

# How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct\*

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## OPSOMMING

### Hoe Word 'n Billike Sanksie Bepaal? Ontslag as Gepaste Sanksie in Gevalle van Ontslag weens (Wan)gedrag

Elke werknemer in Suid Afrika het die reg om nie onbillik ontslaan te word nie. Die Wet op Arbeidsverhoudinge 66 van 1995 bepaal dat 'n werkgewer 'n werknemer billik mag ontslaan op grond van gedrag, vermoë op bedryfsvereistes. Die werkgewer moet egter ook 'n billike prosedure voor ontslag volg. Die Kode van Goeie Praktyk: Onbillike Ontslag (bylae 8 by die Wet) bepaal dat die vraag of 'n rede vir ontslag billik is of nie, word deur die feite van elke saak asook die gepastheid van ontslag as sanksie beantwoord (in besonder item 7(b)(iv)). Dit is egter nie maklik om te bepaal of ontslag die gepaste sanksie in 'n bepaalde geval is nie. Hierdie bydrae oorweeg hierdie vraag sonder om na prosedurele billikhed te verwys. In die saak van *Edcon Ltd v Pillemer NO (Reddy)* is beklemtoon dat 'n werkgewer getuienis moet voorlê om die bewering dat ontslag in werklikheid die gepaste sanksie was, te ondersteun. Sodanige getuienis kan insluit dat die vertrouensverhouding onherstelbare skade gely het. Die werkgewer moet dus kan aandui dat die werknemer skuldig is aan wangedrag en dat die *aard* sowel as die *impak* of uitwerking daarvan sodanig is dat ontslag die gepaste sanksie is. Die bydrae ondersoek 'n aantal sake in die lig van hierdie oorweging, naamlik: (i) die bewyslas in ontslaggeskille; (ii) wanneer ontslag 'n gepaste sanksie kan wees; (iii) die finale besluitnemer rakende of ontslag billik was of nie (maw was dit in die bepaalde geval wel die gepaste sanksie); en (iv) hoe moet 'n werkgewer die besluit om ontslag as sanksie te gebruik of nie benader. Hierdie vrae word telkens bespreek met verwysing na beginsels wat reeds in regsspraak gevestig is.

## 1 Introduction

### 1.1 Background

Every employee in South Africa has a right not to be unfairly dismissed.<sup>1</sup> After an employee proves that he or she was dismissed,<sup>2</sup> in the case of dismissals that are not automatically unfair,<sup>3</sup> the employer may establish that the dismissal was effected for a fair reason, after following a fair

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1 S 185 of the Labour Relations Act 66 of 1995 (LRA).

2 See s 186 LRA.

3 These dismissals are listed in s 187 LRA.

procedure.<sup>4</sup> Section 188 of the Act provides that if a dismissal is not automatically unfair, it is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure.<sup>5</sup> The Code of Good Practice: Unfair Dismissal<sup>6</sup> notes that whether or not a reason for dismissal is a fair reason is determined by the facts of each case and the appropriateness of dismissal as a penalty.<sup>7</sup> It is the latter enquiry that has proven particularly problematic.<sup>8</sup> This contribution will not consider the procedural fairness of a dismissal; I discuss only the more limited issue of the fairness of dismissal as a sanction, given that the employer has established the existence of misconduct.<sup>9</sup>

*Edcon Ltd v Pillemer NO (Reddy)*<sup>10</sup> emphasised that an employer must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This would require evidence, for example, that the trust relationship between the employer and employee had broken down. Put differently, an employer can dismiss fairly if it can prove that there was a transgression, the *nature* as well as the effect or *impact* of which was such as to make the sanction of dismissal appropriate.

In the rest of this paper the following issues will therefore be considered: i) The onus of proof in dismissal disputes; ii) when dismissal could be an appropriate sanction; iii) the final decision regarding whether or not dismissal was fair (ie whether it was in fact the appropriate sanction); and iv) how to approach the decision whether to impose dismissal as sanction or not.

## 1 2 Edcon Case

In *Edcon Ltd v Pillemer NO*<sup>11</sup> Reddy was the user of a company vehicle, a Toyota Corolla, courtesy of Edcon's car scheme policy. In June 2003, Reddy's son was involved in an accident. In terms of the company car policy, Reddy was obliged, amongst other things, to report the accident

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4 See again s 192 LRA "Onus in dismissal disputes".

