# SOME COMMENTS ON THE APPROPRIATENESS OF DISMISSAL AS A SANCTION IN MISCONDUCT RELATING TO SHRINKAGE

## 1 Introduction

The circumstances under which an employer may dismiss an employee for misconduct are clearly stated in item 3(5) of the Code of Good Practice: Dismissal contained in Schedule 8 of the Labour Relations Act 66 of 1995. It provides that a decision to dismiss an employee for misconduct necessitates an interrogation of a number of competing factors including the gravity of the misconduct; the circumstances of the infringement; the nature of the job performed by the employee; and the employee's circumstances (which include length of service, previous disciplinary record and personal circumstances). In this note, the author peruses some of the recent cases which have attempted to balance these competing interests to achieve fairness between the parties.

## 2 Conventional wisdom to shrinkage or dishonesty

A person tasked with deciding whether the employer acted fairly in dismissing an employee would inevitably have to assess the extent to which the employer effectively considered all these factors in order to evaluate the fairness or otherwise of the dismissal. The question to be asked would be, given all these factors which (including the personal circumstances of the employee and the seriousness of the misconduct) is whether dismissal was the appropriate sanction in the circumstances. The difficulty for decision-makers is to weigh up one set of these factors around the employee's interests (*ie*, the employee's personal circumstances, length of service, previous disciplinary record) against the employer's interests (*ie*, the seriousness of the misconduct) in order to reach a decision that is fair to both employer and employee.

In terms of item 3(4) of the Code of Good Practice: Dismissal, the sanction of dismissal is only appropriate where the misconduct is so serious that it makes a continued employment relationship intolerable. An example of this type of misconduct is gross dishonesty, where the employer suffers some shrinkage of product as a result of theft or consumption by employees. The rationale behind these guidelines in the Act is that the employer can dismiss where the employee imposes an operational risk to its business, in the form of shrinkage or potential shrinkage. The employer has an interest in safeguarding itself from such conduct. Grogan (*Dismissal* (2002) 99), puts it in these terms:

> "An employer has two reasons for wanting to rid itself of a dishonest employee. One is that the employee can no longer be trusted. The other less frequently acknowledged but no less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deterrence theory of punishment. The question to be asked is whether a

> repetition of the misconduct, either by the same employee or by others, will adversely affect the employer's business, the safety of the workforce and/or the employer's trading reputation."

This view has been a general, traditional approach to dismissal for reasons of dishonest conduct.

Where the employee has been found guilty of some act of dishonesty, (usually theft, attempted theft or fraud), the attitude of the labour courts has been to adopt a strict approach that dismissal is almost always the appropriate sanction. Far greater weight has been attached to the gravity of the misconduct, than the personal circumstances of the employee. A classic example of this view can be found in the case of *Leonard Dingler v Ngwenya* (1999 20 ILJ 1171; [1999] 5 BLLR 431 (LAC)). The Labour Appeal Court accepted that the dismissal of an employee was an appropriate sanction where he had removed a few boards worth R8.50 each. Notwithstanding the fact that he had been employed for over 7 years and had a clean disciplinary record, the court took into account the fact that the employer had experienced theft on a large scale, and that the dismissal of the employee acted as a deterrent against other acts of theft. The court also took into account that the employee's conduct had been premeditated and that the employee had lied during his evidence in the court *a quo*. These factors, taken together, led the court to find that dismissal was appropriate as "no viable employer-employee relationship remained" (par 78).

A similar approach was adopted in *De Beers Consolidated Mines v CCMA* (2000 21 ILJ 1051;[2000] 9 BLLR 995 (LAC)), where the court accepted the fairness of the dismissal of employees who had length of service of 13 and 18 years and were found guilty of misconduct after they had claimed overtime that had not been worked. Conradie J (par 22) held that:

> "Long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability. Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same."

He took the view that the length of service of an employee could not be regarded as a mitigation factor as the act of dismissing an employee is "a sensible operational response to risk management in the particular enterprise". The length of service is only relevant in measuring the likelihood of the employee repeating the offence (par 24), which must be weighed against the operational risk to the employer, particularly in circumstances where the employee showed a lack of commitment to reform.

A stricter approach to dishonesty as a form of serious misconduct was adopted in *Rustenberg Platinum Mines Ltd (Rustenberg Section) v National Union of Mineworkers* (2001 22 ILJ 658 (LAC)), where the employee had been employed as a cleaner for a period of 15 years and had been found guilty of dishonesty after she attempted to remove meatballs from the kitchen where she worked. The Labour Appeal Court confirmed the decision to dismiss the employee on the basis that "dismissal in these circumstances" was justifiable and that the employee worked in "close proximity of food which can easily be stolen" (par 22). There was little weight attached to the employee's

circumstances in reaching the decision (see also *Toyota SA Motors (Pty) Ltd v Radebe* 2000 21 ILJ 340; [2000] 3 BLLR 243 (LAC) par 16).

