

Zero Tolerance policies for drug use in the workplace - employee rights and employer discipline



In a world where workplace policies are critical to maintaining order and ensuring safety, the debate around zero-tolerance policies, particularly concerning drug use, has gained significant attention.

One such case, ***Enever v Barloworld Equipment South Africa, a Division of Barloworld South Africa (Pty) Ltd*** (JA86/22) [2024] ZALAC (23 April 2024), brought these issues to the forefront, exploring the intersection of employee rights and workplace discipline in the age of cannabis legalisation.

In this article we will discuss the implications of the Labour Appeal Court's ruling for Employers.

The legal landscape following the *Prince* case

Before diving into the specifics of the Barloworld case, it is essential to understand the context. In 2018, the South African Constitutional Court's ruling in *Minister of Justice and Constitutional Development and Others v Prince* transformed the legal framework regarding cannabis.

The court held that adults could use and cultivate cannabis in the privacy of their homes without facing criminal consequences. This decision, grounded in the constitutional right to privacy, raised new questions about its implications for the workplace where privacy and safety interact.

While the *Prince* case made clear that private cannabis use was permissible, it left a grey area regarding its effect on workplace discipline and whether employers could enforce zero-tolerance policies in light of this newfound right.

Caselaw highlights: *Enever v Barloworld Equipment South Africa, a Division of Barloworld South Africa (Pty) Ltd* (JA86/22) [2024] ZALAC (23 April 2024)

- *Enever v Barloworld* highlights the tension between personal rights and workplace regulations. Ms Enever was employed as a category analyst at Barloworld, where she primarily performed office-based administrative tasks. Barloworld enforced a strict zero-tolerance policy concerning the possession and consumption of drugs and alcohol at work. Employees, including Ms Enever, agreed to this policy by signing an employee handbook, which included provisions for random drug testing.
- Following the *Prince* case, Barloworld reaffirmed its position by circulating a memo explicitly stating that, despite the legal status of cannabis in private spaces, it remained prohibited in the workplace. Ms Enever, who had previously used medication for anxiety and depression, began using cannabis in her private time for medical reasons after the *Prince* ruling, finding it more effective than her prescribed medications.
- In January 2020, Ms Enever underwent a random drug test, which came back positive for cannabis. She was subsequently dismissed following a disciplinary hearing where she pleaded guilty. Ms Enever then referred her dismissal to the Labour Court, claiming unfair discrimination based on the zero-tolerance policy.

Legal arguments and Labour Court's decision

Ms Enever's argument hinged on the claim that her dismissal constituted unfair discrimination. She argued that the company's policy violated her right to privacy by penalising her for legally using cannabis in her own home. Moreover, she contended that the policy arbitrarily treated cannabis and alcohol users differently, as cannabis stays in the system longer than alcohol and could lead to dismissal despite a lack of impairment during working hours.

The Labour Court, however, disagreed, ruling that Ms Enever's breach of the zero-tolerance policy constituted misconduct and warranted dismissal. The court noted that Ms Enever had incorrectly pursued a claim of unfair discrimination rather than addressing the issue of her policy breach directly.

Dissatisfied with this outcome, Ms Enever appealed to the Labour Appeal Court (LAC), where the case took a more nuanced turn.

The Labour Appeal Court's ruling

The LAC examined several critical issues, including the effect of the *Prince* ruling on workplace policies and whether Barloworld's zero-tolerance approach unfairly discriminated against Ms Enever.

The court made several key findings:

- o **Right to Privacy vs Workplace Discipline:** The LAC emphasised that while the right to privacy is fundamental, it is not absolute in the workplace. The court found that using a drug test alone without evidence of impairment, could infringe upon an employee's right to privacy. Simply testing positive for cannabis does not necessarily indicate that the employee is impaired or incapable of performing their duties.
- o **Differentiation between Cannabis and Alcohol:** The court noted that Barloworld's policy failed to differentiate between the effects of alcohol and cannabis. Alcohol can leave the system within hours, while cannabis can remain detectable for days. A positive test for cannabis does not automatically mean the employee was "high" or unable to perform their job at the time of the test. This distinction is crucial when applying zero-tolerance policies.
- o **No Proof of Impairment:** The LAC found that Barloworld had not demonstrated any impairment in Ms Enever's job performance or that her cannabis use posed a safety risk. The court ruled that penalising her solely based on a positive test result without evidence of intoxication or harm, was unjust.

The LAC ultimately found in favour of Ms Enever, ruling that her dismissal was automatically unfair due to the arbitrary nature of the zero-tolerance policy. The court awarded her 24 months' compensation for the unfair dismissal, sending a strong message about the limits of such policies in the context of cannabis use.

Broader implications for Employers and Labour legislation

The *Barloworld* case holds significant implications for employers, particularly in industries where zero-tolerance policies are common. The LAC's ruling underscores the need for companies to carefully draft substance abuse policies that account for the unique properties of cannabis.

Employers cannot rely solely on drug tests to justify dismissal but must consider whether the employee's use of cannabis had actually impaired their ability to perform their job or compromised workplace safety. The employee's ability to perform his or her duties can be documented by means of an observation test.

Furthermore, the court made it clear that employees should not be forced to choose between their right to privacy and their employment, especially when their conduct outside working hours does not affect their professional responsibilities.

The ruling also suggests that employers should consider job-specific requirements when enforcing these policies. For instance, safety-sensitive jobs may justify stricter enforcement of substance use rules compared to office-based roles such as Ms Enever's.

Conclusion

The *Enever v Barloworld* case highlights the evolving nature of workplace discipline in the age of cannabis legalisation. It serves as a reminder that while employers have the right to enforce policies that ensure workplace safety, such policies must be applied fairly and with respect to employees' rights, including their right to privacy. Going forward, employers will need to strike a careful balance between maintaining safety standards and respecting the legal choices employees make in their private lives.

As cannabis use becomes more accepted and understood, the need for nuanced, well-considered workplace policies will only grow. Employers should heed the lessons of the *Barloworld* case and ensure their policies align with both the law and the realities of the modern workplace.

At SERR Synergy, we are dedicated to assisting our clients in navigating the complexities of employment law, particularly when balancing workplace rules with an employee's right to privacy. Our team of professionals is able to assist employers and simplify the drafting of policies, ensuring that our clients are safeguarded against labour disputes.

About the author: Etienne Bruwer joined SERR Synergy in May 2024. He is an admitted attorney of the High Court of South Africa and completed his Bachelor of Commerce in Law (B.Com Law) and subsequent Bachelor of Laws (LLB) degrees at the North West University (NWU) in Potchefstroom.

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