5 The fair reasons for dismissal recognised by s 188 LRA originate in Art 4 of the International Labour Organization (ILO) Convention on the Termination of Employment 158 of 1982.

6 Sch 8 LRA.

7 *Idem* item 7(b)(iv).

8 Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) 226 states that the choice of the word "appropriate" reflects the difficulty that courts have experienced in deciding whether dismissal or some lesser sanction should be imposed for a case of proven misconduct.

9 The decision in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* 2006 27 ILJ 1644 (LC) had far-reaching consequences for managing discipline in the workplace as it stressed the need for more informal discipline (unless otherwise stipulated in companies' disciplinary codes).

10 [2010] 1 BLLR 1; 2009 30 ILJ 2642 (SCA).

11 [2010] 1 BLLR 1 (SCA).

to Edcon, the South African Police Service and the relevant insurance company within 24 hours and not carry out repairs on the motor vehicle without the approval of the insurance company. Reddy did not comply with these policy regulations, did not report it and instead arranged with her husband to do repairs at his panel beating shop at own cost. Edcon discovered this when the motor vehicle started to give problems and the Toyota dealership detected the damage. Reddy initially denied that the motor vehicle had been involved in a collision whilst driven by her but later came clean in her final statement. In due course Edcon convened a disciplinary enquiry to look into the matter and charged Reddy with “failure to be honest and act with integrity in that you committed an act, which has affected the trust relationship between the company and the employee in that on 8 June 2003 to 8 October 2003, you failed to report an accident of a company vehicle ...”.<sup>12</sup> She was found guilty and dismissed from her employment.

Contending that her dismissal was unfair, Reddy referred a dispute to the second respondent, the CCMA who appointed the first respondent (“Pillemer”) to arbitrate the dispute after conciliation failed. Pillemer made an award in which she concluded that Reddy’s dismissal was *substantively unfair* and ordered Edcon to *reinstate* her but *without arrear salary*. The commissioner found that failure to report the accident was in itself insufficient to warrant dismissal, but that the crucial issue was whether the employee’s subsequent “lack of candour” had breached the trust relationship, as the presiding officers of the disciplinary and appeal hearing had found.<sup>13</sup> The commissioner did not regard the sanction of dismissal fair because of the circumstances of the matter, the employee’s length of service (43 years), her previous unblemished record and the fact that the employee was only two years away from retirement.

Edcon was unhappy with the award and contended that the commissioner had not appreciated the extent of the employee’s dishonesty. Edcon further contended that the commissioner had erred by having regard to hearsay evidence, and that the company had led sufficient evidence to prove a breakdown of the trust relationship and launched review proceedings in the Labour Court in terms of section 145 of the Act. The Labour Court declined to set the award aside and accordingly Edcon appealed to the Labour Appeal Court with that court’s leave. The Labour Appeal Court dismissed the appeal, concluding that the award was unassailable.

The Supreme Court of Appeal reviewed the history of the various tests applied by the courts in applications to review and set aside arbitration awards, up to and including the judgment of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd.*<sup>14</sup> It noted that the earlier test

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12 *Idem* par 5.

13 *Idem* paras 8 and 17.

14 [2007] 12 BLLR 1097 (CC). In the internal disciplinary hearing Mr Sidumo was charged as follows: “Negligence – Failure to follow established

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requiring a “rational connection between the material properly before the arbitrator and the decision reached” had been replaced with a test requiring an inquiry into whether the award is “one that a reasonable decision-maker could arrive at considering the material placed before him/her.” The court observed, interestingly, that the standard of “reasonableness” confirmed by the *Sidumo* case<sup>15</sup> is conceptually the same as the earlier “rationality” test, the only difference being semantic.

On the merits, the court held that the only issue was whether the material before the commissioner was sufficient to prove that the trust relationship between the employee and the company had been destroyed. The court noted that the company’s only witness had merely recounted developments in the investigation of the matter. He could not and did not testify on the effects of the employee’s conduct on the trust relationship. Not only was the commissioner obliged to find that there was no evidence to conclude that the trust relationship had been destroyed, but she had also correctly taken into account the employee’s years of service and clean disciplinary record. Accordingly, the appeal was dismissed.

## 2 Onus

The employee must establish the existence of the dismissal.<sup>16</sup> On the other hand, the employer must prove that the dismissal is fair.<sup>17</sup> There is no shift of the burden of proof from one party to the other in dismissal cases.<sup>18</sup> In a dismissal dispute each party bears the burden of proof in relation to separate issues (ie the employee regarding *the fact of*

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procedures in terms of the Protection Services Department search procedure which caused prejudice or possible prejudice to the Company in terms of production loss and Failure to follow established procedures in terms of the Protection Services Department search procedures.”

