

DRUNKENNESS AND DRUG-INDUCED CONDUCT ON DUTY



INTRODUCTION

Intoxication is the state in which a person's normal capacity to act or reason is inhibited by alcohol or drugs. Generally, an intoxicated person is incapable of acting as an ordinary prudent and cautious person would act under similar conditions.

The regulations issued under the Occupational Health and Safety Act, No. 85 of 1993 (OHSA) provide that an employer may not allow any person to enter or remain at the workplace if they appear to be under the influence of alcohol or drugs, or to be in possession of or partake or offer other persons intoxicating alcohol or drugs. A professional driver or an operator of machinery may not have a concentration of alcohol in the blood of greater than 0.02 grams per 100ml (0.02%).

It is recommended that employers should have clear guidelines on the issue of intoxication or drinking / taking drugs while on duty and that such guidelines (or disciplinary code) be shared with employees. It must be noted that the Constitutional Court has legalised the use of cannabis in one's private space.

TESTING THE EXTENT OF INTOXICATION

Reasonable proof that an employee is drunk or likely to be under the influence of drugs can be established from eyewitness' accounts of the employees' behaviour and the way s/he looks and smells (bloodshot eyes, slurring words, unsteady on feet etc.) as well as from breathalyser or blood tests. While an employer cannot force an employee to take a breathalyser or blood test, should there be reasonable grounds to believe that the employee is in some way intoxicated, a refusal by the employee to be tested for such may lead to a negative inference being drawn against him or her. The employee may consent to the conducting of breathalyser or blood test in his / her contract of employment.

Although a breathalyser test cannot establish precisely how much alcohol an employee has consumed, it is a reliable indicator that there is alcohol present in the employee's system.

MISCONDUCT AND INCAPACITY

The employer should distinguish between misconduct and incapacity. Misconduct relates to blameworthy intoxication at work which is a disciplinary matter. Regular intoxication or absence from work linked to this may be a sign of drug and/or alcohol dependency which may be treated as a form of incapacity (see CCMA information sheet on Incapacity)

Intoxication whilst at work involves two types of misconduct (subject to the understanding that each workplace is different and may have different requirements):

- working whilst under the influence of alcohol or drugs; and/or
- consuming alcohol or drugs during working hours, without authorisation.

Working whilst under the influence of alcohol or drugs.

This offence must take place during working hours, but not necessarily on the premises. If an employee consumes alcohol/ drugs off the premises, but while on call or standby, the offence may have been committed. An employee could also have consumed alcohol or drugs outside working hours but still be under the influence when s/he reports for work.

Eventhough the private use of cannabis has been decriminalised, it does not offer protection against disciplinary action should the employee act in contravention of a company policy or disciplinary code.

Consuming alcohol or drugs during working hours, without authorisation.

The authority to consume alcohol/drugs during working hours can be explicit or implied. Employees who are invited by their superior to a drinks party in the mid-afternoon or if consuming alcohol during working hours is common place and no disciplinary action is taken, then employees can assume that this is allowed.

"Authorised use" may also mean that an employee is taking medication containing alcohol or drugs on the advice of a doctor. However, an employee should discuss this with his or her supervisor / manager and rather consider taking sick leave if the medication has affected his/her ability to do the work.

DETERMINING THE APPROPRIATE COURSE OF DISCIPLINARY ACTION

The facts of the case and the nature of the problem influence the way in which it should be managed. An employer is also required to consider any applicable legislation, workplace code / guidelines / collective agreement that regulates conduct and incapacity matters at the workplace. It is necessary to distinguish between whether the employee is able/unable to perform his/her tasks, the nature and responsibility of the employee's job, as well as the dangers and risk of the employee's working environment.

The degree to which the employer encourages misuse of alcohol/ drugs is an important factor in determining an appropriate sanction for alcohol or drug abuse and rehabilitation must always be considered.

In situations of gross misconduct which makes the continued employment relationship intolerable, it may be appropriate to consider dismissal, provided a fair procedure has been followed. This includes allowing the employee to be represented by a co-employee or shop steward and to have a fair opportunity to respond to the allegations made against him or her. After the hearing, the employer should inform the employee of the decision. If the employee is not satisfied with the outcome of the hearing, the employer should also inform the employee of his/her right refer the matter to the CCMA or a bargaining council if applicable.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended
- The Code of Good Practice: Dismissal
- Occupational Health and Safety Act 85 of 1993.
- The Code of Good Practice on Employment of People with Disabilities