware of the

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<sup>131</sup> [1999] 11 BALR 1327 (IMSSA).

<sup>132</sup> [2008] 8 BALR 718 (MEIBC).

rule regarding reporting for duty while under the influence of alcohol. That the employee who reported the applicant may have had a vendetta against him, as the applicant claimed, was immaterial, - even if he did, the fact remained that the applicant had an excess of alcohol in bloodstream which constituted a danger to himself and his colleagues. There was no basis for the respondent to deviate from its zero tolerance policy. The applicant's dismissal was confirmed.

In similar vein the applicant employee in *SATAWU/Spoornet*<sup>133</sup> a train driver was dismissed for failing to stop his train at a signal and for driving with a level of alcohol in his bloodstream exceeding the prescribed limit. He admitted that he had consumed alcohol the previous day, but claimed that the train's brakes were defective, and that he had insufficient warning of the signal. The arbitrator held that the employee was guilty of gross negligence by driving after consuming alcohol, and that he had endangered lives by so doing. The applicant's claim that the brakes were deficient was rejected. His dismissal was upheld.

## 2.6 Denial of alcohol dependency

An employee should be informed that intoxication at work is often an indication of an alcohol problem. Bearing in mind that problem drinkers are likely to deny that they are problem drinkers, or that they cannot control their excessive consumption they are likely to decline an opportunity for assessment.<sup>134</sup> It has been suggested that an employer is entitled to institute disciplinary action against an employee who has been found to be intoxicated at work where the latter has denied that he or she has dependency problem or failed to prove that he or she is an alcoholic.<sup>135</sup>

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<sup>133</sup> [2003] 1 BALR 3 (AMSSA).

<sup>134</sup> See eg *Jansen and Pressure Concepts* (2005) 26 ILJ 2064 (BCA).

<sup>135</sup> *Klienkopje Colliery/NUM obo Mabane* [2001] 12 BALR 1289 (AMSSA).

The applicant in *SACCAWU obo Johnson/Clover SA (Pty) Ltd*<sup>136</sup> was booked off for a week due excessive consumption of alcohol, and failed to inform the company of his whereabouts for two days. He was dismissed for failing to inform the company of his absence and for being absent from work due to a "self inflicted illness". The applicant contended that his dismissal was unfair because a doctor had booked him off for the entire period of his absence, and because he had in fact informed the company of his absence and his illness.

The commissioner noted that the applicant was already on final warning for failing to inform the company of an absence, and rejected the applicant's claim that the warning should not have been held against him because his earlier absence was of a different reason. The essence of the offence of failing to inform the company of an absence lay in leaving the company in the dark about an employee's whereabouts. Since the employee had consistently denied that he had an alcohol problem, the company had correctly treated the employee's absence as a case of misconduct. The commissioner held that interference with a penalty imposed by an employer is permitted only where the sanction is unreasonable and unfair, and there is an alarming disparity between the penalty and misconduct. The commissioner thought a proper sanction had been imposed. Since there were no strong mitigating features in the applicant's case, interference was not justified. The applicant's dismissal was upheld.

After being under the influence of alcohol during working hours, the applicant employee in *NUMSA obo Mosibihle/Nampak*<sup>137</sup> was dismissed because he was already on a final warning for this offence. In the arbitration, the employee claimed that he had been sober enough to work, and that the respondent should have assisted him with his "dependency problem". The arbitrator held that the employee could not wait until arbitration proceedings

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<sup>136</sup> [2000] 4 BALR 397 (CCMA).

<sup>137</sup> [2006] 6 BALR 577 (MEIBC).

to plead a "dependency problem" about which he had never informed the employer. The dismissal was upheld. Again in *NUMSA obo Masebe/Scaw metals Group*,<sup>138</sup> the dismissed employee claimed that he was unfairly dismissed because the respondent failed to refer him for counselling after he reported for duty with an excess of alcohol in his bloodstream. The commissioner noted that the employee had first claimed that he had a dependency problem only after he had been found guilty at his disciplinary inquiry. Neither the disciplinary code nor the law obliged the respondent to refer the employee for treatment at that stage. The dismissal was upheld.

Further in *Sebusi/Great Noligwa Mine*<sup>139</sup> the applicant employee was held to have been fairly dismissed for being under the influence of alcohol during working hours. The commissioner held that, although the applicant had an alcohol problem, arriving at work in an intoxicated state was grossly irresponsible and a danger to himself and his colleagues.