<sup>15</sup> *Ibid.*

<sup>16</sup> S 192(1) LRA.

<sup>17</sup> S 192(2) LRA.

<sup>18</sup> In the context of automatically unfair dismissal the following has been raised - in *Janda v First National Bank* [2006] 12 BLLR 1156 (LC) Van Zyl AJ held: “This essential point is obscured if one speaks of ‘the employee must prove’ or a ‘shifting’ of the onus or a duty ‘to establish a *prima facie* case that the reason for the dismissal was an automatically unfair one’. The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a more likely reason than that of the employer ... The essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it”. Furthermore, in *Kroukam v SA Airtlink (Pty) Ltd* 2005 12 BLLR 1172 (LAC) (par 28): “In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.”

dismissal and the employer regarding *the fairness* of the dismissal). If there is no dispute about the fact of transgression of a workplace rule (ie misconduct was proven)<sup>19</sup> the employer still has to prove that the dismissal was substantively fair as it was, *inter alia*, the appropriate sanction for the conduct in question. Where there are factual disputes a court must make findings on “(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.” Clearly the scheme of the Act requires of the employer to adduce evidence “that is sufficient to persuade a court, at the end ... that the claim or the defence, as the case may be, should succeed”<sup>20</sup>

As has now become apparent from the *Edcon* case,<sup>21</sup> it is not sufficient to rely on general statements made without providing supporting evidence and putting material in front of the decision maker to ensure that he or she reaches a reasonable decision. The employer has to look beyond the fact of misconduct, it must consider the effect of such misconduct on the employment relationship. Something more is thus required of the employer than to prove that the employee was guilty of misconduct of a certain nature and it may prove rather difficult to some.<sup>22</sup> Put differently, the chairperson of a disciplinary inquiry can no longer “deal with the issue of sanction on a cursory basis”<sup>23</sup> and if there should be a dismissal dispute the employer must lead evidence regarding the appropriateness of the dismissal as sanction.

The employer has the burden of proof in the sense of a persuasive burden – it must place enough material and facts before the decision maker to persuade such person that the sanction of dismissal was fair. Schmidt and Rademeyer<sup>24</sup> comment on the nature and function of the law of evidence and state:

The court’s judgment as to whether something is reasonable ... is strictly speaking, also not capable of resolution by invoking a burden of proof. It would not be correct to say that one of the parties has to prove that a regulation is reasonable ... That is a matter for the court to decide in the light

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19 *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie* 2003 1 SA 11 (SCA) par 5; Zeffertt and Paizes *The South African Law of Evidence* (2009) 151 *et seq.*

20 Schwikkard et al *Principles of Evidence* (2009) 571 with reference to *Pillay v Krishna* 1946 AD 946 952-3.

21 *Edcon Ltd v Pillemer NO* (2010) 1 BLLR 1 (SCA).

22 Zeffertt and Paizes (2009) 46: “The law of evidence is well known for its power both to fascinate and to perplex. Even in this arcane field, however, the onus of proof stands out for its extraordinary ability to tantalise the legal mind. Few subjects that are so important a part of the practical workings of a legal system can, at the same time, remain so mysterious, enigmatic and elusive to the questioning mind. It is a concept that seems to recede the harder it is pursued and that resists any effort to define or contain it. It is as if, sometimes, one is chasing shadows and as if any attempt at coming to grips with the subject can never yield anything of substance.”

23 Le Roux “Proving the fairness of the dismissal: The need to present evidence” 2010 *Contemporary Labour Law* 57 59.

24 *Law of Evidence* Issue 7 (2009) 2-3.

of the facts set before it. But, of course, the facts influencing the court's decision could be placed in issue, and in that respect the burden of proof could become operative.

