THE APPLICATION OF CONSISTENCY OF TREATMENT IN DISMISSALS FOR MISCONDUCT

1 Introduction

Fairness in employment necessitates that the employer apply consistent disciplinary standards in the workplace, so that employees who commit the same or similar disciplinary infraction are treated equally. The Code of Good Practice: Dismissal (in Schedule 8 of the Labour Relations Act 55 of 1995) sets out a range of guidelines to be applied by the employer before a decision to dismiss an employer may be taken. It seeks to protect employees from arbitrary action by the employer in order to achieve a measure of employment justice (item 1(3)). Employers must therefore apply the rules of the workplace consistently by effecting discipline against all employees accountable for similar misconduct (item 3(1)), and also by applying the same sanction for similar infractions (item 4(6)).

The principle of consistent treatment of employees is referred to as the "parity principle" (Grogan *Dismissal* (2010) 151). It provides that employees who participate in the same or similar wrongdoing, with no distinguishing factors from one case to another, should be penalized in the same way. The foundation of the principle lies in the notion that similar cases must be treated in a similar fashion. It is based on the principle of reasonableness in that fairness in the workplace requires the application of reasonable rules, and not arbitrary or irrational opinions of the employer (Le Roux and Mischke "Parity, Fairness and Dismissal: What Does Consistency Mean in the Context of a Dismissal for Misconduct?" 2005 15(5*) Contemporary Labour Law* 42). Reasonable rules will reflect generality and equality and invariably lead to legal certainty, and a failure by the employer to apply those standards consistently may lead to a finding that the employer acted unfairly in dismissal disputes.

In addition to the requirement of consistency, an employer is required to consider a range of other factors before taking the decision to dismiss an employee. These include the gravity of the misconduct; the nature of the work performed by the employee; the circumstances under which the infraction occurred; and the employee's personal circumstances which may relate to the previous disciplinary record of the employee; his/her length of service and the employee's personal circumstances (item 3(5) of the Code). The consideration of these circumstances often leads to a tension between applying the requirement of consistency on the one hand, and the need to take into account the specific circumstances of the employee and circumstances of the misconduct.

This comment explores the different approaches adopted by the courts in determining whether or not inconsistent treatment by the employer justifies a finding that the dismissal of an employee was unfair in view of the obligation to take into account the other factors required in the Code.

These issues often arise in circumstances where an employee is dismissed by an employer and claims that the employer acted unfairly because other employees were given less severe sanctions for the same or similar misconduct. In deciding the fairness of the matter, the courts have drawn a distinction between individual misconduct and collective misconduct. Historical inconsistency is generally applied in cases of individual misconduct, whilst contemporaneous inconsistency is applied in circumstances of collective misconduct.

2 Historical inconsistency

If the employer dismisses an individual employee for misconduct, but failed to discipline other employees or imposes a lesser sanction on others, such as a warning, for the same or similar misconduct, then the employer may be required to answer a case of unfair dismissal based on inconsistency.

The approach of the court has been that the employer has acted unfairly where it fails to provide a fair and objective justification for the differential treatment of dismissed employees. A classic example of this approach is to be found in *Edgars Consolidated Ltd (Edcon) v CCMA* ([2009] 1 *BLLR* 56 (LC)). An employee was dismissed for sending an email with racist content to persons outside the company. Such emails were prohibited by company policies. The employee challenged the fairness of the dismissal, arguing that there was no consistency of treatment because the employer had not taken disciplinary measures against the employee who originally sent the email to the dismissed employee. The Labour Court found that on the facts before it, both employees were guilty of the same misconduct, and the employer was found to have acted unfairly because of its failure to discipline the other employee without providing satisfactory justification for this failure to act (par 20). A similar approach was taken in *Chetty v Toyota South Africa* (unreported case no D224/06 dated 4 February 2011 par 21), where the employer dismissed the employee for racial utterances when a previous employee had been given only a warning for similar misconduct.

