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CANNABIS IN THE WORKPLACE: THE IMPLICATIONS OF *ENEVER V BARLOWORLD EQUIPMENT, A DIVISION OF BARLOWORLD SA* (PTY) LTD (2022) 43 *ILJ* 2025 (LC)

By

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at the University of the Witwatersrand, Johannesburg

As approved by Postgraduate Studies Committee

Supervisor: Karmini Pillay

Date: 10 September 2024

DECLARATION

I, ____2108784_____ (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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Signature:

Student number: 2108784

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ABSTRACT

The Labour Courts in South Africa face many challenges in respect to cannabis-related issues within the workplace. This has been evident ever since the landmark constitutional ruling of *Minister of Justice and Constitutional Development v Prince*. The recent judgment of *Enever v Barloworld Equipment (Pty), A Division of Barloworld SA (Pty) Ltd*), highlights some of these challenges.

The core challenge is in striking an appropriate balance between the rights between employers and employees, where our courts appear to tip the scale in favouring the employer. In *Enever*, despite the court acknowledging the fact that zero-tolerance policies prevent employees from being able to use cannabis within their own space, there was no attempt really made to rectify this issue. There is thus a need to provide greater protection for employees and achieve the ultimate aim of labour law, which is to effectively balance the rights between employers and employees.

Another challenge relates to the testing for cannabis within the workplace. With no scientifically accurate method currently available for proving cannabis-induced impairment, many employers are of the view that for as long as an employee simply tests positive for the drug then an employer will be entitled to take disciplinary action. Many employers in South Africa make use of tests, such as urinalysis, which does not help in proving impairment but merely indicate recent use. As will be seen in *Enever* and various other decisions regarding cannabis, our courts appear to overlook the established jurisprudence in relation to testing for similar substances, such as alcohol, with no real justifications as to why they do this.

I will consider two sources of foreign law, namely the United States of America (USA) and Canada respectively. Both jurisdictions have successfully struck a balance between balancing the rights and interests of the employee and employer following a fundamental shift in how cannabis is viewed societally and in the workplace. I will look to USA, where there has been a great shift towards accepting and normalising cannabis use, to determine exactly how selected the states effectively balance the rights between employers and employees. I will also consider lessons from Canada to tackle the testing issues for cannabis within the workplace and look at potential testing methods, which South African employers could adopt.

It is clear, there is much development still to be made within the legal framework regarding cannabis regulation in the workplace and, as such, I will investigate and critically evaluate key changes that are likely to impact the regulation of cannabis in South Africa.

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CANNABIS IN THE WORKPLACE: THE IMPLICATIONS OF ENEVER V BARLOWORLD EQUIPMENT, A DIVISION OF BARLOWORLD SA(PTY) LTD *(2022) 43* ILJ *2025 (LC)*

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I. INTRODUCTION

The 2018 Constitutional Court judgment of *Minister of Justice and Constitutional Development v Prince* [1] was a landmark ruling in South Africa. It set the wheels in motion for the legalisation of one of the most widely consumed drugs, cannabis, in private spaces.[2] As a result of this ruling, there have been various workplace implications which have arisen in relation to employees testing positive for and/or being under the influence of the drug at work.[3] The majority of implications relate to dismissals for breach of employer's zero tolerance policies.[4] As I will examine further on, the majority of our courts endorse the view that, for as long as an employer is able to justify having a zero-tolerance policy, a dismissal will be the automatic default outcome for a breach of such policy.[5] In the recent judgment of *Enever v Barloworld Equipment (Pty), A Division of Barloworld SA (Pty) Ltd*,[6] the court found that there was no unfair discrimination or an automatic unfair dismissal for an employee who repeatedly tested positive for cannabis at work.[7] The scope of this paper is to focus on two key issues – how best to strike the balance between competing rights and interests between the employer and employee, and how to regulate cannabis testing in the workplace more effectively.

Labour disputes often involve the balancing of conflicting rights and interests of employers and employees respectively.[8] In the context of cannabis in the workplace, the courts

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* LLB (Wits).

[1] *Minister of Justice and Constitutional Development v Prince* 2018 (1) SACR 14 (CC) (hereinafter referred to as *Prince*).

[2] Theo Haupt 'An appraisal of the use of cannabis on construction sites' (2019) 26 *Acta Structilia* 1 at 150.

[3] Kamalesh Newaj 'Dismissals for cannabis use: Determining substantive fairness' (2023) 44 *ILJ* 683 at 683.

[4] Ibid.

[5] Ibid.

[6] *Enever v Barloworld Equipment, A Division of Barloworld SA(Pty) Ltd* (2022) 43 *ILJ* 2025 (LC) (hereinafter referred to as *Enever*).

[7] Ibid.

[8] Clarissa Pearce 'Balancing employer policies and employee rights: The role of legislation in addressing workplace alcohol and drug testing programs' (2008) 46 *Alberta Law Review* 1 at 142.

have struggled to strike an appropriate balance between an employer's rights to enforce zero-tolerance policies, which are often anchored on mandatory drug tests which consequently impact on an employee's rights to privacy.[9] Evidently, the courts place more emphasis on protecting the employer's interests, hence here is a need to examine whether the implementation of zero-tolerance policies unfairly negatively impact an employee's right to consume cannabis in the privacy of their own home and whether more can be done to achieve an appropriate balance in protecting both employers' and employees' rights and interests.[10]

In the context of testing for cannabis in the workplace, there are a number of challenges associated with the current methods adopted by various organisations.[11] Given the seriousness of the repercussions for testing positive for cannabis, it is time to re-evaluate how employers approach cannabis testing in the workplace in light of the current legal framework, particularly judicial precedent.

Section 39(1)(*c*) of the Constitution of the Republic of South Africa, 1996, the highest law in the land to which all other laws are subject to,[12] states that our courts 'may consider foreign law' when interpreting the Bill of Rights.[13] As noted in *S v Makwanyane,*[14] 'foreign solutions are often comparable because they are solutions to the same problem' which emphasises the value of foreign jurisprudence.[15]

It is therefore beneficial to draw on lessons of other comparable jurisdictions to provide solutions to the vexing issues facing our legal system, such as the ones highlighted above.[16] I will therefore consider the lessons from USA and Canada respectively, where the recreational use of cannabis is permitted.[17] Firstly, these foreign jurisdictions share great similarities to our legal system as they also adopt a written Constitution, with South Africa's Constitution 'largely modelled on the Canadian Charter of Rights and liberal borrowings from the USA'.[18]

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[9] Christo Muller 'The cannabis conundrum: Balancing privacy rights and workplace policies' available at *https://www.linkedin.com/pulse/cannabis-conundrum-balancing-privacy-rights-workplace-christo-muller*, accessed on 27 June 2023.
[10] *Enever* supra note 6 para 26.
[11] J B Laurens & P A Carstens 'Cannabis legalisation and testing for cannabis use in safety- and risk-sensitive environments' (2020) 110 *South African Medical Journal* 10 at 995.
[12] Constitution of the Republic of South Africa, 1996 s 2 (hereinafter referred to as Constitution).
[13] Ibid s 39(1) (*f*).
[14] *S v Makwanyane and Another* 1995 (6) BCLR 665.
[15] Ibid para 34.
[16] Enslin JJ *The cannabis-induced impairment of an employee in the workplace: what is the employer's legal position?* (unpublished LLM thesis, North-West University, 2022) at 68.
[17] Thato Lentsoe *Implications of the use of cannabis in the South African workplace* (unpublished LLM thesis, University of Johannesburg, 2019) at 37.
[18] D.M. Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 *International Journal of Constitutional Law* 2 at 191.

Secondly, in *Bernstein and Others v Bester NO and Others* 1996,[19] Ackermann J confirmed that there is a strong correlation in how South Africa, Canada and the USA approach the right to privacy.[20] Thirdly, both the USA and Canada adopt a more well-considered approach to drug testing in comparison to South Africa. It is thus pivotal to analyse what lessons we can borrow from these jurisdictions in the context of regulating cannabis in the workplace.