After his work had deteriorated for several months, the grievant in *SATAWU obo Lucas/Orex Spoornet Saldanaha*<sup>140</sup> asked to be sent to a rehabilitation centre for alcohol abuse. Arrangements were made for the grievant's admission and his supervisor had called at his home to drive him to the centre. However, when the supervisor arrived at the grievant's home he was not to be found. The following day, the grievant telephoned to say that he intended to travel to the centre by taxi. He was told to report for work. When the grievant failed to do so, he was dismissed. The grievant admitted that he had not met the supervisor at the appointed time because he had been drunk. He claimed, however, that he had gone to the centre, and was under the impression that he had been granted leave for this purpose.

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<sup>138</sup> [2008] 7 BALR 632 (MEIBC).

<sup>139</sup> [2001] 4 BALR 407 (CCMA).

<sup>140</sup> [2000] 7 BALR 850 (AMSSA).



The arbitrator noted that the company had commenced with incapacity procedures in respect of the grievant about year before his dismissal, but that these had been abandoned in the light of the disciplinary charges against him. Although the grievant had a poor disciplinary record the facts that led to his dismissal were peculiar. The company had been aware that the grievant had a drinking problem but had failed to follow its incapacity procedures. Had it done so, the grievant might not have committed further disciplinary offences. As the employee had worked loyally for more than 20 years, it was appropriate that he should be given one further opportunity to reform. The sanction of dismissal was accordingly made subject to the condition that the grievant could submit a report from a certified social worker that he had rehabilitated himself and had a reasonable chance of remaining sober. If he did so within six months of the date of the award, he was to be reinstated without back pay.

## **2.7 Incidents of improper conduct arising out consumption of alcohol during working hours**

There have been numerous decisions dealing with workplace misconduct traceable to the consumption of alcohol during workings. After a drunken meeting of branch managers at a country resort, the applicant in *Rautenbach/Relyant Retail (Pty) Ltd*,<sup>141</sup> a regional manager, intimated to male colleagues in the bar that he had had sexual intercourse with one of the female branch managers, who at the time was recovering in one of the hotel rooms from a drinking bout, and the rumours spread. The applicant was charged with sexually harassing the complainant, and dismissed. The complainant could not recall the events in the room. The applicant denied that he had molested the complainant, or that he had made remarks suggesting that he had had sexual intercourse with her. The commissioner found that, although the evidence did not prove that anything untoward had

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<sup>141</sup> [2005] 8 BALR 890 (CCMA). See too *Costa/Nu Metro Theatres* [2005] 10 BALR 1018 BCEISA).

occurred in the room, the applicant had uttered inappropriate remarks at the bar. As the comments were not made in the presence of the complainant, the applicant's words did not constitute sexual harassment. However, his words still constitute a serious misconduct. While the applicant may have been under the influence of liquor at the time, and may also have subsequently apologised to the complainant, his conduct was sufficiently serious to warrant dismissal.

The applicant in *Simpson/Forklift Retail and Technical Services (Pty) Ltd*<sup>142</sup> jokingly touched a female colleague's breasts at a social party. The colleague took offence and told the (Managing Director's) wife. The MD insisted that the applicant resign or face dismissal. The applicant resigned, and claimed that he been constructively dismissed. The commissioner noted that the MD had been extremely angry at the time, and found that the applicant had justifiably formed the impression that he had no option but to resign because the working relationship had come to an end. While the applicant's conduct may have constituted sexual harassment, this did not necessarily mean that dismissal was warranted. The applicant had clearly been denied the opportunity of giving his version before being forced to resign. The applicant was awarded compensation equivalent to six months' remuneration.

### 2.7.1 Off-duty intoxication

An employer may be justified in disciplining for conduct which takes place outside working hours if a nexus is demonstrated between the employee's conduct and the employer's business. It was also held in *Visser/Woolworths*<sup>143</sup>

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<sup>142</sup> [2005] 10 BALR 1098 (CCMA). The applicant in *Lategan/Postnet Waverley* [2006] 9 BALR 923 (CCMA) was dismissed after a female subordinate claimed that he had repeatedly touched her and "invaded her space". The commissioner rejected the applicant's plea that it was all a joke, and upheld his dismissal for sexual harassment.

<sup>143</sup> [2005] 11 BALR 1216 (CCMA). The employee was dismissed after she was accused of theft at a competitor's store. It was held that an arrest could never constitute an offence. An employer is entitled to institute disciplinary action against an employee even though the

that an employer is entitled to take disciplinary action against an employee for misconduct committed outside the workplace if the conduct damages the employment relationship.<sup>144</sup> It was held in *NEHAWU obo Barnes v Department of Foreign Affairs*<sup>145</sup> that a diplomat's actions undoubtedly had repercussions for his employer and his workplace based on the fact that the employee's actions negatively impinged upon the respondent's diplomatic mission in a host country.

