IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No JS 633/20 and JS926/20

In the matter between:

BERNADETTE ENEVER **Applicant**

and

BARLOWORLD EQUIPMENT, a division of
BARLOWORLD SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **23 March 2022**
Delivered: **01 June 2022**

Summary: **Dual claims under the provisions of section 187(1)(f) of the Labour Relations Act, 1996 and section 6(1) of the Employment Equity Act, 1998 – Applicant dismissed as a result of repetitively testing positive for cannabis drug – employee claims unfair discrimination and automatic unfair dismissal on arbitrary grounds.**

Applicant uses cannabis for alleged medicinal and recreational purposes and no legal distinction could be drawn between the two purposes.

Elements of unfair discrimination not proved by the Applicant and accordingly adversely affecting the claim for automatic unfair dismissal.

JUDGMENT

NTSOANE, AJ

Introduction

[1] The Applicant has referred two claims to this Court by way of stated cases: one claiming unfair discrimination[1] in terms of section 6(1) of the Employment Equity Act[2] (EEA) and another one claiming automatically unfair dismissal[3] in terms of section 187(1)(f) of the Labour Relations Act[4] (LRA). The two claims have been consolidated.

[2] The Applicant was dismissed on account of repetitively testing positive for the cannabis drug and accordingly in breach of the Respondent's Alcohol and Substance Abuse Policy. The Applicant's claim is that her dismissal was automatically unfair and also that the Respondent's policy discriminated against her on arbitrary grounds and seeks to be retrospectively reinstated in the event that this Court finds in her favour.

Background of the claims

[3] I hereby summarise the respective parties' evidence as presented during the trial. The Applicant was employed by the Respondent from 11 April 2007 until she was dismissed on 30 April 2020. At the time of her employment with the Respondent, the Applicant occupied a position of Category Analyst which was a typical office or desk position. The Applicant's position did not constitute a safety sensitive job in that she was neither required to operate heavy machinery nor drive any of the Respondent's vehicles.

[4] The Applicant had an unblemished disciplinary record.

[5] The Applicant testified that some time ago she suffered severe constant migraine and anxiety which affected her general well-being as well as tempering with her smooth sleeping. As a result thereof, she was prescribed

[1] Under case number JS926/20.
[2] Act 55 of 1998.
[3] Under case number JS633/20.
[4] Act 66 of 1995, as amended.

medication by her general practitioner for pain and anxiety which proved to have some side effects on her. During or about May 2012, the Applicant was prescribed pharmaceutical drugs which required daily consumption of about 10 pills (including sleeping tablets) to ease pain and assist in falling asleep. Following the Constitutional Court case[5] which decriminalised the use of cannabis, especially in private spaces, and during or about October 2018 the Applicant gradually moved away from consuming pharmaceutical pills to using cannabis oil and smoking rolled cannabis as an alternative to achieve the same results. It took the Applicant a period of about three months to reduce her daily consumption of pills to four until she completely weaned off the pills so she can continue with the use of cannabis. The transition period took her between six to twelve months.

[6] The Applicant also used cannabis recreationally by smoking rolled cannabis every evening to assist with insomnia and anxiety. This also improved her bodily health, outlook and her spirituality had improved as a result thereof. She testified that smoking cannabis makes her feel closer to God which also assists in her quest to addressing internal struggles. It should be stated that these averments by the Applicant[6], remained unchallenged during the trial of the case.

[7] The Respondent has an Alcohol and Substance Policy which the Applicant was, at all material times, aware of its provisions. In terms of the Respondent's reviewed or amended Alcohol and Substance Policy and in order to gain biometric access to the Respondent's premises, the employees are required to undergo medical tests. On 29 January 2020, the Applicant was subjected to a medical test which was in a form of a urine test. The test came back positive for cannabis drug detected in the Applicant's system and as a result thereof, on the same day, the Applicant was informed that she was unfit to continue working and directed to immediately leave the premises of the Respondent. The Applicant was immediately placed on a 7-day "cleaning up

[5] *Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393 (CC).
[6] Paragraphs 5 and 6 supra.

process" which entailed that the test would be repeated on a weekly basis until the Applicant was cleared by testing negative. The Applicant's accumulated annual leave would be utilised *in lieu* of the time off while on the "cleaning-up process" and in the event that the annual leave is depleted then she would be placed on forced unpaid leave.