In this paper, I will analyse the recent Labour Court judgment of *Enever* and investigate the two legal issues mentioned above. First, I will outline the facts and set out the statement of the case. Second, I will describe the current legal framework on cannabis in the context of South African workplaces. Third, I will investigate the challenge in balancing the rights and interests between an employer and employee respectively. While evaluating how best to strike the balance of rights and interests, I will evaluate lessons that can be drawn from the USA. Lastly, I will investigate the challenges arising from cannabis testing in the workplace by examining the courts approach in *Enever* as well as other South African jurisprudence. Thereafter, I will look at the lessons to be drawn from Canada. After evaluating these legal issues, I propose recommendations on how best to navigate this dynamic area of law.

II. THE FACTS

In this case, Bernadette Enever (the Applicant) was employed by Barloworld Equipment (the Respondent).[21] Her job was not safety-sensitive.[22] She had a history of intense migraines and anxiety and there therefore consulted a medical practitioner who prescribed medication to ease her conditions.[23] Post the Constitutional Court judgment, which decriminalised personal the consumption of cannabis in private spaces, the Applicant slowly switched from prescribed pharmaceutical medication to smoking rolled cannabis.[24] She also consumed the drug recreationally.[25]

The Respondent had a zero-tolerance drug and alcohol policy given the dangerous operations on its premises.[26] The policy required employees to undergo medical tests,[27] which if positive would declare the employee unfit to continue working.[28]

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[19] *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (hereinafter referred to as *Bernstein*).
[20] Lentsoe op cit note 17 at 39.
[21] *Enever* supra note 6 para 3.
[22] Ibid.
[23] Ibid para 5.
[24] Ibid.
[25] Ibid.
[26] Ibid para 22.
[27] Ibid para 7.
[28] Ibid.

The Applicant underwent a medical test though urinalysis, whereby the employee tested positive for cannabis[29] and, as a result, the Applicant was declared unfit to work.[30] Her mental faculties were not impaired whilst performing her duties and she did not perform work whilst consuming cannabis, hence there was no potential to jeopardise the safety of fellow employees.[31]

Due to her continuous consumption of cannabis in her private space, she was required to go to a disciplinary hearing and was subsequently found guilty.[32] Despite the Respondent having requested a final written warning, the chairperson went on to impose a dismissal sanction as it was believed that a final written warning would have served no purpose, since the Applicant gave no indication that she would stop the consumption of cannabis and so would always be in breach of the policy.[33] The employee stipulated that she did not plead guilty to being impaired at work.[34] However, she reiterated the medical benefits of cannabis which reduced her pharmaceutical drug dependency.[35]

Following the Applicant's dismissal, where she claimed unfair discrimination and automatically unfair dismissal,[36] she sought reinstatement.[37]

III. STATEMENT OF THE CASE

In Ntsoane AJ's judgment, it was found that there was no unfair discrimination.[38] The Applicant's regular misconduct case fell outside the Labour Court's jurisdiction to decide on the basis of a first instance.[39] It was held that the Applicant wilfully breached the Respondent's policy and thus dismissal was appropriate in the circumstances.[40] The Applicant's claims were dismissed.[41]

The Applicant failed to provide persuasive evidence of her medical condition, which she failed to divulge to her employer until she tested positive for cannabis.[42] The court cited

[29] Ibid.
[30] Ibid.
[31] Ibid para 8.
[32] Ibid para 9.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid para 2.
[37] Ibid.
[38] Ibid para 45.
[39] Ibid.
[40] Ibid para 20.
[41] Ibid para 48.
[42] Ibid para 21.

Mgobhozi v Naidoo,[43] which stated that, in order to rely on medical conditions, 'one must prove this through expert evidence'.[44]

The court in *Enever*, differentiated between cannabis and alcohol,[45] and stated that the Respondent's dangerous environment justified their right to dismiss and discipline employees who consume cannabis or are under the influence at work in contravention of the policy.[46] The *Prince* case does not protect employees from disciplinary action where they contravene company policies.[47] The Applicant wilfully chose to breach the policy which was made clear by her unequivocal refusal to stop her cannabis consumption.[48] The court stated that, regardless of whether the Applicant was impaired or not when she tested positive, this would not absolve her from misconduct as she was at all times required to comply with the Respondent's rules in its policy.[49] The court also refused to agree with the Applicant that she should have been treated differently since this would create a dangerous precedent of employee differentiation.[50]

The court stated that the chairperson was correct in concluding that a final written warning would not have served any purpose, as the Applicant showed no signs that she would have stopped her consumption of cannabis.[51] The court referenced the case of *Gcwensha v Commission for Conciliation, Mediation and Others,*[52] where it found 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'.[53]

IV. OVERVIEW OF SOUTH AFRICA'S LEGAL FRAMEWORK ON CANNABIS IN THE WORKPLACE

The right to privacy, enshrined in section 14 of the Constitution,[54] is explicated as being fluid in nature and incapable of precise definition.[55] In the *Bernstein* case, Ackerman J stated that

[43] *Mgobhozi v Naidoo NO and Others* (2006) 3 BLLR 242 (LAC) (hereinafter referred to as *Mgobhozi*).
[44] *Enever* supra note 6 para 34.
[45] Ibid.
[46] Ibid para 23.
[47] Ibid.
[48] Ibid para 38.
[49] Ibid para 31.
[50] Ibid para 18.
[51] Ibid para 38.
[52] *Gcwensha v Commission for Conciliation, Mediation and Others* (2006) 27 *ILJ* 927 LAC.
[53] *Enever* supra note 6 para 40.
[54] Constitution, s 14.
[55] Fiona Leppan 'The cannabis judgment: occupational health and safety considerations' available at *https://saefa.org.za/images/The-Cannabis-Judgment---Occupational-Health-andSafety-Considerations.pdf*, accessed on 25 June 2023.

'privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly' therefore, the more your actions have the potential to affect those around you, the more your right to privacy diminishes.[56] The right to privacy is also seen as an extension of an individual's 'right to dignity' and thus should be respected in the workplace.[57] Section 10 of the Constitution protects the right to human dignity.[58] In other words, everyone is entitled to equal respect.[59] Discussing these two rights in more detail is beyond the scope of this paper and is mentioned here for the sake of completeness.[60]

Section 23 of the Constitution regulates labour relations and binds employers and employees.[61] Section 23(1) states that 'everyone has the right to fair labour practices'.[62] 'Everyone' indicates the inclusive and expansive nature of this right, and calls for an equitable balance between the rights and interests of employers with that of employees.[63] Labour relations in the context of cannabis are regulated comprehensively in labour legislation, such as the Occupational Health and Safety Act 85 of 1993,[64] the Labour Relations Act 66 of 1995,[65] and the Employment Equity Act 55 of 1998 respectively.[66]

Section 2A(1) of the General Safety Regulations of OHSA prohibits employees from entering the workplace whilst under the influence and who test positive for, or possessing, cannabis.[67] Employers thus have an interest in employee's private conduct if it impacts their

[56] *Bernstein* supra note 19 para 67.
[57] Lameez Mayet 'The boundaries of privacy in the workplace' available at *https://dommisseattorneys.co.za/blog/the-boundaries-of-privacy-in-the-workplace/*, accessed on 20 June 2023.
[58] Constitution, s 10.
[59] South African Human Rights Commission 'My rights, my responsibilities' available at *https://www.sahrc.org.za/home/21/files/SAHRC%20My%20rights%20My%20responsibilities%20booklet%20revised%2020%20March%202018.pdf*, accessed on 23 June 2023.
[60] See for instance, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC), *Minister of Police and Others v Kunjana* 2016 (9) BCLR 1237 (CC), *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and others v Minister of Police and others* 2023 (1) SACR 14 (CC), *NM and Others v Smith and Others* 2007 (7) BCLR 751 (CC), *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2013 (12) BCLR 1429 (CC), *AmaBhungane Centre for Investigative Journalism NPC and another v Minister of Justice and Correctional Services and others* 2021 (4) BCLR 349 (CC), *Dladla and others v City of Johannesburg and another* 2018 (2) BCLR 119 (CC).
[61] Lentsoe op cit note 17 at 11.
[62] Constitution, s 23.
[63] Lentsoe op cit note 17 at 10.
[64] Occupational Health and Safety Act 85 of 1993 (hereinafter referred to as the OHSA).
[65] Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA).
[66] Employment Equity Act 55 of 1998 ((hereinafter referred to as the EEA).
[67] Lentsoe op cit note 17 at 16 (the OHSA provisions codifies the common law position for employers to provide for a safe working environment).