The aspect of off-duty conduct has been raised as a defence to employer disciplinary jurisdiction by employees of alcohol related misconduct. The applicant in *Erasmus/Norkee*,<sup>146</sup> a fire spotter, was dismissed after he found to be under the influence of alcohol while en route to his workplace. He was late for work at the time. The commissioner rejected the applicant's argument that he was not then under the disciplinary authority of his employer. The commissioner held that, while employers cannot ordinarily discipline employees for misconduct committed outside the workplace, the conduct of employee is of legitimate concern to employers when that conduct affects the employee's capacity to work. Given the nature of the applicant's duties, it was vital for him to be alert at all times while he was on duty. Dismissal was accordingly appropriate in the circumstances.

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latter was acquitted of a related charge in court, but then for the reason of bringing the employer's name into disrepute.

<sup>144</sup>*NUM & another v East Rand Gold & Uranium Co Ltd* (1986) 7 ILJ 739 (IC) - assault on company bus after working hours; *Van Zyl v Duoha Opencast Services (Edms) Bpk* (1988) 9 ILJ 905 (IC)-assault by one employee on another after hours; *Scaw Metals v Vermeulen* (1993) 14 ILJ 672 (LAC) - threat uttered outside the workplace; *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another* (1993) 14 ILJ 1449 (LAC); *Saaiman & another v De Beers Consolidated Mines (Finsch Mine)* (1995) 16 ILJ 1551 (IC) - miners convicted under Explosives Act for privately manufacturing explosives; *Foschini Group (Pty) Ltd v CCMA & others* (2001) 22 ILJ 1642 (LC) - employee dismissed for stabbing an employee from a nearby store.

<sup>145</sup> (2001) 22 ILJ 1292 (BCA). An employee, a diplomat, was disciplined after he was involved in an incident on an aircraft carrying him back to his post. It was contended that the Foreign Office did not have the right to discipline him for an incident that transpired outside the workplace.

<sup>146</sup> [2003] 10 BALR 1132 (CCMA).

Similarly in *YF/Multichoice Subscriber Management Services (Pty) Ltd t/a MWEB*<sup>147</sup> the applicant's dismissal was upheld where he had made improper sexual advances on a trainee. The arbitrator found that, although there was only one incident which occurred outside the workplace, the applicant had abused his position as manager and had sought to exploit past work-related favours that he had extended to the complainant. *SACCAWU obo Mfengwane v Bonus*<sup>148</sup> further underscores the principle that an employer can take disciplinary action against an employee in appropriate circumstances where the employee commits misconduct while notionally on leave. The employee had been given time off to attend to a sick child, but had got no further than the taxi rank, where he was found some hours later in an inebriated state. Since the employee had denied that he had a drinking problem and was on a final warning for drinking on duty, the employer had correctly treated the incident as misconduct.

In contrast, *April/Drake International*<sup>149</sup> it was held that the commissioner held that she was not bound by her colleague's award, and found that mere loss of production was insufficient to create a nexus between misconduct committed outside working hours and the interests of the employer.

Cases decided on this issue indicate that actions performed outside the workplace are *prima facie* considered not work-related, and accordingly beyond the reach of the employer's disciplinary. The onus rests on the

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<sup>147</sup> [2008] 11 BALR 1106 (P). In *Tellier v Bank of Montreal* (1987) 17 C.C.E.L 1 (Ont. Dist. Ct), one of the key events constituting sexual harassment occurred at a cocktail party held by a company doing business with the bank. See also *Simpson v Consumers' Association of Canada* 209 D.L.R (4<sup>th</sup>) (Ont. C.A). The ratio for the extension of rules outside the workplace is clear: misconduct by an off-duty employee can impact negatively on the interpersonal relations at the workplace, wherever it might have occurred. .

<sup>148</sup> [1998] 65 BALR 595 (CCMA).

<sup>149</sup> [2007] 12 BALR 1099 (MEIBC). The applicant in was dismissed along with a colleague after they engaged in a drunken brawl at the applicant's home, which resulted in both employees being booked off sick for short periods. The dismissal of the applicant's colleague was, however, upheld by another council arbitrator. See too *SA Clothing & Textile Workers Union v H C Lee Co (Pty) Ltd* (1997) 18 ILJ 1120 (CCMA) - drunken fighting at a company Christmas party was held to be work-related misconduct because the company had paid the bill and had been obliged to ensure the safety of its staff.

employer to establish that it has sufficient and legitimate interest in an employee's conduct outside the workplace or after working hours to justify disciplinary action against that employee. This onus will be discharged only if the court is satisfied that there is some nexus between the employee's conduct and the employer's legitimate interest. Grogan<sup>150</sup> correctly points out that such connection is enough in itself the employer is still required to prove that the employee committed the offence and that dismissal was appropriate sanction. Indeed, where misconduct is committed outside the workplace and after working hours, the employer carries a formidable onus.