In *Consani Engineering (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration* (2004 25 ILJ 1707; [2004] 10 BLLR 995 (LC)), the court went further and attached no weight to the factors of personal circumstances and found that:

> "a worker with an unblemished record, as is the case in the present case, can not after an incident relating to an act of dishonesty, continue to be trusted. It is the operational risk to the business of an employer that arises from the dishonest conduct that cancels off whatever good record the worker may have had before the commission of the offence."

In this case, the employer was found in unauthorized possession of a roll of rubber tape that was concealed under his jacket. He pleaded guilty to theft at the inquiry and was dismissed. The employer had led evidence of significant stock loss to support its dismissal decision. This approach was also adopted in *Kalik v Truworths Gateway* (2007 28 ILJ 2769; [2008] 1 BLLR 45 (LC)). The court went even further and found that the length of service of an employee (and other mitigating factors) could not be measured against the circumstance where the employment relationship had broken down arising from an act of dishonesty by the employee (par 27). In this case an employee was found guilty of dishonesty because she took a cosmetic testing sample from the store without permission (this judgment is quoted with approval in *MEC for Health (Gauteng) v Mathamini* 2008 29 ILJ 366 (LC)).

## 3 The conventional approach to dismissal revisited

Three recent cases have suggested that the employers needed to examine their attitude towards effecting a dismissal in misconduct cases relating to shrinkage closely.

The first challenge to this approach was found in S*idumo v Rustenberg Platinum Mines Ltd* (2007 28 ILJ 2405; [2007] 12 BLLR 1097 (CC)). In summary the facts were that a security officer, who was responsible for access control at one the mines of the employer, was required to search persons exiting the premises. At an inquiry undisputed video surveillance showed that he did not perform searches at all on at least eight occasions, and on 15 occasions he did not perform them according to the established procedures and that he allowed persons to sign the search register when no search had been conducted. He had been found guilty of negligence for failing to conduct the searches in accordance with established procedures. The matter was referred to the CCMA which held that his dismissal was fair, taking into account that no actual losses could be proved by the employer; that his violations were a mistake or unintentional; and that he had 15 years' service with the employer. The CCMA commissioner placed a great deal of weight in finding the sanction of dismissal too harsh (and thereby unfair) because offence did not "go into the heart of the relationship (with the employer), which is trust". It was also taken into account that he was not charged with a grave offence of dishonesty. He was accordingly reinstated, and the employer took the matter on review to the Labour Court, but it was unsuccessful on the basis

that the court could find no gross irregularity in CCMA proceedings. An appeal was lodged with the Labour Appeal Court which confirmed the decision of the CCMA commissioner, and the employer appealed to the Labour Appeal Court, which dismissed the appeal and found that the employee's clean record and lengthy service were a fair basis to find that the dismissal was too harsh a sanction (*Rustenberg Platinum Mines Ltd (Rustenberg Section) v CCMA* [2004] 1 BLLR 34 (LAC) par 13). This decision was taken on appeal to the Supreme Court of Appeal, on the basis, *inter alia*, of a challenge to the ambit of duties of a Commissioner in terms of the Labour Relations Act. The Supreme Court of Appeal (*Rustenberg Platinum Mines Ltd v (Rustenberg Section) v CCMA* (2006 27 ILJ 2076; [2006] 11 BLLR 1021 (SCA)) found in favour of the employer, for a range of reasons, one of which was that discretion on what sanction is appropriate belongs "in the first instance with the employer" (par 40), supporting the finding in *Country Fair Foods (Pty) Ltd v CCMA* (1999 29 ILJ 1701; [1999] 11 BLLR 1117 (LAC) par 28) and that the Commissioner should "show a measure of deference to the employer's sanction so long as it is fair" (par 42). This court also took the approach that the employee's failure to search persons was a material failure of the performance of his core functions, which impacted on the employer's ability to trust him to perform his duties (par 33).

COSATU joined the proceedings on behalf of the employee and its members, challenging the decision of the Supreme Court of Appeal on the basis of the right to fair labour practices in terms of section 23 and the right to fair administrative action in terms of section 33 of the Constitution.

The Constitutional Court, per Navsa AJ, rejected the "deference to the employer" finding (par 74 and par 178 per Ngcobo J) that the Commissioner's "sense of fairness must prevail" in deciding whether dismissal is fair or not, and the standard for review of that decision is whether a reasonable decision-maker would have come to that conclusion (par 75). On the issue of the appropriateness of the sanction the Constitutional Court gave some guidance on how to reach a fair dismissal decision. It held (par 78) that:

> "In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal. As he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and his or her long-service record. This is not an exhaustive list."

The Constitutional Court found in favour of the employee and endorsed the CCMA approach that no losses to the employer were proved (par 114); that there was an absence of dishonesty; and that his clean lengthy service record were important factors in applying a lesser sanction (par 117).

This judgment alerts employers and decision-makers to the dangers of adopting a strict, narrow approach to imposing the sanction of dismissal. However, if the employee concerned had been found guilty of dishonesty, based on the finding of the court, it is not clear whether or not it would have confirmed the employer's decision to dismiss. The judgment is a reminder of

the competing interests of the employer to be protected against that the competing interests of the employer to be protected from loss/shrinkage and the personal circumstances of the employees. The difficultly, however, still lies in assessing the fairness where the decision-maker has chosen to give greater weight to one of these interests. This may be illustrated by two decisions in the Labour Appeal Court.