workplace performance or brings the good name of the employer into disrepute.[68] Dangerous industries, per *Enever*, include chemical and transport industries, particularly where heavy machinery is operated.[69] It is essential that these rules are clear, fairly drafted and effectively communicated to employees and trade unions.[70]

Section 14 of the OHSA imposes statuary duties on employees to ensure that their conduct does not jeopardise the safety and health of fellow employees.[71] Where employers do not prohibit cannabis consumption through workplace policies, employees should consider whether consuming cannabis privately will jeopardise the health and safety of colleagues whilst performing their workplace duties.[72]

Per the LRA, dismissals for alcohol or substance abuse are on the basis of misconduct or incapacity.[73] Before an employer can dismiss an employee for misconduct or incapacity, certain guidelines must be considered.[74] These include, reasonable validity of the rule, whether the employee knew of the rule and if a dismissal was an appropriate sanction for contravening such rule'.[75]

Turning to judicial precedent, the *Prince* judgement is a key case. In the *Prince* case, Prince was seeking a declaratory order declaring certain provisions against cannabis use and the purchase, possession and cultivation of cannabis for personal consumption as invalid and not in line with the Constitution.[76] Prince alleged that certain sections of the Drugs and Drug Trafficking Act 140 of 1992 violated his right to privacy.[77] The court subsequently upheld the privacy rights of individuals to consume, possess or cultivate cannabis in small amounts in the privacy of their home or private dwelling without any fear of legal reprisals.[78] This decision aligns with South Africa's legal framework with the evolving global shift towards legalising cannabis use.[79] The other constitutional rights that apply to the use of cannabis relate to

[68] Cliffe Dekker Hofmeyer 'Substance abuse in the workplace' available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Substance-Abuse-Guideline.pdf*, accessed on 19 March 2023.
[69] Vusi Mthimkhulu & Hugo Van der Walt 'Exploring the relevancy of random and scheduled alcohol breathalyser testing in high-risk jobs within safety-sensitive work settings' (2021) 19 *SA Journal of Human Resource Management* at 2.
[70] *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2023) 44 *ILJ* 179 (LAC) para 17.
[71] Occupational Health and Safety Act 85 of 1993, s 14.
[72] Cliffe Dekker Hofmeyer op cit note 68.
[73] Labour Relations Act 66 of 1995, Schedule 8.
[74] Ibid.
[75] JV du Plessis & MA Fouché *A Practical Guide to Labour Law* 9 ed (2019) ch 17.
[76] *Prince* supra note 1.
[77] Ibid.
[78] Ibid.
[79] Muller op cit note 9.

'freedom, autonomy, freedom of religion, and the equal enjoyment of rights and privileges', all of which need to be adequately balanced against the health and safety of others.[80]

The challenge, as mentioned in *Prince,* is that the case did not affect amendments to labour legislation regulating workplace health and safety and other risk-sensitive environments, primarily the OHSA.[81] Employees therefore have no protection against disciplinary action when one violates company policies.[82] Employers have full authority to implement zero-tolerance schemes regarding the consumption of cannabis in workplaces deemed as dangerous.[83] Employers can also set their own standards as per *SGB Cape Octorex v Metal and Engineering Industries Bargaining Council*, which dealt with an employee testing positive for cannabis and violating a zero-tolerance policy at work whilst on duty.[84] Employers have to make sure that policies are reasonable and are able to withstand scrutiny, if challenged.[85] This case will be looked at in more detail further on.

Both the cases of *EWN v Pharmaco Distribution*[86] and *Pikitup (SOC) Ltd v SA Municipal Workers*[87] dealt with medical testing within the workplace and made mention that, clauses in employment contracts and policies where drug, alcohol and medical testing are required, must be justified per section 7 of the EEA and in light of privacy rights of individuals.[88] However, constitutional rights including privacy can be limited in circumstances where it is just and equitable.[89]

V. LEGAL ISSUES EMERGING FROM *ENEVER*

(a) The balancing of rights and interests between employer and employee

(i) South Africa

In *Enever,* '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'.[90] This emphasizes that a zero-

[80] Laurens op cit note 11 at 995.
[81] *Enever* supra note 6 para 23.
[82] Ibid.
[83] Kamalesh Newaj op cit note 3 at 696-698.
[84] Ibid.
[85] Sibusiso Dube 'South Africa: Smoke at your own risk – Labour Court finds against employee who was dismissed for consuming cannabis in their own home' available at *https://bowmanslaw.com/insights/employment/south-africa-smoke-at-your-own-risk-labour-court-finds-against-employee-who-was-dismissed-for-consuming-cannabis-in-their-own-home/*, accessed on 25 June 2023.
[86] *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 377 *ILJ* 449 (LC).
[87] *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others* (1) (2014) 35 *ILJ* 201 (LC).
[88] Alan Rycroft 'Privacy in the workplace' (2018) 39 *ILJ* 725 at 732.
[89] Ibid at 747.
[90] *Enever* supra note 6 para 26.

tolerance approach hinders employees' constitutionally-protected right to privacy.[91] For example, a person may consume cannabis privately on a weekend and, when subsequently tested by their employer, may reflect a positive result despite their faculties not being impaired in the workplace. Therefore, a positive test result could lead to an employee facing disciplinary action for 'off-the-clock, private behaviour that is entirely within their constitutional rights', essentially making a zero-tolerance approach non-feasible and unfair.[92] Despite these remarks, the court did not further explore this unequal balancing of rights, which arguably tips the scale in favour of the employer.

Enever also created precedent that, regardless of whether the employee's job entailed performing dangerous acts or occupying a desk job, such as the Applicant, if they tested positive for cannabis and their employer's workplace was 'fraught with danger', the employee could be disciplined or dismissed.[93] It is established in our law however, that the fairness of a dismissal is dependent upon a number of factors. One being the nature of the employee's work, 'irrespective of the implementation of a zero-tolerance policy based on the nature of the environment'.[94] Despite what the law says, our courts seem to pay little attention to it in cannabis-related matters and thus, fail to address the unequal bargaining power between employers and employees.[95]

The court further acknowledged that the application of progressive discipline is appropriate. Whilst a company may have in place a zero-tolerance policy, dismissal as a consequence for breaching such a policy is not automatic.[96] There is room for progressive discipline depending on the facts of each case however, the courts fail to create room for a progressive discipline approach when it comes to cannabis-related issues in the workplace, which again tips the scale in favour of employers with no justification.[97]

It is therefore evident that there is an unequal balancing of rights and interests between employers and employees in this context. The court did not delve deeper into the issue as to why this unbalance is present and measures to address it. After all, the purpose of labour law requires a balancing of rights and interests between employers and employees.[98]

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[91] Laurens op cit note 11 at 995.
[92] Muller op cit note 9.
[93] Newaj op cit note 3 at 696-698.
[94] Ibid.
[95] Lentsoe op cit note 17 at 59.
[96] Newaj op cit note 3 at 696-698.
[97] Ibid.
[98] Lentsoe op cit note 17 at 27.

In other judgments, such as in *Marasi v Petroleum, Oil and Gas Corporation of South Africa (SOC) Ltd*,[99] the court determined whether testing below the limits contained in the employer's policy was an inherent requirement of the job.[100] The court found that it was. Thus, any claim for unfair discrimination will fail.[101] The court studied the nature of the employers working environment and the requirements of the applicable health and safety legislation.[102] This judgment complies with longstanding precedent by the Labour Court and confirms that such policies may still prohibit or limit the consumption of cannabis by employees.[103] It is noteworthy that in this case, the employer never prohibited the employee from consuming cannabis entirely.[104] This contrasts with other cases whereby cannabis consumption was outright prohibited. The employee in *Marasi* was free to consume cannabis provided that he maintained a certain concentration of cannabis in his system that was below the cut off level, which corresponds to a reasonable level of safety as stipulated in the policy.[105] The policy does not place 'an unreasonable burden on him to refrain from using cannabis in quantities likely to result in concentrations of cannabis in excess of this level'.[106] It is not in dispute that employees may not consume alcohol in excess of the permitted level. The same should apply to other intoxicating substances, like cannabis, without having to question the Applicant's constitutional rights.[107] This approach taken by the employer, unlike other cases, does not prohibit cannabis use at all but simply requires set limits similar to that of alcohol. *Marasi* demonstrates an adequate balance between the rights of the employer and employee.