[8] It forms part of the common cause issues that, at the time of undergoing the urine test, the Applicant was not impaired or suspected of being impaired in the performance of her duties nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees. The Applicant was also not in possession or suspected of being in possession of the cannabis whilst at work on the Respondent's premises.

[9] During the period from 29 January 2020 and 28 February 2020, the Applicant was denied access to the Respondent's premises as her further tests continued to detect the cannabis drug in her system. This was so because the Applicant continued to consume the cannabis for both medical and recreational reasons. The Applicant was accordingly charged with breach of the Respondent's Alcohol and Substance Abuse Policy and on 25 February 2020, a notice to attend a formal disciplinary hearing was issued to her. The disciplinary hearing duly sat where the Applicant pleaded guilty to the charge on the basis that she has indeed tested positive for cannabis. During mitigation, the Applicant indicated that she did not plead guilty to being intoxicated or impaired at work. She also indicated that she was never "stoned" at work and reiterated the importance of smoking rolled-up cannabis every evening as well as daily use of CBD oil to relax and maintain her improved medical benefits which reduced her pharmaceutical drug dependency.

[10] Notwithstanding all these, the Respondent instructed the Applicant to undergo a "cleaning-up process" and that she would continue to be tested every seven days until she tests negative which process was in line with the Alcohol and Substance Abuse Policy. The Applicant engaged the services of a law firm so

as to engage the Respondent about its unfair, discriminatory and fundamentally flawed Alcohol and Substance Policy. Following this and on 25 April 2020, the Respondent sent a meeting request to the Applicant in order to convey the outcome of the disciplinary hearing. The meeting held on 29 April 2020 on a virtual platform was convened where the summary dismissal was imposed against the Applicant.

[11] Despite the initiator of the hearing requesting a final written warning against the Applicant, the chairperson however imposed a dismissal sanction as the chairperson was of a view that a final written warning would not serve any purpose due to the fact that the Applicant had unequivocally refused to give up consumption of the cannabis.

Argument

[12] The respective parties submitted their detailed written heads of argument to which the Court is grateful and duly considered. In addition, the parties requested an opportunity to argue their submissions in an oral platform. It is unnecessary for the purposes of this judgment to repeat all those submissions.

Section 6(1) of the EEA

[13] The Applicant submitted that she was unfairly discriminated by the Respondent on arbitrary grounds. The applicant pins her case on two legs, firstly, on section 6 of the EEA and secondly, on section 187 (1) (f) of the LRA. Section 6(1) of the EEA deals with the prohibition of unfair discrimination**.** According to this section, no person may discriminate directly or indirectly against an employee on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary grounds. In this regard, the issue of the Applicant falls within the ambit of the arbitrary grounds.

[14] The EEA then continues to provide in section 11 that if unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must provide, on a balance of probabilities that such discrimination (a) did not take place as alleged; or (b) is rational and not unfair or is otherwise justifiable. In my understanding of section 11, once the Applicant has managed to allege the unfair discrimination then the onus shifts to the Respondent to prove and show that such discrimination in fact did not take place alternatively, it was not an "unfair" discrimination. This means the two parties, employee and employer, have pertinent roles to play to the assistance of the Court. Whilst not all forms of discriminations are unfair, to my understanding section 11 still requires an applicant to produce some facts in order to prove that unfair discrimination has taken place. The Applicant is not absolved from presenting and proving its case if and when unfair discrimination is alleged. Similarly, because the Applicant is alleging automatic unfair dismissal as a result of the discrimination, which the two I conclude are inter-dependent, then the Applicant has the responsibility to also present credible evidence to support her automatic unfair dismissal claim[7]. This means that if the Applicant is able to overcome the hurdle of unfair discrimination then the automatic unfair dismissal case will be afforded a hearing.