## 2.8 Sanction for being under the influence of alcohol

Repeated alcohol abuse which interferes with an employee's performance at work suggests unwillingness by the employee to be bound by the requirements of her employment contract and dismissal would, in such circumstances, be a fair sanction.<sup>151</sup> In assessing fairness of disciplinary sanction, mitigating factors to be considered could include the employee's clean record, employer's relative tolerance of similar offence in the past, the employee's temporary stress at the time due to personal circumstances,<sup>152</sup> or the circumstances in which alcohol was consumed.<sup>153</sup> The degree of intoxication is also a weighty factor.<sup>154</sup>

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<sup>150</sup> Grogan J, *Dismissal*, (2002) at 173.

<sup>151</sup> For example, dismissal was found to be an appropriate sanction in *Spoornet/SARHWU obo Dipico* [1998] 6 BALR 812 (IMSSA), in which the employee had imbibed alcohol while on duty and had been persistently absent from work.

<sup>152</sup> *Mayer and Mind Pearl AG* (2005) 26 ILJ 382 (CCMA). *AECI Explosives Ltd (Zommerveld) Mambula* (1995) 16 ILJ 1505 (LAC) (1993); *Durban Integrated Municipal Employees Society & others v Durban City Council* (1988) 9 ILJ 1085 (IC).

<sup>153</sup> *SACCAWU obo Peter v Hessel Cash & Carry* [2001] 1 BALR 48 (CCMA); *FAWU obo Peren & others v Meadow Meats* (1999) 4 BALR 403 (CCMA); *Naidoo v Rampookar* (1999) 20 ILJ 797 (CCMA).

<sup>154</sup> *Moleveld and de la Rey 1001 Building Materials (Pty) Ltd* (2006) 27 ILJ 1237 (CCMA); *Bahl v St Lucia Sands* [1998] 3 BALR 249 (CCMA); *FAWU obo Peren & others v Meadow Meats* (1999) 4 BALR 403 (CCMA); *Naidoo v Rampookar* (1999) 20 ILJ 797 (CCMA)

For example in *NUMSA obo Kleinbooï/Umgeni Iron Works (Pty) Ltd*<sup>155</sup> a dismissal was sustained where an employee was found to be under the influence of liquor while at work. He claimed that a colleague had smuggled beer into the workplace to drink during a meal break braai, but he had not done so because he does not drink beer of that brand. The commissioner accepted the managing director's evidence that during unannounced nocturnal visit to the factory, he was doodling with his cell phone, and became aggressive when confronted. Although the company's disciplinary code provided for a final warning for being drunk on duty, the applicant's misconduct was aggravated by his attempts to shield the colleague who brought beer on the premises. The applicant's dismissal was upheld.

A similar conclusion was reached in *SATAWU/Spoornet*,<sup>156</sup> where a train driver was dismissed for failing to stop his train at a signal and for driving with a level of alcohol in his bloodstream exceeding the prescribed limit. He admitted that he had consumed alcohol the previous day, but claimed that the train's brakes were defective, and that he had insufficient warning of the signal. The arbitrator held that the employee was guilty of gross negligence by driving after consuming alcohol, and that he had endangered lives by so doing. The applicant's claim that the brakes were deficient was rejected.

A plea that the employee has sought assistance for his personal problems was accepted in *Rautenbach/Protea Coin Group (Pty) Ltd*.<sup>157</sup> In this case the applicant was dismissed when he returned to work after being hospitalised for a drug overdose. The respondent claimed that he had absconded. The commissioner

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<sup>155</sup> [2007] 7 BALR 598 (MEIBC).

<sup>156</sup> [2003] 1 BALR 3 (AMSSA).

<sup>157</sup> [2009] 6 BALR 644 (CCMA). In *UASA obo Fortuin/Golden Arrows Bus Service (Pty) Ltd*,<sup>157</sup> [2004] 5 BALR 517 (MEIBC) the dismissal of the applicant employee was overturned. In *casu*, a diesel mechanic, was dismissed when the traffic authorities turned down his application to renew his driver's licence because of an earlier conviction for driving while under the influence of alcohol. The arbitrator accepted that possession of a valid driver's licence was necessary for the proper discharge of the applicant's duties. However, the respondent had failed to assist the applicant prepare an appeal against the cancellation of his licence. The respondent was ordered to reinstate the applicant if his appeal succeeded.

held that an employee is entitled to a hearing when he returns to work after a period of unauthorised absence. In *casu*, the respondent had in fact been aware that the applicant was in hospital. The commissioner also rejected the respondent's claim that the dismissal was justified because of the fact that the applicant had been in hospital for a drug overdose. The applicant had attempted suicide by taking an overdose of prescribed sleeping pills. There was no evidence that he was a habitual drug user. The applicant was awarded compensation.