In the *Sidumo* case<sup>25</sup> the Constitutional Court rejected the so-called "reasonable employer" test. The court emphasised the importance of "holding the scales between the competing interests of employees and employers evenly in the balance".<sup>26</sup> The court stated that

[u]ltimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.<sup>27</sup>

The employer must be aware of its reasons to dismiss and should be able to put the relevant material supporting such decision in front of a commissioner should a dismissal dispute occur later on. The Constitutional Court's view in *Sidumo*<sup>28</sup> that "[u]ltimately, the commissioner's sense of fairness is what must prevail and not the employer's view" seems to take away the decision from the employer. However, the facts influencing the commissioner's decision could be placed in issue and in that respect the burden of proof become operative.<sup>29</sup>

It should be noted that the courts have emphasised that "fairness" is a double-edged sword.<sup>30</sup> It does not only serve to benefit and protect one of the parties to the employment relationship. This approach cannot be faulted in a "mutual" contract. In *Branford v Metrorail Services (Durban)*<sup>31</sup> it was held that

[t]he concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

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25 *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1097 (CC).

26 *Idem* par 66.

27 *Idem* par 75.

28 *Ibid.*

29 In the *Sidumo* case (*supra*) the commissioner considered Mr Sidumo's service record in his favour. He concluded that dismissal was too harsh a sanction and motivated it as follows: There had been no losses suffered by the Mine; the violation had been unintentional or had been a "mistake"; and Mr Sidumo had not been dishonest. Before making his award the Commissioner stated that he did not consider the offence committed by Mr Sidumo to "go into the heart of the relationship [with the employer], which is trust."

30 *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) par 38-39. See also par 3 below.

31 2003 24 ILJ 2269 (LAC) 2278H-2279A. See also *NUMSA v Vetsak Co-operative Ltd* 1996 4 SA 577 (A) 589C-D: "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances."

Often the decision in a dismissal dispute turns on the factual findings. In *NUM v CCMA*<sup>32</sup> the applicant employees were dismissed after being found guilty of selling diesel from a company vehicle at a squatter camp as well as steel belonging to the respondent to one of the applicant's competitors for their own profit (ie gross dishonesty). The applicants denied any wrongdoing. The CCMA commissioner found that the employer had proven its case against the employees, and upheld their dismissals. On review, the applicants contended, *inter alia*, that the commissioner had not explained why he had found the employee(s) untruthful, that he had relied on hearsay evidence, and that he had ignored the true reason for the dismissals. The court found that the applicants' case principally amounted to a claim that the commissioner had evaluated the evidence incorrectly. The court stated that:<sup>33</sup>

It is trite that in a dismissal case the employer bears the onus of showing that the dismissal was fair. Thus the starting point for a commissioner in assessing the versions presented by the parties during the arbitration hearing is to determine the extent to which the employer's version is more probable than not. In *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 544, the court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probability was sufficient. In *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LAC), the court in dealing with the approach to be adopted in dealing with the evaluation of evidence held that:

‘The credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of the single investigation into the acceptability or otherwise of the employer’s version, an investigation where questions of demeanour and impression are measured against the content of the witnesses’ evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable and should be accepted, not that therefore the other version is false and may be rejected with safety.’

In *Sil Farming CC t/a Wigwam v CCMA*,<sup>34</sup> in relation to a factual finding on the merits, the court held that it will only overturn a decision on review if:

[a] commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justify a decision arrived at or where the decision maker ignores uncontradicted evidence.

In *Senama v CCMA*<sup>35</sup> the employee was dismissed for theft (of stock from a warehouse by a vehicle registered in his name). The

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32 [2010] 6 BLLR 681 (LC).

33 *Idem* par 20.

34 Unreported labour court judgment JR 3347/2005 par 16 - as referred to by Myburgh “*Sidumo v Rustplass*: How have the courts dealt with it?” 2009 *ILJ* 1 13.

35 [2008] 9 BLLR 896 (LC).

commissioner upheld the substantive fairness of the dismissal and rejected the employee's version of having been on leave at the time. The commissioner drew an adverse inference against the employee due to his failure to provide a plausible explanation for only disclosing his ownership of the vehicle at the arbitration. The Labour Court dismissed the review application and held as follows:<sup>36</sup>

A reasonable decision is reached when a commissioner, in performing his/her functions as an arbitrator, applies the correct rules of evidence, and if there is to be a deviation it must not be of such a nature that it materially denies any party a fair hearing. It is also required of the commissioner to weigh all the relevant factors and circumstances of the case before him or her to ensure that his decision is reasonable ...

Regarding so-called "hearsay evidence" in the *NUM* case<sup>37</sup> the court agreed with the statement made in *Swiss South Africa (Pty) Ltd v Louw NO & others*.<sup>38</sup>

Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA.

The court decided that the commissioner relied on such evidence in keeping with the provisions of section 3(1)(c) of the Law of Evidence Amendment Act.<sup>39</sup> As the commissioner did apply his mind to the issue of the hearsay evidence which had been presented and recognised that he was vested with the discretion in the interests of justice whether or not to accept such hearsay evidence the commissioner did not act unreasonably.

