



PODCAST

A GUIDE FOR EMPLOYERS AND EMPLOYEES ON THE

DECriminalisation of DAGGA FOR PERSONAL USE

AND THE LEGAL IMPLICATIONS FROM A LABOUR LAW PERSPECTIVE

NOVEMBER 2019

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A GUIDE FOR EMPLOYERS

Q: How should employers be adjusting their employment contracts and code of conduct documents?

In order to make provision for the new legislation of cannabis (in that an adult may use, possess and cultivate cannabis in a private space for private use), employers would be prudent to include a no-tolerance Substance Abuse Policy which must be signed and consented to by the employee which permits the employer to conduct drug testing (which method of testing must be specified in the Substance Abuse Policy). The Substance Abuse Policy should be carefully formulated so as to ensure that the test procedure is fair and professionally conducted so that none of the employees' rights are infringed and that due process is followed in conducting the test as well as the process to be followed should an employee be found guilty.



Occupational health and safety rules demand that companies keep the workplace safe. What is their responsibility assuming there is no machinery being operated (a normal open office)?

In the case of heavy machinery being operated, it is quite clear that employers are within their rights to dismiss an employee who is found to be using cannabis during working hours. Similarly, in the case of a normal office setting, employers are also still within their rights to forbid the use of cannabis in the office environment or to request a blood test from an employee to establish if there are traces of THC in their bloodstream due to the fact that **an office space is a public space**. Employers should specify that their office space, including individual offices, constitutes a public space. However, employers must be mindful of the fact that should an employee test positive for traces of THC in their bloodstream, they cannot automatically conclude that the employee was using cannabis immediately prior to the test being conducted (i.e. during office hours).

Q: What recourse does the employer have to test and to have a case in the CCMA? Who pays for this test?

Whatever test an employer decides to apply, it must comply with Section 7 of the Employment Equity Act.

In terms of Section 7, the test must be permitted or required by law or must be justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

Q: Can an employer dismiss an employee for cannabis use under substance abuse (assuming the consumption was at home and thus legal) if the employee is still meeting KPI's and performance (Yet the blood test is positive for cannabis use)?

An employer would not be justified in dismissing or disciplining an employee for the use of cannabis in their private time if it is not affecting their capacity to perform their work in a diligent and competent manner.



Q: What is the employer’s obligation with regards to employee wellness prior to dismissal once they find that an employee has a substance abuse problem?

Employees must be guided by item 10(3) of the Code of Good Practice: Dismissals which states that *"the degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider"*. **Thus, employers do have some obligation to assist the employee**, who is found to have a substance abuse problem, with rehabilitation **prior to a dismissal**.

A GUIDE FOR EMPLOYEES

1. Are employees obliged to confess to any smoking of cannabis at home if questioned?

Employees are not obliged to disclose details of their private life to their employer (apart from those which are relevant to their work) and any imposed obligation by the employer to do so will constitute an infringement of the employee’s right to privacy. However, employees are encouraged to be honest with their employers to ensure that they are not found guilty of dishonesty which is a dismissible offence in some cases.

2. Is smoking cannabis at home to be treated in the same “substance abuse” category as using hard core drugs such as heroin or cocaine?

According to the Drugs and Drug Trafficking Act, heroin forms part of the category of “Undesirable Dependence-Producing Substances” while cannabis forms part of part II being



“Dependence-Producing Substances”. This means that the Act doesn’t consider harder drugs as being in the same category of cannabis and thus, **employers may not treat them as such.**

The Constitutional Court ruled that there will be a “reading in” approach with respect to cannabis until Parliament can remedy the constitutional issues of cannabis as a Schedule 2 substance. Thus, while cannabis is still a Schedule II substance, the way it will be treated by the courts and police officials will require their discretion as to how to treat cannabis use and possession so as to protect the rights of the user/possessor.

3. Are employees obliged to take a test when demanded or requested by their employer?

A company’s Substance Abuse Policy which requires that employees take non-consensual drug tests would likely be found to be unconstitutional as it would constitute an infringement of the employee’s right to privacy. The employer, however, can have a policy which requires **consensual drug testing** with strict guidelines designed to protect the employee’s right to privacy, dignity and fair administration by having certain procedures in place such as having a witness present, a formal drug-testing sheet and a professional and qualified person to conduct the test.

5. What recourse do employees have if the employer demanded a test, the results are positive, yet their work has not been affected, and they are suspended?

Employers who have dismissed employees for cannabis use will have to prove that the use caused the employee to be incapacitated and thus the dismissal had a lawful basis.

Alternatively, that the employee is guilty of misconduct as they breached the **signed zero-tolerance Substance Abuse Policy of the company.** This would have to be on the back of a **lawfully conducted test** for cannabis use.

However, employers must be cognisant of the fact that they cannot automatically conclude that simply by virtue of the fact that a blood test for cannabis comes up as a positive, that the



employee is incapacitated as traces of THC remain in the blood stream long after the effect has worn off.

Further, the employer would have to comply with the requirements of the Labour Relations Act as well as the Basic Conditions of Employment Act regarding dismissals. Should the employer fail to meet these requirements, the employee may file an action for an unfair dismissal at the CCMA.

Kindly note that the above does not constitute legal advice and employers and/or employees are to contact a legal practitioner to establish their rights and obligations contingent upon the particular facts and/or circumstances of each case (as each case is unique and therefore requires a tailored approach).

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