

Dismissed, determined doper loses court bid to be reinstated

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Being fired for using cannabis is not unfair discrimination, court rules.



Image source: [razyph - 123RF.com](#)

- The Labour Court has upheld the dismissal of an employee for repeatedly testing positive for cannabis.
- The court ruled that the decriminalisation of cannabis has not given protection to those who breach a company's policy.
- The company had a "zero tolerance" policy and it was irrelevant whether the employee's performance was impaired or not.

A long-serving employee who was fired after repeatedly testing positive for cannabis, in breach of the company's rules, has failed in her bid to be reinstated.

Bernadette Enever, who had been employed in an office position at Barloworld Equipment since 2007, said she used cannabis oil for medicinal reasons and smoked it recreationally for "spiritual reasons".

She wanted the labour court to declare her dismissal in April 2020 to be grounded in “unfair discrimination” and automatically an unfair dismissal.

But Johannesburg Labour Court Acting Judge Makosho Ntsoane has dismissed her application, saying the company treated all employees the same. If Enever needed to use cannabis for medicinal purposes, she should have presented evidence of that. Instead she had only made the claim as an “afterthought”, after she had been caught out.

[Read the judgment](#)

In a summary of evidence, the judge said Enever had an unblemished disciplinary record when she first tested positive in January 2020.

Enever told of how at one stage, due to various ailments, she was taking up to 10 prescription drugs a day. Following the [decriminalisation](#) of cannabis for personal use by the Constitutional Court, she had weaned herself off the pills using cannabis oil. She also smoked rolled cannabis every evening to assist with insomnia and anxiety which had improved her “bodily health, outlook and spirituality”.



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The judge said the company had a zero tolerance policy towards alcohol and drugs and required employees to undergo regular tests.

When Enever had first tested positive, she was placed on seven-day “cleaning up” leave, a process which entailed that the test would be repeated weekly until she tested negative.

It was common cause, the judge said, that when she tested positive, she was not “stoned” or unable to perform her usual desk duties. She was also not in possession of cannabis.

Enever continued to fail the weekly tests for a month and she was charged with breaching the company’s Alcohol and Substance Abuse Policy.

Following a hearing, she was fired, the chairperson indicating that there was no point in giving her a final written warning because she had “unequivocally refused to give up consumption of the cannabis”.

Enever, in her case before the Labour Court, claimed the policy was unfair and discriminatory.

Judge Ntsoane said the unchallenged evidence was that she was at all times aware of the policy. The company had led evidence that it had been applied consistently to all employees.

“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 happens to test positive, the (company) would have to take cognisance of the fact that such alcohol was consumed in the employee’s private space and time.

“It also does not matter that (Enever) was not impaired when she tested positive. She has to comply with the rules.”



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He said in light of the dangerous environment, the company was entitled to its zero tolerance policy and the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they breach company policies.

He said Enever had argued that the company “should understand” that cannabis and alcohol were different in that alcohol could clear out of someone’s system quickly, while cannabis can stay for days or weeks.

But, he said, she had been treated the same way as other employees and if she were treated differently “it would be seen to be creating a precedent” and would place an unfair burden on the company.

On the issue of her medical condition, the judge said there had been no “persuasive evidence” of this, and prior to testing positive she had not volunteered this information to the company but only sought to raise this as a defence “after she was caught”.

“Even if I were to accept the medicinal argument, which I don’t, then why would I accept the recreational drug consumption when either or both will in any event lead to positive tests?”

Regarding the sanction of dismissal, Judge Ntsoane said Enever had indicated that she would not stop using cannabis and the hearing chairperson had correctly found that a final written warning would serve no purpose.

He dismissed her claims of discrimination and automatically unfair dismissal, but made no order as to costs.

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