Evaluation of the evidence

[15] In order to determine and ultimately answer the questions of law raised by the Applicant whether there was an unfair discrimination committed against her in this regard and also automatically unfair dismissal, there are quite a few issues that need to be afforded some attention in order to place my determination into perspective. It is common cause that the Respondent has safety rules in place to protect the employees and the Respondent from liability. One of the safety rules in place includes an Alcohol and Substance Abuse Policy advocating for a "zero tolerance" approach towards substance abuse by the employees and the Applicant was at all material times aware of

[7] *Kroukamp v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC).

it. Whilst the Applicant challenges the zero tolerance approach by the Respondent, the Applicant's defence however to the perpetuated consumption of the cannabis has to do with her "medical condition". Whilst the issue of whether the Applicant was prescribed medication by her general practitioner for pain and sleep due to severe anxiety was placed in dispute in the pre-trial minutes, I must state that the Respondent did not challenge this piece of evidence during the actual trial rendering same as unchallenged. This however does not mean that the Court is bound to accept the evidence as it is. As indicated in terms of section 11 of the EEA, the Applicant cannot make a blunt allegation of unfair discrimination without taking the Court into its confidence about her situation and presenting corroborating evidence in order to prove its case.

[16] The parties signed pre-trial minutes policy raises quite a number of questions to be determined by this Court; whether there was differentiation between the Applicant and other employees; whether there is a causal link between testing positive for cannabis and the dismissal; whether the Respondent's alcohol and substance abuse policy is unfair and discriminatory; the Applicant was subjected to insulting, degrading, humiliating treatment which impaired her dignity as a result of the unfair and unconstitutional discrimination.

Was there differentiation between the applicant and other employees

[17] In the case of *Harksen v Lane N O and others*[8] the CC set out the test for unfair discrimination under the Interim Constitution[9]. The principles established were captured in the EEA and, due to their importance, it is appropriate to refer to it in full:

17.1 Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there's a violation of s 8(1).

[8] 1998 (1) SA 300 (CC) at para 46.
[9] Act 200 of 1993.

Even if it does bear a rational connection, it might nevertheless amount to discrimination.

17.2 Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

a) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whatever, objectively, the ground is based on attributes and characteristics which have the potential to impair their fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

b) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on any unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the effect of the discrimination on the complainant and others in his or her situation.

c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provisions can be justified and limited in terms of the limitations clause.

[18] Firstly and of importance to note, the evidence led was rather unchallenged that the Respondent has the Alcohol and Substance Abuse Policy and the Applicant was at all material times aware of it. The issue then becomes whether such policy was consistently applied to all the Respondent's employees. If this Court finds that there was no differentiation, then I should indicate that the essential leg of discrimination would have failed which would adversely affect the Applicant's entire case. In its quest to show that the policy was applied consistently and did not differentiate between the alcohol and substance employees, the Respondent led evidence that all employees who

test positive for either alcohol or substance are immediately declared unfit for work and denied access to the Respondent's premises. The unfit employees will be afforded an opportunity to undergo a "clean up" process be it for hours or days, whereafter they will be retested. I do not agree with the Applicant that the Respondent should have treated her differently in this regard. The Respondent would be treading dangerously and in fact creating a differentiation between the employees which is the very essence of this case in the first place. On the other hand, save for the evidence presented by the Respondent in terms of its other (alcohol) employees, there was no evidence presented by the Applicant that seem to suggest that (whoever) employee tested positive for a particular substance/dagga and was treated differently by the Respondent to how the Applicant was treated.

[19] The point is that the Respondent's policy creates a rule which the Applicant was aware of and which policy was, in terms of the evidence presented, consistently applied. The Applicant however seems to be challenging the said policy that it discriminates against her on arbitrary grounds. This argument will be parked momentarily whilst I determine the essential determining issues. Further, whether the breach of the said rule may lead to dismissal and whether her dismissal was imposed fairly is another issue which in my opinion challenges the jurisdiction of this Court in terms of section 158(2) of the LRA, especially if a finding is made that there was no differentiation. Once a positive test is realised, whether for alcohol or substance, such employee is immediately declared unfit for work and is accordingly refused entry to the premises of the Respondent.