In *Shoprite Checkers v CCMA* (2008 29 ILJ 2581 (LAC); [2008] 9 BLLR 838 (LAC)) an employee was seen on video footage on two separate days eating food in the deli of the employer's premises. He was found guilty of dishonesty (for consuming goods not paid for) and breach of company rules (because he had eaten in an area not designated for that purpose). He was dismissed, and his challenge of the dismissal at the CCMA was successful. The employer took the matter on review, where the Labour Court found in favour of the employee on the basis that the sanction of dismissal was too harsh in view of the low value of the goods consumed and the clean lengthy service record of nine years (par 15). The Labour Appeal Court took a different view, and found that the dismissal of the employee in the circumstances was justified, in view of the continued problem of shrinkage experienced by the employer, and that employees were made aware of this (par 22); that the employee had gone to manufacture evidence by calling a witness who was unable to assist in the matter (par 24) and that the employee had "flagrantly" breached the company rule on two separate occasions thereby breaching the trust between the parties (par 25). Davis AJ in this matter found the employer's business interests outweighed the employee's personal interests.

On the contrary, in S*hoprite Checkers v CCMA* ([2008] 12 BLLR 1211 (LAC)), Zondo JP took the personal circumstances of the employee as the outweighing factor in finding that the dismissal of the employee was too harsh. In this case, the employee was employed as a deli supervisor and video footage o three occasions showed him eating in prohibited areas. He was found guilty of breaching the company rule of eating in a prohibited area, and subsequently dismissed. Zondo JP found that the sanction of dismissal was too harsh in the circumstances considering that he had a clean lengthy service of 30 years (par 24), and the low value of the goods in question (par 25). He found no reason to interfere with the decision of the CCMA on this issue (see also *Shoprite Checkers (Pty) Ltd v CCMA* [2009] 7 BLLR 619 (SCA)).

These cases illustrate the real problem with weighing up a list of factors where there is no guidance on which criteria take precedence. The overall standard is one of fairness, and all decision-makers have different views on what fairness means in various circumstances. The employees in these two cases, working for the same employer, were found guilty of largely the same offence, but the outcome was different, depending on the weight the different judges attached to the competing interests. Both decisions can be supported on the basis that they took into account all the factors, and gave more weight to one or the other factor. There is little basis to argue that either court was wrong in its decision. These cases demonstrate a skewed jurisprudence of fairness, where the outcome of whether the sanction was appropriate or not is wholly dependent on the decision-maker's preference of the competing concerns.

## 4 The way forward

A common theme in all these cases has been that the courts are more likely to support the decision to dismiss where the employee is found guilty of *dishonesty*, as opposed to some other offence which relates to shrinkage. In cases involving the offence of dishonesty, the conventional approach seems favoured to place greater weight on the employer's business interests. An employer who is reluctant to charge an employee with dishonesty and chooses another offence stands the risk of creating the impression to a decision-maker that the conduct is not serious. The *classification* of the misconduct can have a significant impact of the decision of the appropriate sanction. An example, albeit not related to shrinkage, can be found in *Cashpaymaster Services Northwest (Pty) Ltd v CCMA* ([2009] 5 BLLR 415 (LC)), where the employee was a trainee who was required to submit an assignment on a compact disc. He submitted a blank disc, suggesting that he had handed in the assignment. He approached two of his colleagues to give him a copy of their assignments after he had been repeatedly asked to re-submit his own assignment. He was dismissed for failing to obey an instruction, and submitting a compact disc with the full knowledge that it did not contain the assignment. The Labour Court confirmed the decision of the CCMA that the misconduct was not serious enough to warrant dismissal as it "did not affect the core of the trust relationship between the parties" (par 17).

However, this distinction in offences is somewhat artificial. An employee who contributes to the employer's shrinkage problem (either by consuming goods or failing to follow a procedure which is intended to protect the employer from shrinkage) is not less culpable because the offence is called something else. The offence is still serious misconduct and the fact that an employer does not charge the employee with the offence of dishonesty should not detract from conduct which is based on untruthfulness or misrepresentation. In the *Sidumo* case, for example, it is arguable that the employee was dishonest because he held out to the employer that he was conducting the searches when he had not done so. The failure to charge an employee with the specific offence of dishonesty should not detract from the inherent nature of the offence: that the employer can no longer trust the employee to perform functions in an honest way, and this *must* impact on the relationship of trust between the parties. An example of such an approach can be found in *Engen Petroleum Ltd v CCMA* (2007 28 ILJ 1507; [2007] 8 BLLR 707 (LAC)), where the employee was charged with the breaching of a rule by tampering with a tachograph in a vehicle that he was required to drive. The Labour Appeal Court accepted that this constituted serious misconduct, even though the employee was not charged with dishonesty (par 188).

In the author's view, there needs to be a greater focus on the nature and impact of the misconduct, not what it is called, and this must be weighed against the employee's personal circumstances to reach a fair decision.

Brenda Grant
*University of KwaZulu-Natal, Pietermaritzburg*