An argument by an employer that it wishes to deter other employees from similar misconduct will not suffice as a fair and objective justification for the inconsistent treatment. In *Minister of Correctional Services v Mthembu NO* ((2006) 27 *ILJ* 2114 (LC)), the court found in favour of a warden who had been dismissed where the employer had taken more lenient measures against similar offenders in the past. The court took the view that the dismissal was a "knee-jerk" reaction by the department to recent revelations of corruption in country prisons, which it was attempting to address (par 19). The rationale behind the finding of unfairness is that the employee needs to be aware, by the employer's conduct, of the consequences of misconduct. This prevents the employer from applying sanctions or discipline in a

retrospective fashion, as the less severe penalty (or failure to take action) that was imposed previously would have given employees the impression that they would not be dismissed for that particular infraction. Nicholson JA in *Gcwensha v CCMA* ((2006) 27 *ILJ* 927; [2006] 3 *BLLR* 234 (LAC) par 36) stated that "disciplinary consistency is the hallmark of progressive labour relations that every employee be measured by the same standard". A rigid application of this formulation of consistency of treatment for employees, however, may compel employers not to dismiss employees for serious misconduct that would ordinarily justify dismissal merely because previous employees were not dismissed. This is well illustrated by the decision in *Westonaria Local Municipality v SALGBC* ([2010] 3 *BLLR* 342 (LC)). The employee was dismissed from the municipality after it was discovered that she did not have the requisite Grade 12 for the position in which she was employed. In defence to a claim of inconsistency by the employee, the municipality argued that the previous employee was not dismissed because she had entered into a plea-bargaining agreement in terms of which she agreed to testify in a case of alleged corruption against another employee. Furthermore, that position did not require a Grade-12 qualification. The Labour Court focused on the historic attitude of the employer. It found that the employer did not apply a zero-tolerance approach to acts of dishonesty. It held that a consistent standard was not applied in determining the present employee's penalty (par 28). The employer is responsible for setting standards of conduct to which employees must conform. The employer must apply this standard consistently. If the employer does not apply the standard consistently then it would lead to the conclusion that non-compliance with the standard will not be regarded as serious enough to warrant a dismissal (par 27).

An employer may circumvent the rigid application of historical consistency by informing employees of a new standard or policy not consistent with past practices. Where an employer decides to inform employees of a new sanction or new policy on misconduct, the court is less inclined to find unfairness on the basis of historical inconsistency. This position is illustrated in *Consani Engineering (Pty) Ltd v CCMA* ((2004) 25 *ILJ* 1707; [2004] 10 *BLLR* 995 (LC)), where the company's management introduced a zero-tolerance approach to theft perpetrated by employees. When an employee was dismissed after the adoption of this policy his claim that another employee had not been dismissed, six years previously for a similar offence, failed. The court held that consistency is not a "hard and fast rule", but rather only one of the factors to be taken into account in determining fairness. The court found that an employer is justified in changing its policies to reflect changes in its operational requirements. It held (par 19) that:

> "Shifts in policy inevitably introduce standards not consonant with past practices. The applicant's change in policy to one of zero tolerance hence can be fairly regarded as a legitimate modification of the operational means for protecting the company from ongoing stock losses. Any ensuing element of inconsistency cannot be considered arbitrary or in bad faith in the circumstances."

An employer is also likely to escape liability where it is able to provide a sound justification for not applying consistency. The employer must prove that the difference in disciplinary measures taken are *bona fide* and for the benefit of the workplace, in circumstances where other considerations, in fairness to the parties, outweigh the need for consistency. (see also *Cape Town City Council v Masitho* (2000) 21 *ILJ* 1957 (LAC) par 14; and *SVR Mills (Pty) Ltd v CCMA* (2004) 25 *ILJ* 135; [2004] 2 *BLLR* 184 (LAC) par 18). These considerations include the gravity of the misconduct; aggravating and mitigating factors; and the previous disciplinary conduct of the employee concerned.

The gravity of the misconduct in the circumstances of the affected employee is likely to tip the scales in favour of the employer's justification for differential treatment. In *Nel v Transnet Bargaining Council* ([2010] 1 *BLLR* 61 (LC)), a senior employee was dismissed after he had failed to disclose a gift from a customer to attend a trip to a golf estate. His claim of fairness on the basis of inconsistency failed because the court accepted the employer's justification that the misconduct was more serious in his case as he was a senior staff member, whilst the other employee, who was given a warning for the same misconduct, was a junior staff member. In this case the conduct of the employees could further be distinguished because, on the facts, a mitigating factor was that his colleague was invited to the event by a personal friend and did not attend in his official capacity. The Labour Court took the view that the gravity of the offence is a vital factor in determining whether the employer was justified in imposing different sanctions for similar misconduct (par 34).