[20] Indeed, everyone is entitled to use cannabis in their own space and for recreational purposes. Similarly, everyone is entitled to consume alcohol in their own private space and time. This however does not mean that if an employee who consumed alcohol the previous night and happens to test positive the Respondent would have to take cognisance of the fact that such alcohol was consumed in the employee's private space and time. The Respondent's policy will be applicable across the board as it has been. This argument by the Applicant must fail as it is not sustainable. The Applicant

wilfully committed the misconduct. I am also conscious of the fact that this is not a misconduct issue before this Court however I am of the view that all these issues are so interrelated that it is rather difficult to separate them. I must concur with the Respondent's submission that it does not matter that the Applicant was not impaired when she tested positive but that the Applicant has to comply with the Respondent's rules contained in its policy. The Applicant however seems to be raising what she perceives as justifications for the commission of her misconduct as a Constitutional issue/right. One of the grounds is that the consumption of the cannabis was medicinal and "religious" in a way as it brought her closer to God. The Respondent is adamant that the Applicant's conduct amounts to misconduct as it is in breach of its Alcohol and Substance Abuse Policy.

[21] This then carefully brings me to the issue of medicinal and recreational reasons. I find the issue of the medical condition of the Applicant not persuasive as not only did she not indicate this to her employer and waited until she got caught to raise it, but there was also no persuasive evidence presented to the Court that indeed the Applicant has a medical condition. It was incumbent upon the Applicant in appreciating and respecting the Respondent's policy to volunteer her medical condition, especially in view of the fact that it was rather obvious that consumption of the cannabis will ultimately and most definitely lead to a positive test and then contravention of the policy. The Applicant deliberately omitted to do this and sought to bring this to the attention of her employer in an attempt to justify contravention of the policy. I find this argument to amount to an afterthought and accordingly must also fail.

[22] It also does not matter whether the Applicant did not smoke or consume the cannabis at work or during office hours but that the consumption occurs after hours and outside the Respondent's premises. The Respondent led evidence that, owing to the highly dangerous operations in its premises, it had a zero tolerance approach to working under the influence of alcohol or drugs. The employees were aware of this and all (alcohol and substance) employees are being treated the same way in line with the Respondent's policy. I concur with

the Respondent that if the Applicant's argument is anything to go by then this means the Respondent should create a policy dealing with alcohol and then another one dealing with substances, alternatively each policy for each employee's situation. This will create a rather cumbersome working environment for the Respondent and its employees.

[23] Whilst the Applicant raises the Constitutional Court case which decriminalised/legalised the use of cannabis in private space, which case law I am aware of but I am not going to get into that fray at this stage, I am however strongly of the view that the Respondent, in light of its dangerous environment, is entitled to discipline and dismiss any employee who uses cannabis or is under the influence whilst at work in contravention of its policy. Unfortunately, the Constitutional Court judgement does not offer any protection to employees against disciplinary action should they act in contravention of company policies. While I note that the Applicant herself did not engage in such dangerous services, there is nonetheless no question that the Respondent has a workplace that is fraught with danger. The Applicant tested positive for cannabis and continued to test positive simply on her perpetuated act of consumption of the substance which she made it rather clear that she will not refrain from.

[24] On the evidence before this Court, it appears that the Respondent has been treating the alcohol and substance employees equally. In line with the policy, an employee who tests positive is immediately declared unfit to work and is refused entry to the premises of the Respondent. The Applicant however argues that the Respondent should rather understand that cannabis and alcohol are different in that whilst alcohol may clear in one's system quite quickly, cannabis substance on the other hand is different as it stays in the system for days or weeks. This in my view does not change the fact that the Applicant was treated the same way as the other employees, at least in line with the policy. Should the Respondent have allowed the Applicant to access the workplace despite its contravened policy, it would be seen to be creating some precedent. The fact that Respondent discovered Applicant's positive substance state before she made it to her work station places an unfair

burden on Respondent and sets a precedent that employees may report for work despite the contravention of the employer's policy and perform their duties before intervening. Such a requirement could have disastrous effects and cannot be said to be in the best interests of public policy.