### 2.8.1 Consistency and progressive discipline<sup>158</sup>

The interaction of the two basic principles underlying our law of unfair dismissal, namely, the parity principle and progressive discipline have been subject to close examination in the determination of substantive fairness of dismissal of employees for alcohol-related misconduct. Put simply, the dismissal of employees for being under the influence of alcohol while on duty were found to unfair because the employer had treated other cases of similar misconduct more leniently.<sup>159</sup> The following arbitration awards illustrate application of these competing principles.

The decision of the CCMA in *NUM obo Mathethe/Robbies Electrical*<sup>160</sup> throw a light on the circumstances in which discipline had been inconsistently applied and that the 'parity principle' had been infringed. The applicant employee was dismissed after one of the respondent's clients reported that he had driven a company vehicle whilst under the influence of alcohol. The commissioner found that the respondent had given two other employees final warnings in almost identical circumstances. In absence of any plausible

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<sup>158</sup> For an overview: Le Roux, PAK 'Individual Employment Law' in Cheadle *et al* (eds) *Current Labour Law* (2000) 1 at 9-11.

<sup>159</sup> *PPWAWU obo Mangeaka/Cape Truss Manufacturing* [1999] 10 BALR 1195 (CCMA).

<sup>160</sup> [2009] 2 BALR 182 (CCMA).

explanation from the respondent this inconsistency rendered the dismissal unfair. The employee was retrospectively reinstated.

The applicant in *Ntshinka/Telkom SA (Pty) Ltd*<sup>161</sup> was dismissed for driving a company vehicle while under the influence of alcohol. He claimed that his dismissal was unfair because other employees guilty of the same offence had not been dismissed. The commissioner held that the "parity principle" is not a fixed rule. The applicant had committed serious conduct, which justified dismissal. There was no evidence to support the conclusion that the company had acted in bad faith by treating the applicant more severely than employees who had been disciplined for similar offences. The application was dismissed.

The arbitration award in *NUMSA obo Ndlovu/Highveld Steel*<sup>162</sup> also evidences a more realistic approach to consistency. In this case the applicant employee was dismissed for reporting for duty under the influence of alcohol. He claimed that his dismissal was unfair because, in the past, other employees has not been dismissed for the same offence even though they had the same number of warnings as he had had, or more. The commissioner noted that after those cases on which the employee relied, the employer had introduced a new policy on alcohol abuse, which had been applied in the applicant's case. The employer could not be bound forever by the manner in which employees were treated before the policy was introduced. The applicant had received four warning for alcohol related offences, and was on final warning at the time of the offence for which he was dismissed. No evidence had been led to prove that the applicant suffered from alcohol dependency. His dismissal was upheld.

The contention that the employer had applied punishment selective by dismissing an employee for consuming alcohol on a flight on which she was

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<sup>161</sup> [2002] 7 BALR 749 (CCMA).

<sup>162</sup> [2008] 10 BALR 935 (MEIBC).



serving as a cabin attendant, thereby bringing the company's inconsistency, as another employee had been given a final warning for consuming alcohol on a flight was rejected in *SALSTAFF obo Magubane/South African Airways (Pty) Ltd*<sup>163</sup> was dismissed. In upholding the employee's dismissal, the commissioner held that there was a difference between the two cases, in that the other employee had not been found to guilty of damaging the company's name.

### 2.8.2 Double jeopardy<sup>164</sup>

On the other hand, the question whether an employer is entitled to hold a second enquiry into alcohol-related misconduct in circumstances where first enquiry had acquitted or imposed a lesser sanction on the culprit, thereby placing an employee in double jeopardy arose in *UASA obo Davidtz & others/Kloof Mining Company Ltd*.<sup>165</sup> In the present case the applicants were issued with final written warnings by their manager after they were found in possession of beer at the workplace. They were later summoned before a disciplinary hearing on the same charge, and dismissed. After extensively reviewing authorities on the application of the "double jeopardy" principle in labour law, the commissioner held that there was no inflexible rule that employers may not institute second disciplinary hearing after employees had been punished for particular offences. Each case must be considered on its merits. In the present case, the manager had instituted action in terms of the company's disciplinary code, and had first obtained approval from the HR division. No new facts emerged after the first inquiry to justify a second hearing. Furthermore, the evidence indicated that the respondent had been

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<sup>163</sup> [2002] 3 BALR 324 (CCMA).