The court's approach seems to avoid any form of progressive discipline in matters related to cannabis use despite progressive discipline being endorsed in *Enever* but found not to be appropriate in these circumstances. In *National Union of Metalworkers of SA obo Nhlabathi and 1 Other v PFG Building Glass (Pty) Ltd & others*,[108] the court dealt with employees testing positive for cannabis within the workplace and consequently breach as

[99] *Marasi v Petroleum, Oil and Gas Corporation of South Africa (SOC) Ltd* (2023) ZALCCT 38 (hereinafter referred to as *Marasi*).
[100] Ibid para 27.
[101] Ibid para 30.
[102] Ibid.
[103] Chloe Loubser 'South Africa: Another blow to the cannabis community – Labour Court rules that employer's substance abuse policy does not unfairly discriminate based on cannabis' available at *https://bowmanslaw.com/insights/employment/south-africa-another-blow-to-the-cannabis-community-labour-court-rules-that-employers-substance-abuse-policy-does-not-unfairly-discriminate-based-on-cann/*, accessed on 8 July 2023.
[104] *Marasi* supra note 99 para 20.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] *NUMSA obo Nhlabathi and 1 Other v PFG Building Glass (Pty) Ltd* (2023) 44 *ILJ* 231 (LC) (hereinafter referred to as *PFG Building Glass (Pty) Ltd*).

employees were not stationed at any machines on the day that they tested positive, they were attending training, they were not in danger and did not pose a danger to other employees, their clean disciplinary record should have been considered as no harm was suffered by the employer.[109]

In *National Union of Metalworkers of South Africa obo Cloete v Trentyre (Pty) Ltd and Others*,[110] the court decided whether dismissal was appropriate for an employee who was found under the intoxication of alcohol at the workplace,[111] and held that 'dismissal is not an appropriate sanction for every case and that each matter must be decided on its merits' and progressive discipline was endorsed.[112] In *Shoprite Checkers (Pty) Ltd v CCMA & others* case,[113] the fairness of dismissals based on zero-tolerance policies within the workplace was questioned.[114] It was held that an employer cannot adopt a zero-tolerance approach for all acts of misconduct. The appropriateness of a dismissal, or its proportionality to the misconduct requires determination.[115] Thus, there is no reason why these principles do not apply to testing positive for cannabis.[116] *Sidumo and Another v Rustenburg Platinum Mines Ltd & others*[117] was a landmark ruling that established the test to be used by judges in reviewing the awards set by Commissioners.[118] It stated that, 'in determining whether dismissal is an appropriate sanction, a number of factors have to be considered' therefore the Labour Court in *PFG Building Glass (Pty) Ltd* which found that mitigating factors plays no role in dismissals for cannabis use within the workplace, was erroneous. The court stated that these factors include:

> '[H]ow many dependants an individual has, previous disciplinary record, how many years of unblemished service he or she has rendered, whether or not the employee actually presented a danger on the day they tested positive or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied'.[119]

[109] Newaj op cit note 3 at 699.
[110] *National Union of Metalworkers of South Africa obo Cloete v Trentyre (Pty) Ltd and Others* (2016) JOL 35706 (LAC).
[111] Newaj op cit note 3 at 690.
[112] Ibid at 700.
[113] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 2581 (LAC).
[114] Ibid.
[115] Newaj op cit note 3 at 701.
[116] Ibid.
[117] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC).
[118] Ibid.
[119] Newaj op cit note 3 at 701.

Considered factors are 'whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it is justified in the workplace'.[120]

In the Commission for Conciliation, Mediation and Arbitration (CCMA) case of *NUFBWSAW obo Steenberg v RCL Foods Consumer (Pty) Ltd*,[121] the Commissioner stated that dismissing an employee after merely testing positive for cannabis and then argue its due to the job being dangerous is problematic.[122] Thus, a dismissal amounts to an infringement of an employee's constitutional right to privacy.[123] The Commissioner found it absurd that an employer is entitled to limit an employee's right to privacy regarding cannabis use, and argued that a dismissal is reasonable and justifiable.[124] The Commissioner opined that vulnerable employees who lack have access to justice to challenge these issues, are open to exploitation.[125] The Commissioner thus disagreed with *Mthembu and others v NCT Durban Wood Chips*' precedent[126] In this case, it was found reasonable to dismiss someone for testing positive for cannabis as the workplace was fraught with danger.[127] The Commissioners agreed that, while employers are obliged to provide a safe working environment, an employee is not 'under the influence' if they are a cannabis user or due to testing positive for the drug.[128] Every case must be evaluated on its own merits regarding the nature of work. Different approaches must be adopted for certain professions with approaches differing based on whether the employee is, for example, a pilot, a driver, a machine operator, general worker or gardener.[129] In *NUFBWSAW obo Steenberg*, the Commissioner stated that *Mthembu*, indicated no evidence proving that the employees were indeed 'under the influence' but for the positive test result, despite traces of cannabis may remain in a person's body for days after consumption which will lead to positive result, there was no reasonable relation between urine testing and promoting its purpose of ensuring a safe working environment.[130] It is argued in *Mthembu* that, reasonableness in terms of item 7(b)(i) of the Code of Good Practice on Dismissals should have

[120] Monique Jefferson 'Disciplinary action for testing positive for cannabis in the workplace' (2023) *De Rebus* 34.
[121] *NUFBWSAW obo Steenberg v RCL Foods Consumer (Pty) Ltd* (2022) JOL 56087 (CCMA) (hereinafter referred to as *NUFBWSAW obo Steenberg*).
[122] Ibid.
[123] Ibid para 31.
[124] Ibid.
[125] Ibid.
[126] *Mthembu v NCT Durban Wood Chips* [2019] 4 BALR 369 (CCMA) (hereinafter referred to as *Mthembu*).
[127] Ibid.
[128] *NUFBWSAW obo Steenberg* supra note 121.
[129] Ibid.
[130] Ibid.

been construed by weighing the conflicting interests of the employer with that of the employee to reach the balance required in terms of section 23(1) of the Constitution.[131]

Enever, *Mthembu*, *PFG Building Glass (Pty) Ltd* and other precedent, in my view, testify to the fact that the courts do not pay attention to the test of reasonableness of the various testing methods used and continue to sway decisions in favour of the employer without adequately protecting the rights of the employee in return. *NUFBWSAW obo Steenberg* serves as one of very few decisions whereby the courts acknowledged the imbalance and called for changes in order to rectify this issue.

(ii) United States of America

Whilst cannabis is still a Class 1 drug under US federal law,[132] meaning that 'it has no accepted medical use and has a high potential for abuse',[133] Thirty-eight states have legalised cannabis for medical use and nineteen states have legalised cannabis for recreational use.[134] Only a handful of states have however enacted statutes which provide employees protection for their off-duty cannabis sue.[135] Some states have addressed these issues by preventing discrimination against employees for off-duty use.[136] Other states have employed scientifically reliable drug testing in addition to physical evaluations which are done by 'Workplace Impairment Recognition Experts' who aim to detect or identify an employees' impairment or use of cannabis in the workplace.[137] Despite no solution being perfect, many states continue to legalise cannabis use and legislatures are encouraged to implement statutory schemes that protect the livelihood of the individuals who consume cannabis.[138] A federal policy, much like South Africa which regulates the use of cannabis by employees, is the 1970 Occupational Health and Safety Act which also requires employers to provide for a safe working environment in compliance with federal protective health and safety standards.[139]

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[131] Lentsoe op cit note 17 at 55.
[132] Fred Sherratt, Matthew Hallowell & Marzia Hoque Tania 'Marijuana use within the construction workforce: theoretical considerations and a research proposal' (2017) 7 *Journal of Construction Project Management and Innovation* 2 at 2012.
[133] John Howard 'Cannabis and work: Implications, impairment, and the need for further research' available at *https://blogs.cdc.gov/niosh-science-blog/2020/06/15/cannabis-and-work/*, accessed on 28 June 2023.
[134] Kenneth Wyatt II 'Cannabis in the Workplace: A Hazy Line Between Legalization and Discrimination' available at *https://ubaltlawreview.com/2022/10/09/cannabis-in-the-workplace-a-hazy-line-between-legalization-and-discrimination/,* accessed on 21 June 20.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Kerry Cork 'Marijuana use by employees: Drug-Free policies and the changing legal landscape' (2022) 49 *Fordham Urban Law Journal* 3 at 599.