[25] The case of *Transnet Freight Rail v Transnet Bargaining Council and others*[10], endorsed the following statement of the learned author, J Grogan, on handling the disease of alcoholism in the workplace:

> 'In this regard Grogan states the following in Workplace Law:
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> "Employees may be dismissed if they consume alcohol or narcotic drugs to the point that they are rendered unfit to perform their duties. There may, however, be a thin dividing line between cases in which alcohol or drug abuse may properly be treated as misconduct, and those in which it should be treated as a form of incapacity. The Code of Good Practice: Dismissal specifically singles out alcoholism or drug abuse as a form of incapacity that may require counselling and rehabilitation (item 10(3)) ....
>
> It is clear, however, that in certain contexts being intoxicated on duty can be treated as a disciplinary offence....
>
> Special mention is made (in the Code of Good Conduct: Dismissal) of employees addicted to drugs or alcohol, in which cases the employer is enjoined to consider counselling and rehabilitation. The dividing line between addiction and mere drunkenness is sometimes blurred. An employee who reports for duty under the influence of alcohol or drugs may be charged with misconduct. Whether such an employee should be considered for counselling or rehabilitation depends on the facts of each case. These steps are generally considered unnecessary if employees deny that they are addicted to drugs or alcohol, or that they were under the influence at the time. Rehabilitative steps need not be undertaken at the

[10] (2011) 32 ILJ 1766 (LC) at para 19.

employer's expense, unless provision is made for them in a medical aid scheme."' [Own emphasis]

[26] There is further no question that, unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days. This may mean that a zero tolerance approach may be unconstitutional as it will result in an employee not being able to use cannabis at home in their private time. In addition, tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties. Cannabis may remain detectable in the bloodstream for days after consumption. Cannabis can be detected for a few days after occasional consumption, up to weeks for heavy users and up to months for chronic users. Unlike alcohol, one cannot determine a level of impairment based on test results. Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature. In this regard, the Applicant testified that she is a chronic user and she will thus never test non-negative to the Respondent's tests.

[27] The General Safety Regulation 2A of the Occupational Health and Safety Act[11], requires that an employer may not allow any person who is or who appears to be under the influence of an intoxicating substance, to be allowed access to the workplace. Neither may an employer allow any person to have intoxicating substances in his or her possession in the workplace. Whilst the general and practical theory of intoxication can be defined as the negative behaviour and impaired physical effects caused by consumption of alcohol, drugs or substances, the legal theory on the other hand is different. Alcohol/drug intoxication is defined legally according to a person's blood alcohol/substance level which can only be determined through testing be it urine, breathalyser or blood samples.

[11] GNR 1031 of 30 May 1986: General safety regulations.

[28] What about an employee who comes to work after using cannabis in private before or outside the workplace? How do you test if he or she is “stoned” at work? There is no question that employers such as the Respondent use biological blood and urine tests to assess if an employee has consumed alcohol or drugs. As already indicated, cannabis stays longer in the bloodstream than alcohol therefore employers have practical physical tests to easily assess if an employee is under the influence of alcohol or other intoxicating substances – bloodshot eyes, slurred speech, unstable etc. But it’s not so easy to assess if an employee who tests positive for using cannabis is “under the influence”. This calls for a scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action.

[29] Grogan[12], in discussing the case of *Tanker Services (Pty) Ltd v Magudulela*[13] in which it was found that the employee, who was found to have been under the influence of alcohol, committed an offence justifying dismissal, notes the following:

> ‘...[I]n *Tanker Services v Magudulela*, the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer. The court held that an employee is 'under the influence of alcohol' if he is unable to perform the tasks entrusted to him with the skill expected of a sober person. The evidence required to prove that a person has infringed a rule against consuming alcohol or drugs depends on the offence with which the employee is charged. If employees are charged with being 'under the influence', evidence must be led to prove that their faculties were impaired to the extent that they were incapable of working properly. This may be done by administering blood or breathalyser tests...
>
> Whether employees are unable to perform their work depends to some extent on its nature. In *Tanker Services*, the question was whether Mr Magudelela's faculties had been impaired to the extent that he could no longer perform the 'skilled, technically complex and highly responsible

[12] J Grogan, “Workplace Law” 13th ed, Juta & Co (2020) at p 207 – 208.
[13] [1997] 12 BLLR 1552 (LAC).

task of driving an extraordinarily heavy vehicle carrying a hazardous substance'. Having found that he could not safely do so in his condition, the court concluded that Magudelela's amounted to an offence sufficiently serious to warrant dismissal."