Myburgh submits that an analysis of Labour Court decisions indicates the following:<sup>40</sup>

In summary, a commissioner's finding on the facts will be unreasonable if it is: (i) unsupported by any evidence; (ii) based on speculation by the commissioner; (iii) entirely disconnected from the evidence; (iv) supported by evidence that is insufficient reasonably to justify the decision; or (v) made in ignorance of evidence that was not contradicted.

### **3 Who Decides whether the Dismissal was an Appropriate Sanction and therefore Fair?**

Even though the Supreme Court of Appeal<sup>41</sup> has confirmed that employers may set reasonable standards of conduct in the workplace and may enforce such standards it is still rather controversial whether an employer knows best when deciding on the appropriate sanction for

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36 *Idem* par 18-19.

37 *Idem* par 22.

38 2006 27 *ILJ* 395 (LC) par 43.

39 45 of 1988 (ie in the interests of justice etc).

40 Myburgh 2009 *ILJ* 1 13.

41 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 27 *ILJ* 2076 (SCA).

transgression of a workplace rule. The Constitutional Court<sup>42</sup> has stated that employees are a vulnerable group in society<sup>43</sup> and thus deserving of protection. An employer may enforce discipline in its workplace and may dismiss for conduct, capacity or operational requirements. However, the dismissal must be substantively fair. The Constitutional Court in the *Sidumo* case<sup>44</sup> did not agree with the Supreme Court of Appeal's approach to determining the fairness of a dismissal for misconduct and held that:<sup>45</sup>

There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator.

The ultimate decision maker will therefore be the commissioner.<sup>46</sup> Navsa AJ also reconfirmed the decision of the Labour Appeal Court in *County Fair Foods (Pty) Ltd v CCMA*<sup>47</sup> that CCMA arbitrations are in fact hearings *de novo*. The court referred to sections 138(1) and (2) of the LRA, which accord commissioners discretion to determine the manner and form of proceedings. Navsa AJ stated that in terms of section 138(2), subject to the discretion of the commissioner, a party may give evidence, call witnesses and address concluding arguments to the commissioner. In *County Fair Foods (Pty) Ltd v CCMA*<sup>48</sup> the court held that

the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing *de novo*.<sup>49</sup>

The test that a commissioner must employ when impartially considering the fairness of a dismissal dispute therefore requires that the commissioner must take into account the totality of circumstances.<sup>50</sup> Put differently, rather than to defer to the decision of the employer the

42 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 ILJ 2405 (CC). See also Le Roux and Mischke "The disciplinary sanction: when is dismissal appropriate?" 2006 *Contemporary Labour Law* 91 and Le Roux and Young "The role of reasonableness in dismissal: the constitutional court looks at who has the final say" 2007 *Contemporary Labour Law* 21.

43 *Idem* Par 72.

44 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC).

45 *Idem* Par 61.

46 See in this regard Grogan "Two-edged sword" *Sibergramme* 5/2008: "Cheetham's case confirms, then, that after *Sidumo* the scope for review of commissioners' decision on proven misconduct has been reduced to virtually zero – except, perhaps, in cases where ... the sanction imposed by a commissioner is so aberrant that no reasonable commissioner could possibly have agreed that it was appropriate."

47 1999 20 ILJ 1701 (LAC). Refer to the *Sidumo* case *supra* par 18: "An arbitration under the auspices of the CCMA is a hearing *de novo*".

48 *Ibid.*

49 *Idem* par 11.

50 *Idem* par 78.

commissioner must consider all relevant circumstances. However, the court also stated that a commissioner “is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair”.<sup>51</sup> Therefore as long as the decision is one that a reasonable decision maker could make a court won’t interfere.<sup>52</sup>

In *Fidelity Cash Management Service v CCMA*<sup>53</sup> the Labour Appeal Court explained that the *Sidumo*-review test is a stringent test that will ensure that awards are not lightly interfered with.

It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often ...<sup>54</sup>

In an earlier contribution<sup>55</sup> I have submitted that in considering the fairness of a dismissal and the appropriateness thereof as a sanction one must have regard of the Labour Appeal Court’s observation in the *Phalaborwa* case<sup>56</sup> that: “[c]learly, commissioners of the CCMA have a weighty responsibility to act fairly”. Having regard of the stringent nature of the *Sidumo* test this certainly cannot be over-emphasised. In addition, the stringent nature of the *Sidumo* test must not be interpreted as a licence for commissioners not to apply the substantive law on dismissal.