<sup>164</sup> See generally *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC); *SALSTAFF obo Brink and Portnet* (2002) 23 ILJ 628 (LAC); *MWU-Solidarity obo Erasmus v Bevcan (A Division of Nampak Ltd)* (2001) 22 ILJ 2543 (ARB). See also PAK Le Roux, 'Overturning disciplinary decisions: Can more severe penalties be imposed by senior management?' (1997) 7 (4) CLL 31

<sup>165</sup> [2005] 7 BALR 787 (CCMA).

lenient in the past with drinking working hours. The applicants were reinstated.

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### 3. Alcoholism and Incapacity

#### 3.1 General remarks

By far the most difficult problem of fair employment practice in dealing with alcohol related offence arises when persistent intoxication at work is a simply a manifestation of alcohol addiction. Faced with an alcohol dependency problem, employers will be expected to be cautious in visiting such a delinquent employees with disciplinary sanction or until all reasonable alternatives in form of counselling and rehabilitation to the individual to have addiction resolved have explored to no avail. It has been pointed out that:<sup>166</sup>

'Counselling and rehabilitation are clearly options when the employee's addiction flows from a condition for which the employee cannot be blame. However, there is merit to treating individual cases of alcohol abuse with sympathy. When an employee is found to be under the influence of alcohol, a separate inquiry may be held by appropriately qualified personnel to establish whether the employee is addicted to alcohol. If this found to be the case, the employee should be offered assistance, which need not be provided at the employer's expense. If the employee declines assessment or refuses to undergo counselling or treatment, it become evident that efforts to correct the employee's behaviour have failed, dismissal on the basis of incapacity will be justified.'

#### 3.2 Alcoholism as a species of incapacity

In cases where an employee suffers from addiction to alcohol a disciplinary approach may be inappropriate. This was illustrated in *Automobile Association of SA v Govender NO & others*<sup>167</sup> in which the respondent employee, a patrolman was dismissed after being found guilty of reckless and negligent driving; endangering the public, bringing the AA into disrepute and acting aggressively and pointing a firearm at a member of the public while representing the AA. It was common knowledge that, at the time of the offences, the employee was physically ill and suffering from severe depression for which he was receiving medication. The CCMA found that the

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<sup>166</sup> Grogan, *J Dismissal* (2002) at 119.

<sup>167</sup> (1999) 20 ILJ 2854 (LC).

employee had been under the influence of medication which affected him both physically and mentally when he perpetrated the acts of misconduct, and that dismissal was in the circumstances not the appropriate sanction. The commissioner substituted dismissal with a final warning that, if the employee's negligent taking of medication resulted in acts prejudicial to the AA within the next six months, he could be dismissed.

On review Landman J was of the view that the commissioner's finding that the employee lacked the necessary mental intention to commit misconduct was justifiable even in the absence of relevant medical evidence. It appeared that he had acted out of character and under stress aggravated by what appeared to be an overdose of medication.<sup>168</sup>

Similarly, in *Naik v Telkom*<sup>169</sup> an employee with 17 years' service had experienced no alcohol problems before he was moved to another post. After the move his drinking gradually became a problem. The new post he occupied entailed liaising with other employees and handling documents; the nature of the job required that the employee be sober at all times. The employee admitted himself to rehabilitation and for couple of months later it appeared that he had turned a new leaf. But he suffered relapses and on one time he was found to be under the influence of alcohol at work and he intimidated his superior with physical violence.

The employee was ordered to attend counselling provided under the employer's wellness programme but after one session, told the counsellor that he had his own doctor. The counsellor following communication with the medical practitioner at the rehabilitation centre and visiting the centre itself, was satisfied with the programme. In spite of this, the employee failed to attend a crucial meeting - instead of attending, he was found sleeping in his

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<sup>168</sup> *Automobile Association of SA v Govender NO & others* at para 17.

<sup>169</sup> (2000) 12 ILJ 1266 (CCMA).

vehicle, so inebriated that he was hardly able to stand. The meeting had to be cancelled and the employee's superiors expressed the view that he had gone as far as he could with the employee. The CCMA commissioner, in line with the provision of the Code of Good Practice: Dismissal, affirmed that alcohol abuse is a species of incapacity and that alcoholism is an illness that should be dealt with in terms of incapacity principles and not misconduct. Relevant considerations in this regard include the nature of the job, the extent to which the illness incapacitates the employee, the length of the employee's absence from work and the possibility of securing a temporary replacement - all considerations relating to incapacity in the form of ill-health.

