

# When zero-tolerance policies backfire: Dismissal for cannabis use at home ruled 'unfair'

By [Richard Brown](#)

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An office worker was fired because she smokes marijuana at home in the evenings. Now she must be paid two years' compensation by her former employer after the Labour Appeal Court (LAC) held she was unfairly dismissed.



Image source: Alexander Grey from [Pexels](#)

Barloworld, the company that sacked her, has a zero-tolerance policy on alcohol and drugs, but the LAC decided there is 'no rational link' between the maintenance of safety in its workplace and what amounts to a ban on personal cannabis use by all its employees in the privacy of their homes.

It's a major development in labour law, built on earlier decisions by the Constitutional Court decriminalising the private use, possession and cultivation of marijuana.

[Read the judgment](#)

Before she was dismissed, Bernadette Enever worked in an office at Barloworld Equipment, a division of Barloworld. Its core business includes providing and servicing huge equipment for mining and civil engineering projects.

During a routine medical in 2020, Enever tested 'non-negative for cannabis while on duty' and this led directly to her dismissal.

She smokes dagga at home in the evenings, as an alternative to medicine prescribed by her doctor to help with pain and severe anxiety but which caused difficult side effects. That background didn't help her cause with Barloworld. Nor did the fact that she worked in an office with no dangerous machinery. The company has a zero-tolerance policy on drugs and alcohol and when she said she wasn't going to give up her nightly puff, she was sacked.



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## Many employers will have to rethink company policy on home dagga use

The Labour Court upheld her dismissal, but she challenged the outcome at the Labour Appeal Court. That decision, just handed down, declares her dismissal unfair and orders compensation.

It's a potentially far-reaching result that means many employers will have to rethink any blanket company policy on afterhours marijuana use by staff.

The three judges were well aware of the likely spin-off from their decision in the case, and they say, right at the start, that the main issue involved was 'the effect ... on workplace discipline' of the Constitutional Court's decision decriminalising the private cultivation, possession and use of dagga by adults (the *Prince* case).

It was a condition of employment at Barloworld Equipment that staff could be required to undergo workplace medical examinations. Further, the use and possession of alcohol at work was forbidden, and anyone 'under the influence of alcohol and/or drugs' was also forbidden access to the workplace.

Random checks are held, and there's also testing during annual medicals, pre-employment tests, after 'incidents' at work and so on. An employee whose results are 'positive or non-negative' will have a second, confirmatory test.

Should that still be positive or non-negative, the employee is sent home for seven days and then re-tested. A positive outcome leads to disciplinary action in terms of the company's zero-tolerance approach.

## No impairment at work; no operating of dangerous machines

Enever was re-tested several times, but because she didn't stop smoking at night, all the results were positive. She pleaded guilty at a disciplinary hearing and explained the medical reasons for why she continued her nightly smoke.

She was summarily dismissed after the chair said it would be futile to give her a final written warning since she claimed she had a right to use cannabis and wouldn't stop.

Private cannabis use v zero tolerance policy - and the winner is...



The company didn't dispute that, at work, she wasn't impaired in carrying out any of her duties, nor was she suspected of being intoxicated. Further, she didn't operate any dangerous machinery, and she didn't need to drive for the company.

When the Labour Court upheld her dismissal, it said the company had valid reasons for dismissing her, based on her 'wilful violation' of its policy. And that the decriminalisation of dagga use made no difference as she had infringed the workplace policy.

In the Labour Appeal Court, things went rather differently.

## Portrayed 'as a junkie'

Enever claimed she was discriminated against on arbitrary grounds. Her privacy rights were violated, and she was subjected to "a humiliating process that portrayed her as a 'junkie'"; all this while it was agreed by both sides that her duties weren't affected by her nightly smoke and that she didn't operate any dangerous machinery or have to carry out any other duty where 'impairment from cannabis would present a risk'.

Writing for a unanimous court, Dunstan Mlambo said while the *Prince* case didn't involve labour matters, the significance of that decision impacted on the privacy rights of all employees.

Barloworld justified its policy on the grounds that it was needed to comply with the law on health and safety at work. By extension, this was also the company's justification for limiting what Enever does in her own private time after hours.

"I do not find this a justifiable reason for the infringement of (her) right to privacy," Mlambo said. It was an "overbroad, unwarranted and unjustifiable invasion" of her rights.



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## Irrelevant to employer that staffer 'enjoyed an evening joint' at home

Mlambo said it was irrelevant to the employer that Enever "enjoyed a joint during her evenings in the privacy of her home". But while the company's policy prevented her from engaging in conduct that is of "no effect" to her employer, it forced her to choose between her job and the exercise of her right to consume cannabis.

It might be different if an employee was "stoned" or impaired on the premises during work hours or if the employee had to work with heavy and dangerous machinery, but that was not the case here.

The fact that cannabis stays in the system longer than alcohol added to the arbitrariness of the zero-tolerance policy. One employee could drink alcohol at home but have a negative test result at work next day, while a staffer smoking cannabis the previous night would still test positive.

## Employers must consider the 'nature' of an employee's job

But the court warned that its conclusion didn't apply to all employees, some of whom "perform drastically more dangerous

jobs” and for whom a zero-tolerance rule on cannabis might be more justified.

Enever asked the LAC for compensation for 24 months. In considering whether to grant it, the court spelled out the bottom line of the judgment, and the essence of what other employers should consider in the wake of this decision:

*“ Merely having a zero-tolerance policy on the basis of workplace safety does not give an employer the right to have a uniform policy that does not consider the nature of an employee’s job and the environment the employer operates in. ”*

The court’s formal order declares that the company’s alcohol and substance abuse policy is “irrational” and violates privacy rights by prohibiting office staff who don’t work with heavy and dangerous equipment from “consuming cannabis in the privacy of their homes”.

What weighed heavily with the LAC was the conservative restriction on personal freedoms which had no rational link to the job she was required to perform. Employers would do well to take heed and revisit their approach to similar prohibitions.

This in turn meant that Enever had been unfairly discriminated against, her dismissal was automatically unfair and the company was to pay her 24 months’ salary as compensation.

## ABOUT THE AUTHOR

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