[30] In the case of *Exactics-Pet (Pty) Ltd v Petalia NO and others,*[14] Revelas J stated the following:

'In the arbitration of *NUMSA obo Davids v Bosal Africa (Pty) Ltd* [1999] 10 BALR 1240 (IMSSA), the union argued that, although its member had operated a heavy duty crane with alcohol in his bloodstream on the material date, his physical condition did not prevent him from performing properly since he had managed to operate the crane for approximately three hours before his condition was detected. In response to this strange submission the arbitrator, Dr Grogan, held as follows:

> "However the plea that the moral culpability of a person who is drunk in charge of a vehicle or machinery is diminished because he failed to have an accident before being apprehended, is clearly preposterous. Were that defence to be upheld in traffic courts, the offence of driving under the influence of liquor would be rendered unenforceable, except when the accused had had an accident."

The arbitrator's finding in the matter before me, is akin to stating that the ability of the fourth respondent to work for two hours without causing an accident, meant that either he was not drunk or that he should not be held liable for his state of intoxication. That is a logically unsustainable argument.' [Own emphasis]

[31] The point is, the fact that one is not impaired to perform duties does not in itself absolve that employee from misconduct in terms of the employer's policy. The Applicant tested positive for cannabis and continues to test positive as a result of her repeated and daily consumption of cannabis. She

[14] (2006) 27 ILJ 1126 (LC) at para 12.

will undeniably continue to test positive. The Applicant's performance had not been affected by her actions but the Respondent's issue was not one of performance. As discussed above, the issue was more properly classified as one of misconduct and her performance is an irrelevant factor. It is pertinent to note that on the day in question, the Applicant's performance was indeed affected by her actions, namely, she was unfit to render her services to the Respondent and was immediately instructed to leave the premises of the Respondent or had to be sent home.

[32] The Applicant argues that she had to consume cannabis for her well-being or medicinal reasons despite the dangers and safety of being at work under the influence of the substance. While the Applicant's personal situation may be regrettable, she was more than aware when she made the conscious decision to consume cannabis that she was required to report for duty the following day and days after that, she would most likely still be intoxicated at that time. What the Applicant however is saying is that the Respondent should set aside its safety rules and regulations and rather condone intoxication especially if it is for medicinal purposes. Once again, there is no evidence that the Applicant had approached the Respondent in order to engage the Respondent on her medical circumstances instead she only sought to raise this as a defence after she was caught.

[33] Even if I were to accept that the Respondent has not challenged her medical situation, this however does not absolve the Applicant from her responsibility to properly approach the Respondent in order to raise her medical circumstances and for the Respondent to properly afford her situation an ideal and practical resolution. I find the argument of the Applicant to be unsustainable. There is simply no reason why the Applicant could not have sought specific assistance from the Respondent. Despite this, the Applicant chose her own ways, out of her volition, to consume cannabis despite full knowledge that she will repetitively test positive and most importantly, in breach of the Respondent's policy.

[34] I must state that I am not persuaded about the Applicant's case or at least her defence that she used the cannabis for medicinal purposes. Whilst this remains unchallenged by the Respondent, I note this and once again, the Applicant only raised this when she was caught. In my opinion, it was incumbent for the Applicant to approach the Respondent in order to state her condition so as to discuss and find a common ground on her medical issues. This was not done. There is in fact no professional and validated medical proof on her argument that the cannabis was used in order to ease the pain and anxiety. In *Mgobhozi v Naidoo NO and Others,*[15] the Court held that if one wants to rely on a medical condition, this must be properly proven by expert evidence. It was held as follows, which serves as an appropriate example of the kind of evidence the Applicant needed to submit:[16]

> '… I cite but one example, namely that the appellant is alleged to have suffered from sane automatism for seven months. Even the most cursory research into the law reports on the topic of sane automatism and its use as a defence in criminal proceedings would reveal that it is a complex condition, requiring the assistance to the court of specialist psychiatrists, with a special interest in the field. For it to continue for seven months seems most incongruous. But that was for the appellant to explain to the Labour Court in acceptable fashion via affidavits from psychiatrists, not for the Labour Court or this court to speculate.'

[35] The Applicant presented no proper medical evidence. As such, her evidence regarding her medical condition and how the use of cannabis can possibly serve to treat it or provide her with relief is unsubstantiated, and in essence, requires this Court to accept her word as layperson on such a complex medical issue, or even to speculate. This is not permissible.