By the same token, mitigating factors would provide an objective justification for the employer who treats their employees inconsistently to argue that the circumstances of the misconduct were not equally grave. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* ((2008) 29 *ILJ* 1180; [2008] 3 *BLLR* 241 (LC)), the court found that the employer had acted fairly when it dismissed one employee, who had orchestrated the unauthorized dispatch of goods to her daughter, and gave a warning and suspension to the other employee who failed to follow proper procedure in documenting the release of the goods. A factor taken into account by the court was that in the case of the dismissed employee, there was a breakdown of the relationship as the employee had shown no remorse for her actions (par 48). The court held further that the presence of dishonesty on the part of the employee tips the scales in favour of dismissal of an employee (par 43). In *Southern Sun Hotel Interests (Pty) Ltd v CCMA* ((2010) 31 *ILJ* 452; [2009] 11 *BLLR* 1128 (LC)), employees who were dismissed for the unauthorized consumption of food claimed unfairness when an employee was treated lightly by the employer because of the consideration of mitigating factors. The employee contended that he was on medication for a mental illness. He admitted to the unauthorized consumption of food. However, he explained that on that day he had left his lunch at home and was required to eat food before taking his medication. The employee showed remorse for his wrongdoing and his mental illness

was a fair and objective reason for distinguishing the employee from the group of offenders (par 26).

Furthermore, the disciplinary history of individual employees can be a justifiable reason to treat them differentially. Where one employee is on a final written warning for an infraction and another employee commits the same infraction for the first time, the employer is justified in taking into account this factor in deciding what measure to take against the employee (*Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 *BLLR* 541 (LAC) 545H-J).

The consideration of these factors will invariably lead to some inconsistency of treatment between employees. However, it is argued that the overriding consideration of fairness permits and in some instances requires a deviation from consistency to maintain discipline in the workplace.

3 Contemporaneous inconsistency

The difficulty with contemporaneous in consistency is that a group of employees may collectively commit an offence and the employer is hard-pressed to impose a similar sanction where the employees do not share the same personal circumstances. Previous final warnings are often significant in determining the appropriate sanction for collective misconduct and are frequently the basis for justified differential treatment of employees. The courts, however, have taken the view that employees who engage in collective misconduct should be treated alike, regardless of their previous infractions. This approach was formulated in in *NUM v Free State Consolidated Gold Mines (Operations) Ltd* ((1995) 16 *ILJ* 1371; [1995] 12 *BLLR* 8 (A)), where employees engaged in a national stay-away and were charged with absence from work. Only those employees with prior warnings were dismissed. The court considered that each employee individually made the decision to participate in the collective action (378B). However, the misconduct committed by the dismissed employees was substantially of the same kind and degree as those who were given warnings for the misconduct. In deciding whether an individualized approach should be applied to determining sanctions for collective misconduct, Nestadt JA found it unfair and inequitable to apply selective dismissal for the collective misconduct (379E). Similarly, in *SACTWU v Novel Spinners* ([1999] 11 *BLLR* 1157 (LC)), employees were charged with absenteeism when they collectively refused to work for a period of three hours. The employer dismissed employees who were on final warning for absenteeism.

The court formulated the approach that once a worker engages in collective misconduct, individual records become irrelevant in determining the sanction. It found that selective dismissals for collective offences were not fair because employees may have had no choice other than to participate in collective action as members of a union or they might have participated for fear of victimization (par 44). In *SATAWU v Ikhwezi Bus Service (Pty)* Ltd ((2009) 30 *ILJ* 205; [2008] 10 *BLLR* 995 (LC)) the court also took this approach and rejected the employer's operational justification for not dismissing bus drivers who had no previous disciplinary infractions.

