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Cannabis Legalisation and Employment Law in South Africa: A Comprehensive Analysis of Off-Duty Cannabis Use and Workplace Dismissal

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Introduction

- **Global cannabis legalisation has evolved significantly in recent years**
- **Questions regarding the impact of cannabis legalisation on employment law have become increasingly prominent**
- **In SA, where cannabis is decriminalised for personal use, understanding the interaction between off-duty cannabis consumption and employment law is crucial**



Pivotal Case of Prince

- In the landmark case of *Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393, the Constitutional Court (CC) recognised that criminalising private cannabis use infringed upon privacy rights, dignity, and autonomy.
- Cannabis use is legal in private homes and any location not considered public.
- cannabis consumption in public spaces, around minors, or without consent from adult = illegal



GAP IN REGULATION OF WORKPLACES

- **The CC's focus on personal privacy and autonomy in its ruling left a gap in guidance regarding cannabis use in workplace environments.**
- **Employers and legislative bodies are tasked with navigating and establishing policies addressing cannabis use among employees, considering both legal rulings and workplace needs.**



The Properties and Characteristics of Cannabis

- **The substance contains hundreds of chemical compounds, with over one hundred cannabinoids, including Tetrahydrocannabinol (THC).**
- **THC is the primary cannabinoid responsible for the substance's euphoric effects.**
- **used both medicinally and as a psychoactive drug.**
- **Classified as a controlled substance globally, subject to strict regulations or bans in many countries.**
- **It can be consumed through smoking, inhalation, oral ingestion, or topical application.**



EFFECTS OF CANNABIS USE

- **Effects vary among individuals and may include dizziness, sleepiness, headaches, memory loss, and impaired motor skills.**
- **Effects are felt within minutes of inhalation, peaking approximately 30 minutes later. Primary effects typically last 2-4 hours, but may persist longer in some cases.**
- **Prolonged or heavy use can result in long-term consequences such as dependency, respiratory problems, cognitive decline, and mental health disorders.**
- **A person can test positive days/weeks after use.**



Implications On Employment Dismissals Post-Decriminalisation

- **Legalisation of cannabis poses challenges for employers regarding workplace safety.**
- **Effects may compromise an employee's ability to perform duties safely and efficiently.**
- **Ruling in *Prince* case introduces complexities in regulating cannabis use in the workplace.**
- **Positive urine tests for cannabis metabolites may lead to dismissals, despite lack of impairment indication.**
- **Such dismissals may infringe upon employee privacy rights if cannabis use occurred outside work hours (days or weeks after use).**
- **Absence of universally accepted standards for defining safe cannabis consumption levels complicates regulation efforts.**



- **Overview of Relevant Legislation Regulating Dismissals for Misconduct-LRA**
- primary legislation governing dismissals for misconduct.
- objectives include fostering economic growth, advancing social equity, and democratising workplace.
- seeks to promote fairness, inclusivity, and transparency
- It aims to uphold employees' rights and dignity while implementing constitutional rights and meeting international obligations.
- LRA facilitates effective dispute resolution mechanisms.
- **Code of Good Practice: Dismissal...** issued by NEDLAC under the LRA to ensure fairness of dismissals.



Occupational Health And Safety Act, Mine Health And Safety Act

- **Employers must ensure a safe workplace, following OHSA and MHSA regulations, including risk mitigation and prohibition of substance influence.**
- **responsible for compliance with safety protocols and prompt reporting of hazards.**
- **International standards, such as those set by the ILO, emphasise maintaining safety standards and guaranteeing workers' rights to a safe environment.**
- **Tripartite Declaration of Principles encourages governments and enterprises to uphold safety standards.**
- **Emphasis is placed on effective safety management to prioritise worker protection.**

Regulation of off duty use of cannabis: Zero-Tolerance Policies

- **employers frequently establish policies to ensure workplace safety, often adopting zero-tolerance measures against intoxication.**
- **These policies aid employers in meeting legislative duties and promoting a safety-oriented culture.**
- **Zero-tolerance policies entail immediate disciplinary action for any drug use and prevent employees from working if intoxicated.**
- **They aim to uphold a safe work environment by strictly prohibiting impairment that could endanger personal or others' safety, particularly in safety-sensitive settings.**