[36] I pause to take it further and tackle the issue of "recreational" use of cannabis by the Applicant. My other reasoning in this regard is the Applicant's

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[15] (2006) 27 ILJ 786 (LAC).
[16] Id at para 29. See also *Minya v SA Post Office Ltd and Others* (2021) 42 ILJ 141 (LC) at para 24; *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 81; *Value Logistics Ltd v Basson and Others* (2011) 32 ILJ 2552 (LC) at fn 2.

"recreational" smoking of cannabis. Recreational denotes an act or activity done for enjoyment when one is not working. This then creates serious difficulty in drawing a line between the Applicant's medicinal and recreational use of the cannabis. If on one hand, she had reasons to use the CBD oil in order to reduce her anxiety and ease the pain, what could possibly be the reason to "recreationally" smoke the rolled-up cannabis when either or both will in any event lead to positive test(s)? Even if I were to accept the medicinal argument, which I don't, then why should I accept the recreational consumption which seems to denote that she simply consumes the drug for fun? The Applicant's argument in this regard must fail especially on the recreational part which diminishes her grounds as it is clearly unsustainable.

Was there a causal link between the Applicant testing positive and her dismissal?

[37] The Respondent conceded that there is a direct causal connection between the Applicant's positive test and her dismissal. Over and above the Respondent's concession, I also do agree that this connection was created. It was as a result of the Applicant testing positive that she was ultimately charged and dismissed. This is one matter in that the true reason for the dismissal is not in dispute. It should however be noted that the issue goes further when the Applicant is imposed with a dismissal sanction instead of a final written warning. Can this Court then ignore the fact that it was as a result of the Applicant's negative attitude towards its employer that led to a dismissal and not necessarily the contravention of the policy? The Applicant indicated to the disciplinary hearing chairperson her unwillingness to cease consuming the substance as she sees the benefits. It was as a result of the latter that the Applicant was dismissed and not necessarily the positive test. The chairperson of the disciplinary hearing was inclined to find that the final written warning would be defeated ultimately as it was rather obvious that the Applicant will continue testing positive.

[38] Whilst I appreciate the fact that the contravention of the policy is the primary reason why she was dismissed, there is a secondary aggravating factor which

I cannot ignore. This then questions the fairness of her dismissal which once again, challenges the jurisdiction of this Court, in that it goes to whether the decision of the chairperson was appropriate or not. This, I conclude, is a misconduct issue. The Applicant failed to have a proper appreciation of the importance of the strict application of that rule in this matter and this was rather clear even to the chairperson of the disciplinary hearing. Condoning such behaviour by the Respondent, especially when she had already indicated that she will not cease consuming the cannabis which will lead to a repeated form of misconduct, could send a message to the Respondent's other employees that the company will tolerate such behaviour. I do not think that is an unreasonable stance. At the end, the chairperson correctly found that a final written warning would serve no purposes for someone who essentially made it clear that she will not stop consuming the cannabis.

[39] In this regard Nicholson AJ in *Gcwensha v Commission for Conciliation, Mediation and Others*[17] (*Gcwensha*) stated the following:

> '[25] Even in the absence of a valid final written warning an employer is entitled to dismiss an employee in appropriate circumstances. It must also be recalled that there was in existence a written warning dating from March the previous year with a 12-month duration. The appellant has a deplorable employment record and there is a litany of transgressions to which I have alluded. An employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his

[17] (2006) 27 ILJ 927 (LAC) at paras 24 and 32.

employment contract and can be dismissed in appropriate circumstances.

...

[32] I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal. That seems to be the purpose of the warning issued in October to the appellant. I am of the view that an employer is always entitled to look at the cumulative effect of the misconduct of the employee.'

[40] In this regard it is noted that the Court in *Gcwensha* was of the opinion that where a policy allowed for a certain course of action to be taken for misconduct it does not follow that such action must be taken before dismissing an employee in certain circumstances. The Code of Good Practice: Dismissal[18] specifically acknowledges that circumstances may arise where the misconduct of an employee is simply too serious to justify any action short of dismissal. It is clear to me that the Applicant's misconduct in the current case is one such case that justifies dismissal at first instance. Further, the final written warning of an employee must be aligned with the principle of progressive discipline and, given the Applicant's attitude in this regard that she will not stop consumption of cannabis, a final written warning would indeed not serve any purpose. Any sanction short of dismissal would amount to the Applicant not being disciplined at all.