Generally, states were allowed to make use of and enforce zero-tolerance drug-free policies, which consisted of conducting random drug tests of employees, screening of job applicants for cannabis use and discipling or dismissing employees for cannabis use.[140] Recently, however, various states and employers have become more tolerable to use the of cannabis by employees for off-duty medical and recreational cannabis.[141]

In New Jersey, the laws provide expansive protection to all employees thereby preventing employers from taking adverse action against employees who uses cannabis or tests positive for it.[142] The law also sets out specific circumstances for when an employer is able to drug test an employee and requires, on top of just a medical test, to also include 'a physical evaluation in order to determine an employee's state of impairment' which is to be performed by a 'Cannabis Regulatory Commission certified individual'.[143]

The state of California has very recently created statutory discrimination protection for employees consuming cannabis outside working hours.[144] In September 2022, the California Governor signed a new Assembly Bill (Bill 2188) which aims:

> '[T]o prohibit employers from discriminating against employees based on the employee's use of cannabis off the job and away from the workplace and a drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids'.[145]

It has been stated by the Californian legislature that the purpose of the Bill is not to permit or promote the use of cannabis in the workplace but to encourage employers to make use of scientifically relevant cannabis testing methods which are used to detect impairment as opposed to the mere presence of non-psychoactive cannabis metabolites.[146] As stated earlier, because non-psychoactive cannabis metabolites can remain present in a person's system as tetrahydrocannabinol (THC), it does not indicate that the person's faculties are impaired.[147] The presence of THC merely indicates that the person who tests positive likely consumed cannabis in the past few days or even weeks.[148] The Bill thus forces employers to make use of

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[140] Ibid at 602.
[141] Ibid.
[142] Ibid at 612.
[143] Ibid.
[144] John A Mavros 'Dazed and Confused: Cannabis in the Workplace' available at *https://www.linkedin.com/pulse/dazed-confused-cannabis-workplace-john-a-mavros*, accessed on 23 June 2023.
[145] Philip Person & Chris Cruz 'New California legislation will not allow employers to prohibit off-the-job marijuana use for much longer' (2022) 12 *National Law Review* 291.
[146] Wyatt II op cit note 134.
[147] Ibid.
[148] Ibid.

more reliable testing methods, such as impairment tests, where the emphasis is on showing current impairment as oppose to recent cannabis use.[149] The Bill does not limit an employer's ability to take legitimate disciplinary action against employees in relation to cannabis use but rather ensures that employers are only taking disciplinary action when an employee is found to be impaired at work.[150] If these protections are not in place, many employees may face disciplinary sanctions in the workplace for their legal off-duty use of cannabis and employers who continue to make use of scientifically inadequate drug testing methods to detect employee cannabis use will only continue to promote inequality in the workplace.[151] Employers have until the first of January 2024 to transition to a test that is compliant with the Bill.[152]

The case of *Skinner v. Railway Labor Executives' Association*[153] dealt with the issue of drug testing for cannabis in the workplace.[154] The majority judgment held that urine testing is reasonable given the fact that public safety outweighs an employee's right to privacy especially in environments characterised by high degree of danger.[155] The dissenting judgment however offers many positives as reasonableness of urinalysis was assessed with due diligence.[156] In the dissenting judgment, the court indicated that a positive drug screening through urinalysis is not a legitimate ground to dismiss an employee which is purely based on the constitutional right to privacy.[157]

In the USA, the social tolerance for cannabis is seemingly reflected in the workplace through more relaxed drug testing.[158] This is evident in light of the rapid pace at which societal attitudes towards cannabis seems to be changing the labour law landscape in the USA despite the fact that the federal status of cannabis as an illegal drug remains unchanged.[159]

(iii) Analysis and recommendations

In the USA, it is submitted that there is a more open approach towards accepting cannabis use, with workplaces being more lenient but also more accommodating to employees. I assert that a fundamental lesson that could potentially benefit South Africa is that, in states such as

[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] A Mavros op cit note 144.
[153] *Skinner v. Railway Labor Executives' Association* 1989 489 U.S. 602 (hereinafter referred to as *Skinner*).
[154] Ibid.
[155] Lentsoe op cit note 17 at 44.
[156] Ibid.
[157] Ibid.
[158] Cork op cit note 139 at 615.
[159] Ibid.

California and New Jersey, laws have been enacted preventing employers from taking unjust action against employees who consume cannabis or test positive for it thus equalling the playing fields and providing employees with more protection. It is thus my submission that, if South Africa adopted a similar approach and put in place similar legislation such as that in the state of California, which urges employers to make use of scientifically accurate methods before taking disciplinary action, it would help address the inequality faced by employees within the workplace. I therefore assert that having similar legislation would benefit both employers and employees, as this would still allow employers to regulate the use of cannabis while also protecting employees' rights against unfair discrimination. A sound legal framework would also help bring much needed legal certainty since there is proper legislation and guidance in place to help tackle issues related to cannabis use within the workplace. This would also relieve the burden on our courts, who have been inundated with cases dealing with cannabis in the workplace and who have struggled to effectively develop the jurisprudence of cannabis-related infringements.

It is evident that, based on my analysis, in South Africa there is a still a societal stigma against cannabis use in contrast to other countries, such as the USA where there is a growing acceptance of the drug. The proposed Cannabis for Private Purposes Bill (Private Purposes Bill), which is still making its way to parliament, aims to address the grey areas and gaps in the current legislative framework on cannabis.[160] I assert that the Bill may align South Africa's approach to cannabis with other foreign jurisdictions.

It is my submission that the best approach to cannabis use-examinations should be dealt with in a similar manner to alcohol use where additional diagnostic evidence is required to indicate impairment 'beyond the mere presence of the parent metabolite or compound above a threshold concentration applicable for safety and risk' since this provides more accurate results.[161] In addition to this, it is evident that the Private Purposes Bill[162] proposes possible amendments to the National Road Traffic Act 93 of 1996,[163] whereby 500 nanograms THC per 100 milliliters of blood is set as the standard for identifying possible drivers under the influence.[164] Prescribing set limits could also be extended into the workplace and help employers achieve a balance in protecting the privacy rights of employees whilst still ensuring

[160] Staff Writer 'New court case deals with private cannabis use and what it means for workplaces in South Africa' available at *https://businesstech.co.za/news/business-opinion/650019/cannabis-use-in-south-africa-new-court-case-clears-up-whether-employees-can-be-high-at-work/amp/*, accessed on 22 March 2023.
[161] Laurens op cit note 11 at 998.
[162] The 'Cannabis for Private Purposes Bill' (published in *GG 43595* of 7 August 2020).
[163] Ibid in terms of Schedule 5 of the Bill.
[164] Ibid.

a safe working environment. Based on my evaluation, in the recent *Marasi* case, the approach adopted by the employer was fair, as it did not prohibit employees from consuming cannabis even where there are zero-tolerance policies in place. Instead, a set limit had to be met.[165]

I therefore urge employers to develop their policies in line with an approach similar to the above. In *Enever*,[166] as well as in the CCMA decisions of *Grantham v SI Logistical Services (Pty) Ltd*[167] and *NUFBWSAW obo Steenberg*,[168] all in my analysis alluded to the fact that, where employers dismiss employees for testing positive for cannabis, this could unreasonably infringe on their rights to privacy.[169] The approach I propose thus strikes a fair balance; one which reasonably relates to the purpose of the tests itself which is to ensure a safe working environment.