The applicant in *NUM obo Motha/Scharrighuizen Opencast Mining*,<sup>170</sup> an operator and safety representative was dismissed after several medical tests indicated that he had quantities of cannabis in his bloodstream during working hours. The respondent claimed he had no option but terminate the applicant's services because mining regulations required a "zero tolerance" policy towards employees who reported for duty under the influence of alcohol or drugs. The commissioner held that the fact that applicant had tested positive on a number of occasions over a period of 20 days indicated that he suffered from a drug problem. Addiction to alcohol or drugs is a medical condition that requires sympathetic treatment, despite stringent regulations binding on the respondent. No evidence had been led to indicate that the respondent had attempted to assist the applicant. His dismissal was accordingly unfair. The applicant was retrospectively reinstated, subject to conditions.

One aspect of alcoholism which has caused difficulty is the reality that there is no guarantee that employee will co-operate if the employer attempts to assist the employee in overcoming his addiction. The question that arises at this

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<sup>170</sup> [2003] 2 BALR 174 (CCMA).

point is whether the employee's failure or refusal to co-operate in addressing his or her alcohol addiction constitutes a separate ground for misconduct.

### 3.3 Refusal to undergo counselling and/or defaulting on treatment

Where an employee is uncooperative in counselling and/or defaults on treatment plan deal with his or her alcohol dependency problem, and is apparent to management that its efforts to correct the employee's behaviour have, failed, then delinquent employee may be fairly dismissed following an enquiry. In *PPWAWU v Nampak Corrugated Containers*<sup>171</sup> the employee had been dismissed for repeated absence from work. The employer proved that he had been counselled on several occasions for abusing alcohol and had defaulted from treatment. The arbitrator accepted that the employee had been consulting a traditional healer during the period of absence for which he had been dismissed, and that he had given up drinking. He was reinstated subject to a final warning against any offence relating to unauthorised absence, alcohol abuse or failing to co-operate with medical treatment for his condition.

After his work had deteriorated for several months, the grievant in *SATAWU obo Lucas/Orex Spoornet Saldanha*<sup>172</sup> asked to be sent to a rehabilitation centre fro alcohol abuse. Arrangements were made for the grievant's admission and his supervisor had called at his home to drive him to the centre. However, when the supervisor arrived at the grievant's home he was not to be found. The following day, the grievant telephoned to say that he intended to travel to the centre by taxi. He was told to report for work. When the grievant failed to do so, he was dismissed. The grievant admitted that he had not met the supervisor at the appointed time because he had been drunk. He claimed, however, that he had gone to the centre, and was under the impression that

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<sup>171</sup> [1998] 1 BALR 34 (CCMA).

<sup>172</sup> [2000] 7 BALR 850 (AMSSA).

he had been granted leave for this purpose. The arbitrator noted that the company had commenced with incapacity procedures in respect of the grievant about year before his dismissal, but that these had been abandoned in the light of the disciplinary charges against him. Although the grievant had a poor disciplinary record the facts that led to his dismissal were peculiar. The company had been aware that the grievant had a drinking problem but had failed to follow its incapacity procedures. Had it done so, the grievant might not have committed further disciplinary offences. As the employee had worked loyally for more than 20 years, it was appropriate that he should be given one further opportunity to reform. The sanction of dismissal was accordingly made subject to the condition that the grievant could submit a report from a certified social worker that he had rehabilitated himself and had a reasonable chance of remaining sober. If he did so within six months of the date of the award, he was to be reinstated without back pay.

*Portnet (Cape Town) v SATAWU obo Lesch*,<sup>173</sup> further confirms the view that the employee's refusal to co-operate in addressing his alcohol addiction changes the nature of the dismissal from incapacity to misconduct. In this case the employer had argued that it had done enough for the employee. In sharp contrast the union contended the sanction of dismissal was not appropriate in the circumstances, because the employer had assisted the employee "to become more alcohol friendly". The arbitrator's view in respect of the misconduct/incapacity distinction was as follows:<sup>174</sup>

'The employee was well aware of the rule prohibiting working under the influence of alcohol and the intrinsic consequences for his fellow workers. In my view, when a person has received numerous warnings regarding such conduct, and still flouts the rules knowingly in the way the employee had done, leads me to believe that the company was justified in dismissing the employee for the misconduct. Here considerations of incapacity are clearly distinguishable and irrelevant because of the facts and evidence before me. In my view, incapacity procedures (although a prima facie valid consideration in relation to the facts) would not have any utility due to the employee's disposition. Therefore, on the basis of the evidence before me, I regard the

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<sup>173</sup> (2002) 23 ILJ 1675 (ARB).