Case law

Mthembu and others v NCT Durban Wood Chips [2019] 4 BALR 369

- **workplace was inherently hazardous due to the use of large logs and heavy equipment.**
- **company had a strict zero-tolerance policy towards substance abuse.**
- **Employees tested positive for cannabis use through urine tests, leading to their dismissal.**
- **Employees challenged the fairness, arguing they had consumed cannabis during their private time, while the employer justified the policy due to workplace hazards.**
- **CCMA= dismissals fair, considering the company's safety emphasis and employees' awareness of the drug abuse policy.**



Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd (2022) 43 ILJ 2025 (LC)

- **Employer had a zero-tolerance policy for alcohol and drug addiction.**
- **Employee shifted from prescription drugs to cannabis for personal reasons and tested positive- dismissed**
- **argued that cannabis use occurred during personal time and the policy was discriminatory.**
- **Court upheld dismissal despite employee's non-involvement in hazardous tasks.**



National Union of Metalworkers of SA on behalf of Nhlabathi & another v PFG Building Glass (Pty) Ltd & others (2023) 44 ILJ 231 (LC)

- 2 employees tested positive for cannabis, admitted to cannabis use and were dismissed, prompting an unfair dismissal complaint.
- The employer justified the dismissals citing adherence to company policy and concerns regarding the hazardous workplace environment.
- Despite cannabis decriminalisation, workplace was subject to OHSA regulations.
- Commissioner found dismissal substantively fair.
- LC upheld the dismissal mitigating factors deemed irrelevant under zero-tolerance stance.



Case law Analysis

- **Case law underscores the importance of zero-tolerance policies in disciplinary actions-safety.**
- **Applying zero-tolerance policies to off-duty cannabis use raises fairness and legality concerns amid changing cannabis laws.**
- **Assessing dismissals requires considering policy awareness, timing of cannabis use, and job responsibilities for fair disciplinary actions.**
- **Balancing privacy rights with safety standards requires assessing impairment and disciplinary measures carefully.**
- **Thorough examinations are essential for achieving fair outcomes that uphold the rights and interests of both employees and employers within legal frameworks.**



Legal vacuum

- **Legal vacuum in addressing dismissals for off-duty cannabis use**
- **Decriminalisation of cannabis creates workplace uncertainties due to lacking legal directives**
- **Accountability is complex, relying solely on workplace rules, compounded by challenges in assessing impairment without specific laws**
- **Fair dismissals depend on safety, while LRA principles require considering mitigating factors.**
- **Current legal uncertainty underscores the need for legislative clarity to minimise inconsistent outcomes.**
- **insights for legislative amendments-comparative study.**



COMPARATIVE ANALYSIS: SOUTH AFRICA VS CALIFORNIA, NEW YORK AND COLORADO.

- **California laws permit off-duty cannabis use but maintain employers' rights for drug-free workplaces. Proposed AB 2188 provides protections for employees using cannabis off-duty.**
- **In New York, dismissal for off-duty cannabis use is prohibited unless it impairs job performance. Clear criteria aid employers in assessing impairment, prioritising workplace safety.**
- **Colorado's HB 1152 safeguards employees from adverse actions due to cannabis use. Restrictions on cannabis use for specific job roles balance employee rights with safety concerns.**



Lessons for South Africa

- **Recognise safety-sensitive industries' authority in enforcing drug policies.**
- **Focus on observable impairment during work hours.**
- **Establish clear criteria for assessing impairment.**
- **Incorporate "bona fide occupational requirement" concept.**
- **Develop a balanced regulatory framework for off-duty cannabis use, ensuring employee rights and workplace safety.**



Recommendations

- **Define expectations for off-duty cannabis use and communicate policies clearly.**
- **Use impairment testing to assess employees' ability to perform job tasks safely.**
- **Investigate brain imaging technology for detecting THC impairment.**
- **Educate employees on cannabis effects and company policies.**
- **Implement counselling services for employees struggling with substance use.**
- **Assess off-duty cannabis incidents considering job nature and evidence of impairment.**
- **Push for clearer legal standards to handle off-duty misconduct consistently.**



Conclusion

In conclusion, navigating the complexities of off-duty cannabis use in the workplace demands a multifaceted strategy that strikes a delicate balance between safeguarding employee rights and addressing critical safety and productivity considerations.