(b) The challenges arising from testing for cannabis in the workplace

(i) South Africa

As mentioned above, a further challenge for employers, as mentioned above, are the methods of detecting cannabis.[170] 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' but the court mentioned that 'it is not so easy to assess if an employee who tests positive for using cannabis is under the influence'.[171] As stated by the court, it is well known as stated by the court that:

> '[U]nlike 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 or up to weeks and that tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties or indicate recent use'.[172]

The court subsequently stated that there is a need 'for a scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action'.[173]

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[165] *Marasi* supra note 99.
[166] *Enever* supra note 6.
[167] *Grantham v SI Logistical Services (Pty) Ltd* (2022) JOL 56088 (CCMA).
[168] *NUFBWSAW obo Steenberg* supra note 121.
[169] *Enever* supra note 6 para 26.
[170] Nadine Mather 'Taking your high from home to work – considering the impact of cannabis on the workplace' available at *https://bowmanslaw.com/insights/employment/taking-your-high-from-home-to-work-considering-the-impact-of-cannabis-on-the-workplace/*, accessed on 25 June 2023.
[171] *Enever* supra note 6 para 26-28.
[172] Ibid.
[173] Ibid.

In the case, while the court acknowledged the differences between alcohol and cannabis, it was stated that 'proof of impairment is therefore not needed as with alcohol and a person is automatically assumed to be under the influence of cannabis due to its intoxicating nature.' However, there was no basis for this conclusion.[174] If it is clear that impairment for alcohol cannot be determined on the basis of test results as found in various cases, then it is certainly not possible to demonstrate impairment for cannabis use since it is established that cannabis can remain in a person's system for days after consumption.[175] In this case, we know that impairment was not in issue and the main focus was the mere fact she tested positive for the drug and so contravened her employer's policy which led to her disciplinary actions.[176]
If we turn to other decisions made by the Labour Court. In *Tanker Services v Magudulela*,[177] which dealt with alcohol testing in the workplace.[178] It was held that intoxication is a matter of degree.[179] Employees are considered under the influence of alcohol if one is unable to perform required tasks.[180] Despite the employee refusing breathalyser testing in the case of *Tanker Services (Pty) Ltd*,[181] the court ruled that he was under the influence of alcohol on a balance of probabilities. Factors like slurred words, a strong alcohol scent, walking unsteadily and odd behaviour were considered.[182]

The Labour Court used this precedent in decisions such as *Scrader Automotive (Pty) Ltd v MIBC*,[183] where despite an employee undergoing a breathalyser test and exceeding the prescribed limit, the dismissal was substantively unfair given that he was a store man and there was no evidence to suggest he was intoxicated and unable to perform his duties.[184] In *Tosca Labs v CCMA*, which also dealt with the issue of alcohol testing within the workplace, the court found that whilst, breathalyser tests established the presence of alcohol in the employee's breath, there was no indication that the employee's competence was impaired.[185]

[174] Ibid.
[175] Newaj op cit note 3 at 696-701.
[176] Ibid.
[177] *Tanker Services (Pty) Ltd v Magudulela* (1997) 12 BLLR 1552 (LAC) (hereinafter referred to as *Tanker Services (Pty) Ltd*).
[178] Ibid.
[179] Newaj op cit note 3 at 688.
[180] Ibid.
[181] *Tanker Services (Pty) Ltd* supra note 177.
[182] Newaj op cit note 3 at 689.
[183] *Scrader Automotive (Pty) Ltd v MIBC* (2008) ZALC 126.
[184] Ibid.
[185] Ibid.

In the most recent Labour Court decision of *Samancor Chrome Ltd (Western Chrome Mines)* v *Rickus Willemse*,[186] brought into question the accuracy of breathalyser tests.[187] In this case, the court stressed the point that evidence obtained from breathalysers to establish the presence of alcohol in employees to warrant discipline and dismissal, are unreliable and problematic.[188] This is due to breathalysers often giving false positives in certain conditions.[189] This means that employers with zero-tolerance policies for alcohol and drugs may be required to do more than merely a breathalyser tests.[190] Overall, it is clear from this case that the fairness criteria will always be based on the totality of facts and circumstances of each case; not necessarily what the employer finds just.[191] Therefore, an employee failing a breathalyser alone, cannot automatically warrant a dismissal whereby there is a zero-tolerance policy.[192] With expert evidence, it was established that 'blood tests are more accurate than a breathalyser test' similarly, where an employee is suspected to be under the influence of cannabis and passes a positive testing through urinalysis, they should then be subject to a blood test to confirm impairment.[193]

All these cases had zero-tolerance policies in place and an employer charging an employee with being under the influence of alcohol. Employers are required to prove that the consumption of alcohol impaired the employee in carrying out their duties.[194] Despite these established legal principles regarding alcohol-related dismissals, where zero-tolerance policies are applicable, our courts avoid dealing with it in respect to cannabis-associated infractions with no basis or justifications for such.[195]

In *Grantham v SI Logistical Services,*[196] the CCMA stated that an employee testing positive for cannabis does not equate to being 'under the influence'.[197] The Commissioner in *Grantham* cited Professor Cheadles' article wherein the latter argued that a singular test result proving an employee to be 'under the influence', is insufficient.[198] The article further suggested

[186] *Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others* (2023) ZALCJHB 150.
[187] Ibid.
[188] Karabo Tshabuse 'Case law update: A warning against the over reliance on the breathalyser, in a zero-tolerance for alcohol policy in the workplace' available at *https://www.linkedin.com/pulse/case-law-update-warning-against-over-reliance-alcohol-karabo-tshabuse*, accessed on 23 June 2023.
[189] *Samancor Chrome Ltd* supra note 186 para 17.
[190] Tshabuse op cit note 188.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Newaj op cit note 3 at 689.
[195] Ibid at 701.
[196] *Grantham* supra note 167.
[197] Ibid para 20-26.
[198] Ibid.

that employers implement an 'observational check list' and to analyse recent usage via conducting a saliva test.[199] It is known that district surgeons analyse drivers to determine impairment of one's senses in drunken driving incidents.[200] The Commissioner in *Grantham* urged employers to apply these principles in the workplace.[201] When employers suspect drug use despite no evidence of employee intoxication, employers can request a clinical examination to establish an employees' intoxication on a balance or probabilities.[202] The Commissioner further held that employers should implement policies and measures to identify intoxicated employees through observation drug testing in order to exclude them from entering the workplace.[203] To test positive for cannabis should not be a dismissible offence, as per the Commissioners view, employers lack the authority to dictate employees prohibition of cannabis after work, privately.[204] Additionally, failure to employ the employee equates to discrimination.[205]

On closer examination of all the above in mind it is clear cannabis testing in the workplace is problematic since cannabis contains characteristics which complicate the testing process.[206] The active compound causing impairment is THC.[207] Many experts argue that THC's presence indicates sufficient impairment and, even though THC only lasts for a short amount of time in the body, the 'psychomotor effects,' are seen for over a week.[208] Despite scientific efforts, no reliable test can determine a state of intoxication compared to breathalyser testing for alcohol.[209] Unlike alcohol, which has threshold of 0.08 blood-alcohol level, an established level for THC is absent and requires more research and data.[210] In DRUID *study*, 'it was stated that 3.8 ng/ml THC (≈ 2 ng/ml in whole blood)' is as impairing as '0.5 g/l BAC The Metabolite'.[211] It is noteworthy that alcohol-induced impairment remains 'a much larger safety and public health problem than current cannabis-induced impairment'.[212]

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[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Sherrat op cit note 132 at 2008.
[207] V Schillack, M Wentzel & Y Essack 'The role of the laboratory in dealing with cannabis in the workplace' (2019) 25 *Occupational Health Southern Africa* 2 at 77.
[208] Sherrat op cit note 132 at 2011.
[209] Amanda Visser 'How to deal with cannabis in the workplace' 2018 *Finweek* 20.
[210] Health & Safety 'Rethinking cannabis policies in the workplace' (2020) *IMIESA* at 23.
[211] Rhys Evans 'Drug and Cannabis Abuse in The Workplace – The laws, testing and safety' available at *https://www.mmpa.org.za/wp-content/uploads/2019/10/DRUG-AND-CANNABIS-ABUSE-IN-THE-WORKPLAC-law-testing-and-safety.pdf*, accessed on 21 June 2023.
[212] Schillack op cit note 207 at 78.

