A Zero-Tolerance Policy - How Fair Is That?

By Johanette Rheeder - Director

It may sound hugely unfair when the consumption of two pieces of carrots got an employee fired at Nando's in the matter of *Nando's Scottville v Gwala and others*[1]. According to the employer his conduct amounted to dishonesty and according to the employee, he was merely testing if the food was good for consumption as it appeared to have ice in it. The matter came on review some years later. The employee denied that he knew he could be fired for this, whereas the disciplinary code of the employer determined the consumption of food to be dishonesty and theft/fraud. In the CCMA, the commissioner was not satisfied that the employer proved that the employee was dishonest. The LC found that it accepted that the employee breached the rule and that it was a serious transgression, however, as was found in the Shoprite matters, not all transgressions of this nature warrants dismissal as the appropriate sanction. As per the LAC – **a zero tolerance policy must only be accepted by the CCMA if such policy warrants such strict application, based on fairness!**

The Labour Court examined the requirements for a dismissal based on a zero-tolerance policy in the matter of *Air Products South Africa (Pty) Ltd v Matee and Others*[2]. The employer, due to the possibility of workplace accidents, which would be perilous for the environment, its employees, contractors and the surrounding community, adopted strict safety protocols, policies and procedures, including a zero-tolerance approach to alcohol and drug abuse on its premises. The Employee tested positive for alcohol at employer's facility access gate, after he was subjected to an breathalyser test. A blood test result indicated that the level of alcohol in the employee's blood was 0,03g/dl.

The employee was suspended and issued with a notice to attend a disciplinary hearing. During the disciplinary hearing, he pleaded guilty to the charge, after which the chairperson recommended a sanction of dismissal. Accordingly, the employee was dismissed. In the CCMA, the case was mainly surrounding the question whether the sanction of dismissal was too harsh, as the employee he did not consume alcohol at the workplace, but that he had consumed it the previous day at home.

Having analysed the evidence, the arbitrator found that the employee's dismissal was substantively unfair. It is this award that became the subject of a review application. The labour court examined the requirements of summary dismissal for a first offence, therefore a zero-tolerance policy of an employer.

In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others,* the requirements were considered at length. Although, this case relates to the rule regarding declaration of personal goods, it is relevant to the any zero-tolerance rule, as it outlines the principles applicable to the zero-tolerance policy as follows:

'[17*] …. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.*

[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. See the incisive contribution by André van Niekerk (Juta 2012) 102-119. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees.

…

[22] Even assuming that the appellant was pursuing a zero tolerance policy, it was not one that is appropriate for an infringement of this rule without further evidence from appellant for the justification of such an inflexible policy. In any event, the commissioner is required to consider whether the circumstances of the case warrant dismissal. If it does not, then irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction.

In the words of the judge, "it is clear from the above authority that the zero-tolerance policy will be accepted only where the circumstances necessitate its adoption by the employer. Thus, when pursuing a zero-tolerance policy, the employer has a duty to show that dismissal is appropriate and proportional to the offence".

One way to "soften the blow" of the apparent need for a strict zero-tolerance policy towards alcohol, the policy can diminish the potential harshness by allowing employees, who have consumed alcohol the previous day and suspects that they may still have the presence of alcohol in their blood stream, to submit themselves to a voluntary alcohol screening test prior to entering the premises. In a case where the employee tests positive, they are sent back home and subsequently disciplined for the lesser offence of absenteeism.

Of further importance is that the employees must be made aware of the policy through various means such as training and constant awareness campaigns. Record of attendance must be kept as well as evidence of previous use of the policy with the particular employee.

Another important factor is evidence that the rule was consistently applied by the employer in that employees are or were dismissed in the past for transgressing the zero-tolerance policy towards alcohol.

The employer must lead evidence to show the reasonableness of the policy in relation to the employee's role and responsibilities and the environment in which the employee is working, such as driving heavy and dangerous equipment or working near explosives.

In the Air Products matter, the arbitrator failed to assess whether the circumstances of the case warranted the applicant to adopt the zero-tolerance policy. Instead, he found a witness' testimony that the employee's part of his duties was to hand over the dangerous vehicles to the drivers, which needed him to make a judgment whether the driver standing before him was fit to drive the vehicle, to be indicating a contradictory understanding of the application of the applicant's rule. This was so because the applicant failed to consider whether the first respondent was fit, so said the arbitrator. The arbitrator therefore considered the law as it stands whether the employer could proved that the employee's intoxication made it impossible for him to perform his duties, in stead of applying the principles applicable to a fair dismissal for a zero tolerance rule.

The arbitrator relied on the judgment in *Tanker Service (Pty) Ltd v Magudulela*[3], which was relied on in *Tosca Labs v CCMA*[4] to find that the employee will only be under the influence of alcohol if he was not able to perform the tasks entrusted to him. Further that the policy of zero tolerance should not lead to the termination of employee's services in all circumstances specifically where it was not established that the employee was not able to execute his duties.

The *Air Products* matter was found to be distinguishable from these cases on which the arbitrator relied. In *Tanker Service (Pty) Ltd v Magudulela*, the question was whether Mr Magudulela's faculties had been impaired to an extent that he could no longer perform the skilled, technically complex and highly responsible task of driving an extraordinary heavy vehicle carrying a harzadous substance. Having found that he could not do so in his condition, the Court concluded that he committed an offence justifying dismissal.

As aforesaid, in the *Air Products* matter, the issue before the arbitrator was whether the first respondent transgressed the applicant's zero-tolerance policy on alcohol. To do that, he was required to assess whether the applicant's circumstances necessitated the adoption of a zero-tolerance policy and whether the dismissal was appropriate and proportional to the offence. The arbitrator did not do that. Instead, he delved into the enquiry regarding whether the first respondent was capable of performing his duties. In so doing, he committed an error in law and misconstrued the enquiry, which resulted in him arriving at the conclusion that a reasonable decision-maker could not arrive at, resulting in his award to be set aside.

In conclusion: it is important for employers to know what to charge the employee with and to ensure that the evidence relates to the charges. In the Air Products matter, the employer correctly led evidence on the reason for the zero-tolerance rule as the employee pleaded guilty and the matter resolved around the fairness of the decision, not as much the guilt of the employee.

Johanette Rheeder

Director : JR Attorneys Inc.

[1] *D06/2019*

[2] *(JR763/18) [2021] ZALCJHB 332 (30 September 2021)*

[3] [1997] 12 BLLR 1552 (LAC)

[4] (2012) 33 ILJ 1738 (LC)