The company argued that it could not afford to dismiss a large number of drivers, so it dismissed only those with previous, similar disciplinary infractions. The court held that the prior disciplinary sanctions of the individual employees could not be used to justify a differentiation in penalty and that the employer "has no choice but to impose the same sanction in respect of all employees engaged in the collective misconduct", however compelling the commercial reasons for the decision (par 25). In *NUMSA v Henred Fruehauf Tailers (Pty) Ltd v National Union of Metalworkers of SA* ((1992) 13 *ILJ* 593 (LAC)), the court again rejected the employer's commercial justification for applying individualized sanctions. In this case, the two thousand employees embarked on an unlawful go-slow. The employer took a decision to dismiss forty-four employees in one branch of its business because it was the only branch where it could ascertain objectively productivity levels accurately, and thereby adduce evidence of the go-slow. The court found that such a decision was arbitrary (600I) and that it was unfair because there was no way of knowing if all the employees were engaged in the go-slow. The court held (601I-J), in context of a go-slow that if most employees worked normally, "but a few respondents had deliberately delayed the process, all the respondents would have been affected by the delaying tactics of the few and would have been unable to achieve their production goal". This decision was, however, overturned in *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* ((1994) 15 *ILJ* 1257; [1995] 2 *BLLR* 1456 (AD)), where the court found that equity requires that all the employees ought to have been disciplined in the same fashion. The court found that the selection of just one branch of employees to be punished for misconduct involving all the employees of the business offended the basic tenets of fairness (1264A).

The focus of these judgments has been the notion that fairness to the *employees* must require that the employer treats all employees alike fairly for the same infraction committed at the same time. However, the courts have on occasion, viewed this issue from the perspective of the purpose of discipline in the workplace. In *NUM v Amcoal Colliery t/a Arnot Colliery* ((1992) 13 *ILJ* 1449 (LAC)) only employees who had prior final warnings for earlier, similar misconduct were dismissed when a group of employees refused to obey a lawful instruction given by the supervisor. The court held that the dismissals were fair, because employees on final warning are aware that further transgression would lead to dismissal, and a sanction other than dismissal in these circumstances "would have been at odds with logic and the very purpose of punishment" (par 8). The court rejected the notion of a single, collective sanction and held that the parity principle "was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence" (par 19). Thus, the court held that an existing disciplinary record may justify differentiating between employees guilty of the same misconduct.

The seriousness of the collective misconduct has also tended to sway the court in accepting individualized imposition of sanctions. In *SACCAWU v Irvin & Johnson Ltd* ((1999) 20 *ILJ* 2302; [1999] 8 *BLLR* 741 (LAC)) only employees on final warning were dismissed for violent mass demonstrations

as part of an illegal strike. Conradie J found that the "parity principle" is only one of the factors to be taken into account in determining fairness, and that, in cases of mass misconduct a standard of reasonable, rather than absolute consistency, would suffice. The effect of a rigid application of consistency would mean that employees who have committed serious offences are allowed to escape sanction for the sole purpose of preserving the sanctity of consistency, which is, in any event only one of the requirements of fairness (par 29). The court was loath to reinstate employees who had been shown to behave violently to such an extent that other employees had been too afraid to testify against them (par 31). Whilst the facts of this case are not common, the principle adopted by the court is that a guilty employee cannot simply escape sanction because some other employee has done so.

4 Conclusion

In matters of individual misconduct, the courts have adopted a fairly consistent approach in finding that the employer must apply the same sanction to similar cases. The offending employee must be treated in the same way that previous offenders have been treated, unless other considerations of fairness justify a deviation. In doing this, fairness requires the employer to make a comparison by taking into account all the features that are usually relevant where one employee commits an offence. The employer must show some differentiating circumstance to prove that the misconduct of the dismissed employee was more serious and therefore, deserved a more severe disciplinary measure.

In the case of collective (or mass) disciplinary action, the matter takes a different set of considerations. Where there are real grounds for distinguishing between the guilt employees, then the differential treatment is justified. Employers should be discouraged from dismissing not employees for misconduct that justifies dismissal, merely because previous employees were not dismissed. For the employer, the decision to apply consistency and dismiss all the offending employees, does not often make economic sense. The choice to select some employees for dismissal, whilst justifiable for commercial reasons, exposes the employer to a finding of unfairness by the courts when the court chooses to trump rigid consistency over the employer's operational needs. Despite the attempts by the courts to adopt a strict approach to applying the parity principle, it appears that due to the notion of fairness the application of consistency must be determined on a case-by-case basis and therefore, remains largely inconsistent.

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