Various cannabis testing methods using urine, oral fluids or hair test for cannabinoid metabolites (C-THC), not THC.[213] C-THC attaches to fat cells in the body and generates whilst THC's impairing effects wear off. It lasts for over thirty days longer than THC in the body.[214] This duration is individual-dependant based on factors such as the cannabis strain's strength, individual physiology and the frequency of usage.[215] A standard positive test for cannabis through a urine test is therefore merely an indication that the person has historically been exposed to the drug but not a confirmation of present impairment.[216] Additionally, many results are false positives.[217] Blood testing for THC should rather be considered by employers wanting to 'identify employees whose performance by may be in impaired by cannabis use'.[218] Blood testing is most accurate in estimating a person's level of impairment.[219] It requires a registered phlebotomist and consent which renders problems given the invasiveness of the venipuncture.[220]

Although testing issues and the medical definition of 'under the influence of cannabis' are undetermined, employers should be aware of 'visible signs' of intoxication of cannabis such as through 'bloodshot eyes, slurred speech,[221] poor muscle and limb coordination, delayed reaction times, increased appetite, mood changes, abrupt systems of anxiety, panic or hallucinations or a strong alcoholic scent indicate impairment.[222]

The National Workrights Institute stated that impairment testing is improving, that employers making use of impairment testing lead to minimised accidents, and it was welcomed by employees.[223] Moreover, employers stated that these tests are superior to urine testing, as it ensures a safe working environment whilst respects employees' rights to consume cannabis.[224] Impairment testing aims to evaluate the employee's real-time cognitive functions and motor skills in order to establish proof that an employee may be impaired.[225]

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[213] Sherratt op cit note 132 at 2011.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Visser op cit note 209.
[218] Macdonald S, Hall W, Roman P, Stockwell T, Coghlan M, & Nesvaag S 'Testing for cannabis in the workplace: a review of the evidence' (2010) 105 *Addiction* 3.
[219] Laurens op cit note 11 at 996.
[220] Ibid at 997.
[221] Visser op cit note 209.
[222] Haupt op cit note 2 at 158.
[223] Russel Phifer 'A sensible approach to workplace drug testing for cannabis' (2016) 24 *Journal of Chemical Health & Safety* 2.
[224] Ibid.
[225] Howard op cit note 133.

The Standard Field Sobriety Test is the most common impairment testing method which was developed by the National Highway Traffic Safety Administration in the 1970s.[226] It consists of three tests (horizontal gaze nystagmus, walk-and-turn, and one-leg stand test) performed during traffic stops to ascertain if a driver is over the Blood Alcohol Concentrations limits.[227]

The horizontal gaze nystagmus test determines if involuntary eyeball jerking eyeballs occurs.[228] When a person is under the influence, their eyeballs jerk extensively when looking from side to side following an object whilst trying to keep their head still.[229] However, this method has only 77% accuracy in determining if a person is impaired.[230]

The walk-and-turn test requires walking on a line whilst taking nine heel-to-toe steps, turning around and repeating.[231] Failure to walk heel to toe, using arms to balance, stepping out of the line or taking the incorrect number of steps indicates impairment.[232] This test is 66% accurate and may not even be challenging for individuals who are not impaired.[233]

Third, is the one-leg stand test requiring standing on one leg and holding their other leg off the ground until instructed to lower it.[234] The person conducting the test must document any swaying, the use of arms to balance, lowering of the leg before being instructed to do so or hopping.[235] This test is 65% accurate, as any person with natural coordination and balance challenges will fail.[236]

Overall, the general consensus is that employers inaccurately view being under the influence of alcohol or drugs in the workplace as a dismissible offence, which is not always correct.[237] It is argued by academics that the developing jurisprudence of cannabis related infringements within the workplace is not in alignment with the established jurisprudence regarding dismissals for alcohol use.[238] Employers ought to ensure that the occupational health and safety practitioners conducting the testing understand the organisation's policies, the bio-matrix to be employed cannabis testing and establishing 'screening and cutoff concentrations

[226] Phifer op cit note 223.
[227] Ibid.
[228] JJ op cit note 16 at 62.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid at 63.
[235] Ibid.
[236] Ibid.
[237] Stacy Lee Oberem *The Regulation of The Use of Cannabis in The Workplace* (unpublished LLM thesis, Nelson Mandela University, 2020) at 18.
[238] Newaj op cit note 3 at 701.

for THC'.[239] Employees should be informed of the consequences for not adhering to cannabis-related policies because of the potential health and safety risks of consuming the drug.[240] Employers are also encouraged to ensure 'appropriate actions such as counselling and treatment which enables the employer to deal with the situation in an appropriate manner without having to resort to disciplinary action which in most instances results in dismissals'.[241]

(ii) Canada

In October 2018, the use of cannabis for recreational purposes was officially legalised in Canada, which was approximately the same time that cannabis for privative consumption was legalised in South Africa.[242] It is evident that South Africa's Constitution and the Canadian Charter share many parallels.[243] Our courts often refer to Canadian law in many of their decisions.[244] The issues surrounding cannabis use and drug testing in the workplace has also been prevalent in the USA and Canada.[245] Canadian laws and policies relating to cannabis use in the workplace has largely been influence by its neighbouring country the USA.[246] Similar to South Africa, employers are obliged under section 2(1) of the Occupational Health and Safety Act to enhance the safety within their workplaces and to adopt appropriate codes and standards.[247] They are expected to take all the necessary precautions and to exercise due diligence in order to ensure employees are safe.[248] Employees, are also expected to ensure their conduct does not put the health and safety of other employees at risk.[249]

With regards to testing of cannabis in the workplace, a lot can be learnt from Canada's jurisprudence. In the case of *Entrop v. Imperial Oil Ltd* 2000,[250] a fine line was drawn between cannabis and alcohol testing.[251] It was stated that 'random testing of cannabis through urine

[239] Piet Bester & Sonja Els 'The legalisation of cannabis: A security-vetting dilemma' (2021) 49 *Scientia Militaria: South African Journal of Military Studies* 2 at 20.
[240] Ibid.
[241] Warren Beech 'Has the employer's right to dismiss for being under the influence of cannabis at work gone up in smoke?' (2020) 20 *Without Prejudice* 11 at 16.
[242] Nancy Carnide, Hyunmi Lee, Victoria Landsman, Michael R Frone, Andrea D Furlan & Peter M Smith 'Cannabis use and workplace cannabis availability, perceptions and policies among Canadian workers: a comparison before and after the legalisation of non-medical cannabis' (2022) *Occup Environ M* 79 at 824.
[243] Lentsoe op cit note 17 at 45.
[244] Ibid.
[245] Kebogile Mokwena 'Social and public health implications of the legalisation of recreational cannabis: A literature review' (2019) 11 *African Journal of Primary Health Care and Family Medicine* 1 at 4.
[246] Ibid.
[247] JJ op cit note 16 at 73.
[248] Ibid.
[249] Ibid.
[250] *Entrop v. Imperial Oil* 2000 137 O.A.C. 15 (CA) (hereinafter referred to as *Entrop*).
[251] Ibid para 12.

does not disclose that the person is impaired at the time of the test, but only shows the presence of metabolites which only discloses cannabis consumed in the past', as opposed to alcohol testing, which is able to detect actual impairment.[252] *Entrop* thus declared that alcohol testing in the workplace has a reasonable connection to the purpose of the test but, in contrast to cannabis, it was declared unreasonable since urinalysis is incapable of promoting its aims of ensuring safety.[253] As quoted in the judgment, 'urinalysis is not justified as a *bona fide* occupational requirement because it was not reasonably necessary to further the goal of protecting workplace and public safety',[254] as in South Africa's Constitution, the limitation clause requires the limitation (drug testing policy) to be capable of promoting its purpose (of ensuring workplace safety).[255]