<sup>174</sup> *Portnet (Cape Town) v SATAWU obo Lesch* at 1687.

company as having done all it reasonably could to assist the employee and that dismissal was justified in terms of the employee's misconduct.'

Another example is *Spoornet (Ermelo) v SARHWU obo Nkosi*<sup>175</sup> in which an employee refused assistance and denied that he has alcohol addiction problem. The employer had made a serious effort to assist the employee but he was totally uncooperative. The employee could not be compelled to accept treatment and, the arbitrator concluded, reinstating him would simply lead to a repetition of problems experienced in the workplace. The employee's dismissal was upheld.

A final point to be noted here is that an employer must seek to deal with alcohol addiction or dependency along the lines of incapacity is now a settled principle. Such a course of action would in certain circumstances foreclose recourse to disciplinary action. A case in point is *Black Mountain v CCMA & others*<sup>176</sup> where an employee was dismissed for misconduct after causing an accident while driving a heavy vehicle under the influence of alcohol. This clearly constituted a breach of the employer's disciplinary code and warranted dismissal, nevertheless, the employer's policy relating to alcohol and drug dependency superseded the disciplinary code and, because the employer had failed to follow its own policy, the dismissal was held to be unfair.

The Labour Court took the view that the drug and alcohol policy imposed a significant limitation on the employer's prerogative to discipline an employee for drunkenness:<sup>177</sup>

'The standard procedure set its sights on humane alternatives aimed at the treatment of what is after all a social problem, before the imposition of a drastic final sanction. As for the occasional drinker, he or she would be disciplined for misconduct, because there would be no underlying illness in the form of dependency, which would justify a

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<sup>175</sup> [1998] 1 BALR 108 (IMSSA).

<sup>176</sup> [2005] 1 BLLR 1 (LC).

<sup>177</sup> *Black Mountain v CCMA & others* at 6-7.



different approach. In short, the occasional drinker is guilty of wilful misconduct, whereas the person dependent on alcohol is ill and possibly operationally incapacitated. It is precisely the purpose of the assessment contemplated in clause 7.2 [of the policy] to determine whether the conduct should be viewed as misconduct or incapacity. Such an approach reflects, and is entirely in keeping with, item 10 of the Code of Good Conduct in Schedule 8 of the Labour Relations Act 66 of 1995 which endorses the view that disciplinary action is not always the appropriate way of treating alcohol abuse and that counselling and rehabilitation may be the preferred option. Admittedly the Code is not prescriptive in this regard. But, as in this case, when the employer chooses to determine, formulate and communicate a policy opting for a progressive rehabilitation approach, at the very least it can be expected to observe and act in accordance with it. Failing which, it will be open to the charge of substantive unfairness for failing to apply its own policy governing alternatives to dismissal.

After admitting to her employer that she had a drug dependency problem, the applicant in *NUFAWU obo Rouch/Cori Craft (Pty) Ltd*<sup>178</sup> issued a final warning and told to take six months unpaid leave to "clean herself up". She booked into a drug rehabilitation centre for that period, but was advised by her counsellors that she needed a further three months' treatment. The applicant was dismissed after she had been absent for six months because she had not furnished proof that she was still under rehabilitation. The arbitrator found that the applicant had been under the genuine impression that the respondent had tacitly agreed to her extending her rehabilitation treatment, and that the respondent had acted unfairly by summarily terminating her employment without inquiring into the applicant's circumstances. The applicant was awarded compensation.

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<sup>178</sup> [2006] 12 BALR 1186 (BCFMI).

#### 4. CONCLUSION

Although alcohol problems should be treated with sympathy, understanding and compassion, alcohol abuse is appropriately the subject of discipline unless it is a manifestation of an underlying addiction or dependence. Discipline should be progressive in nature, intended to remedy, rather than merely to punish, wrongful behaviour. Redemption is preferable to damnation. Disciplinary sanctions should as far as possible, be designed to discourage repeated alcohol abuse. Different standards of conduct may be expected of different employees given the nature of their work and the degree of their responsibility. Where intoxication can have more serious consequences, an intoxicated employee can be treated more severely than would otherwise be the case. Fair discipline requires a fair procedure, fair disciplinary rules and a fair, graduated system of punishment. Sanctions, which are likely to support a delinquent employee to moderate his or her drinking, should be applied, whenever feasible, within the bounds of what is reasonable.

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