Is the policy discriminatory/automatically unfair dismissal

[41] Section 6(1) of the EEA provides that:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility,

[18] Schedule 8 to the LRA.

ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or birth or on any other arbitrary grounds'.

[42] Section 11 of the EEA deals with the burden of proof in unfair discrimination matters. It provides that:

'(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –
(a) did not take place as alleged; or
(b) is rational and not unfair, or is otherwise justifiable.
(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
(a) the conduct complained of is not rational;
(b) the conduct complained of amounts to discrimination; and
(c) the discrimination is unfair.'

[43] I must state that I find the conduct of the Applicant to be a pure misconduct and nothing about it has the elements of discrimination and/or automatic unfair dismissal. Whilst I do not intend repeating the determination made hereinabove, I must however state that I have already found that the Respondent has a rule in the form of the Alcohol and Substance Abuse Policy which the Applicant was at all material times aware of. The Applicant breached that rule which amounts to misconduct. The Respondent consistently applied this rule to all classes of employees without exception. As such, the policy does not differentiate between employees. This should in itself be fatal to a discrimination claim relating to the Policy. In *Mbana v Shepstone & Wylie*[19] the Court said the following:

'The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing

[19] (2015) 36 ILJ 1805 (CC) at para 26.

whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair…'

The Applicant fails at the first step.

[44] Secondly, I have made a determination that the Applicant's medicinal use was an after-thought and her submission is incredible in many respects. She had the responsibility to voluntarily announce her medical state of affairs to the Respondent so as to seek guidance but she did not. Why did she wait to be charged and only then does she reveal her medical condition? This is made worse by the "recreational" use of the substance which, as stated, diminishes any (medicinal) ground which the Applicant perceives as a justifiable ground.

[45] Of important to note is that the Applicant did not take this Court into confidence as to how there was discrimination or how the Respondent's policy was discriminatory against her. I find that the discrimination issue must fail and having made the determination as I did, the Applicant's claims for both the automatically unfair dismissal and unfair discrimination must fail. I therefore do not wish to engage much into the principles of discrimination and automatically unfair dismissal as these claims were not proven. In my assessment, this was more of a normal misconduct case, which is an issue that falls outside the purview of this Court to decide on the basis of a first instance case. The Applicant thus wrongly elected to pursue a case based on discrimination, when no discrimination existed.

[46] Even if it can be said that in applying the policy to the Applicant there was perhaps some kind of differentiation because of her purported pleaded medical condition, the Applicant will still fail in establishing discrimination. In this regard, the Court in *Sethole and others v Dr Kenneth Kaunda District Municipality*[20] the Court summarized the position as follows:

[20] [2018] 1 BLLR 74 (LC) at para 69. In *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC) at para 17, the Court described it as: "*… differentiation takes place for an unacceptable reason* …". See also *Naidoo and Others v Parliament of the Republic of SA* (2019) 40 ILJ 864 (LC) at para 46.

> '… only specific kinds of differentiation would be impermissible. This would be differentiation that is irrational, or arbitrary, or based on what the Court called a "naked preference", or served no legitimate purpose. Differentiation that cannot be shown to fall within one of these categories would be permissible differentiation, the discrimination enquiry would be at an end there and then, and the discrimination claim must fail.

As is clear from what I have discussed above, the conduct meted out to the Applicant by the Respondent was rational and served a legitimate purpose. There was no naked preference established. Hence there can be no discrimination.

Conclusion

[47] In conclusion, I find that the Applicant's two claims of discrimination and automatically unfair dismissal must fail. I am of the view, taking into account all of the circumstances and the law and fairness, that, notwithstanding the outcome of these two claims, there should be no order as to costs.

[48] In the premises I make the following order:

Order

1. The Applicant's claims of discrimination and automatically unfair dismissal are dismissed.

2. There is no order as to costs.

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M.M. Ntsoane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv M A Lennox
Instructed by	Schindlers Attorneys
For the Respondent:	Adv N C Nieuwoudt
Instructed by:	Norton Rose Fulbright South Africa Inc