In the case of *Imperial Oil Ltd v Communication, Energy and Paperworkers Union of Canada, Local 900*, 2009,[256] an employer adopted the approach taken in *Entrop* and utilised a random drug testing policy with a more modern technology testing program which consisted of saliva samples otherwise known as 'oral fluids test'.[257] The employer argued that that the approach conformed with that of the case *Entrop*, and stated that saliva tests are accurate and effective since it shows the likelihood of impairment as a result of using cannabis at the time of test thus connected to the rational purpose of the test which is to ensure safety.[258] The employer made mention to scientific studies which show that a person after being tested by a random oral fluid test is most likely is likely to be impaired.[259] The court dismissed the employers' submissions and stated that saliva drug testing is unreasonable.[260] The employers' approach to testing was more in line with the approach found in the case of *Entrop* and the dissenting USA judgment in *Skinner*.[261] It has been argued by various academic scholars such as Professor Cheadle that saliva testing does indeed strike a fair balance between workplace safety and the employee's right to privacy, and could reasonably determine if someone is under the influence of cannabis at the time that the test is conducted.[262]

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[252] Lentsoe op cit note 17 at 47.
[253] Ibid.
[254] Ibid at 48.
[255] Constitution, s 36 (1)(a)-(e).
[256] *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900*, 2009 ONCA 420.
[257] Ibid.
[258] Lentsoe op cit note 17 at 48.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Martha Smit & Roxanne Gilbert 'Constitutional Court, cannabis, caveats and… Canada' (2020) 20 *Without Prejudice* 1 at 16.

Despite the challenges to measure cannabis impairments in Canada, it has been shown that behavioural-based impairment testing acts as an existing practice, which circumvents the problems of biological tests.[263] In Canada, employers are not the only ones expected to regulate cannabis use, the State is also obliged to do so.[264] In the context of driving, a test known as the Standardised Field Sobriety Test is conducted by police who have been trained to detect impaired drivers.[265] If a police officer 'suspects a driver to be impaired, the driver will possibly be required to undergo an examination through behavioural and physical tests to establish impairment by the officer who has been trained as a Drug Recognition Evaluator'.[266] Section 254(2)(*a*) of the Criminal Code of Canada deals with the coordination tests, which consist of those such as the walk-and-turn test, the horizontal gaze nystagmus test and various others .[267] In addition to these coordination tests, a police officer may get a medical professional or other qualified person to conduct a blood test on person who is suspected of being impaired of cannabis.[268] Where the blood test reflects more than 2 nanograms of THC per millilitre of blood, that person will then be guilty of driving under the influence of cannabis.[269] These tests have been proven to have low effectiveness in deducing cannabis impairment[270] however the combinations of these coordination tests, together with blood tests, offer the best approach to a problem which has no perfect solution as yet.[271] This test, which could be adopted by employers, may act as an option to identify impairment without causing any undue hardship to an employer.[272]

The case of *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20[273] also dealt with the testing of cannabis within the workplace. The court stated that a coordination test should be used to establish if impairment is present and only if the employee fails this test would they then be subjected to a drug test.[274] This is the same stance adopted by Canada when

[263] Kelsey Van Pelt *Cannabis Impairment in the Workplace: A Jurisdictional Analysis of Drug Testing Policies and Recommendations in the Context of Canadian Legalization and Regulation* (Master of Public Health in The Faculty of Health Sciences, Simon Fraser University, 2017) at 12.
[264] JJ op cit note 16 at 73.
[265] Smit op cit note 262 at 16.
[266] Ibid.
[267] JJ op cit note 16 at 76.
[268] Ibid.
[269] Ibid.
[270] Van Pelt op cit note 263 at 12.
[271] JJ op cit note 16 at 77.
[272] Ibid at 74.
[273] *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*. 2020 NLCA 20 (hereinafter referred to as *International Brotherhood of Electrical Workers*).
[274] JJ op cit note 16 at 78.

trying to establish if a person is impaired.[275] The evidence of this approach, in the absence of any other effective one, makes it more reliable and thus increases the probatory proof of proving current impairment.[276]

(iii) Analysis and recommendations

Based on my evaluations, despite no scientifically accurate method being available, in Canada we can see how employers and even the state makes use of various other tests and methods in an attempt to identify cannabis-induced impairment. The courts in Canada acknowledge the fact that testing for cannabis by way urinalysis has no rational connection to the purpose of the test in the first place which is to ensure a safe working environment. As has been analysed above, the use of oral fluid testing, for example, serves a greater chance of detecting actual impairment however behavioural-based impairment testing, together with blood testing, serves as the most effective current approach. This approach was even endorsed by the court in the *International Brotherhood of Electrical Workers* case and is utilised by Canada. So, whilst this approach may have its flaws, I contend that it is the only one which currently brings us the closest to establishing impairment.

In South Africa, many employers as found in the case of *Enever*,[277] continue to make use of urine tests to determine whether an employee has consumed drugs and it is unheard of for employers to make use of the Sobriety Test. There is much difficulty in getting employers to accept this form of impairment testing as there is an expense to equip employees to perform them and based on the frequency of the drug testing it may lead to high overall costs.[278] In my analysis, it is evident that the courts continue to endorse the view that, for as long as an employee tests positive for cannabis, they can be subject to disciplinary action or dismissal which is contrary to section 23 of the Constitution and the fairness criteria of dismissals as found in the LRA.

It is also well established that employers can set their own standards and policies when it comes to testing but are obliged to ensure that such are defendable and reasonable if contested.[279] A legally defensible approach would thus entail considering an analysis of THC,

[275] Ibid.
[276] Ibid
[277] Phifer op cit note 223.
[278] Ibid.
[279] Sibusiso Dube 'South Africa: Smoke at your own risk – Labour Court finds against employee who was dismissed for consuming cannabis in their own home' available at *https://bowmanslaw.com/insights/employment/south-africa-smoke-at-your-own-risk-labour-court-finds-against-employee-who-was-dismissed-for-consuming-cannabis-in-their-own-home/*, accessed on 25 June 2023.

the psychoactive component in cannabis.[280] Employers should also consider the 'performance-behavioural effects', and related 'threshold concentration level'.[281]

I submit that the best method, where an employee is considered to be under the influence, will be where they are required to undergo the various physical coordination tests which are to be conducted by medical professionals together with a saliva test which is able to establish recent use. Upon my evaluation, once it has been established that the employee is indeed impaired through failure of the physical coordination tests and a positive test result showing cannabis in the system, the employee must then undergo a blood test also conducted by a medical professional to confirm this impairment and establish if the person is over a set THC limit. Due to the invasiveness of blood tests, it would be wise for employers however to stipulate clearly in their employment contracts that employees are required to undergo blood test to confirm cannabis-induced impairment so to avoid any unjust infringements of an employees' rights.

In essence, given all the above, an employer may accept on a balance of probabilities that the employee is indeed under the influence of cannabis and so will have sufficient grounds to dismiss an employee or impose corrective sanctions which may include warnings and/or mandatory training based off the seriousness of the transgression.[282] After all, multiple tests being used to establish impairment is far better than one simple test such as urinalysis, which is what most employers conduct in their workplaces within South Africa.

VI. CONCLUSION

In conclusion, it is evident that South Africa still has a long way to go in terms of fully realising the right to privacy in the context of consuming cannabis. Whilst recent decisions such as *Marasi, Grantham* and *NUFBWSAW obo Steenberg* serve as a potential shift in the existing jurisprudence for cannabis use in the workplace, there is much to be learnt from foreign countries such as the USA and Canada. These jurisdictions are much more ahead in terms of effectively regulating and addressing cannabis related issues. The proposed Cannabis for Private Purposes Bill has the potential to bring about the change drastically needed to steer the

[280] Laurens op cit note 11 at 995.
[281] Ibid.
[282] Pierre de Vos 'Cannabis testing in the workplace: the CCMA got it wrong' available at *https://www.dailymaverick.co.za/opinionista/2019-05-16-cannabis-testing-in-the-workplace-the-ccma-got-it-wrong/*, accessed on 18 March 2023.

legalisation of cannabis in South Africa on a fair and equitable path for all and provide much needed guidance for employers on how to effectively test for cannabis impairment and balance the conflicting rights between employers and employees.

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