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51 *Idem* par 79.

52 In *Samson v Commission for Conciliation, Mediation and Arbitration* 2010 31 *ILJ* 170 (LC) the applicant employee was charged with distributing pornography on the third respondent employer's intranet. He pleaded guilty, expressed remorse and apologised to the co-employee to whom he had accidentally sent the e-mail containing the pornographic material. The chairperson of the disciplinary enquiry found the employee guilty and imposed a final written warning valid for three years. The employer's executive vice president set aside the original sanction and imposed a sanction of dismissal. The employee appealed raising the defence of “double jeopardy”. The sanction of dismissal was upheld on appeal. The employee then referred a dispute to the CCMA. At the commencement of the arbitration hearing the commissioner granted the employer the right to be represented by its attorney although the employee opposed the application. The commissioner having heard evidence and argument found that the employee's dismissal had been substantively and procedurally fair. On review the court noted that it would only review and set aside the commissioner's award if it failed to meet the threshold established by the *Sidumo* judgment *supra*, namely whether the commissioner's decision was one to which no reasonable decision maker could come. The court was not willing to come to such a finding in this case.

53 2008 29 *ILJ* 964 (LAC).

54 *Idem* par 100.

55 Smit “When is a dismissal an appropriate sanction and when should a court set aside an arbitration award? *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) / [2007] 12 BLLR 1097 (CC)” 2008 *ILJ* 1635.

56 *Palaborwa Mining Co Ltd v Cheetham* 2008 6 BLLR 553 (LAC) par 8.

## 4 When Could a Dismissal be Appropriate and Fair?

### 4.1 Introduction

The Code of Good Practice: Dismissal<sup>57</sup> states that whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty.<sup>58</sup> The code proceeds to state that the courts have endorsed the concept of corrective or progressive discipline,<sup>59</sup> meaning that the purpose of discipline is viewed as a means for employees to know and understand what standards are required of them.<sup>60</sup> The code then suggests that “[d]ismissal should be reserved for cases of serious misconduct or repeated offences”.<sup>61</sup>

A reading of item 3 of the code seems to suggest that “serious” misconduct will be conduct which is of such gravity that it makes a continued employment relationship intolerable.<sup>62</sup> Examples of such conduct (with the proviso that each case should be judged on its own merits) include gross dishonesty, wilful damage to employer property, wilful endangering the safety of others, physical assault and gross insubordination.

The code then proceeds by stating that when deciding whether or not to impose dismissal as penalty, in addition to the gravity of the misconduct, the *employer* should consider certain factors. These include the employee’s circumstances (length of service, previous disciplinary record and personal circumstances, etc), the nature of the job and the circumstances of the infringement itself.<sup>63</sup>

In the *Sidumo* case<sup>64</sup> the Constitutional Court proceeded to list the factors that a commissioner must consider when deciding on the fairness of a dismissal. These factors do not represent a closed list and the weighting that should be attached to each factor would differ from case to case. The factors are:

- i. The importance of the rule that was breached.
- ii. The reason the employer imposed the sanction of dismissal.
- iii. The basis of the employee’s challenge to the dismissal.
- iv. The harm caused by the employee’s conduct.
- v. Whether additional training and instruction may result in the employee not repeating the misconduct.
- vi. The effect of dismissal on the employee.

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<sup>57</sup> Sch 8 LRA.

<sup>58</sup> Item 2(1) Sch 8 LRA.

<sup>59</sup> Item 3(2) Sch 8 LRA.

<sup>60</sup> *Ibid.*

<sup>61</sup> Item 3(3) Sch 8 LRA.

<sup>62</sup> Item 3(4) Sch 8 LRA.

<sup>63</sup> Item 3(5) Sch 8 LRA.

<sup>64</sup> *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

vii. The long-service record of the employee.

It therefore appears that an employer must firstly indicate that the misconduct in question is serious and grave to the extent that it makes the employment relationship intolerable. In addition to this the employer must then proceed to show that it had considered all relevant factors and that dismissal was still considered to be the appropriate sanction.

In the *Sidumo* case<sup>65</sup> the court stated that the absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal.<sup>66</sup> It could be argued that the converse is perhaps also true, namely that the presence of gross dishonesty is a significant factor against the application of progressive discipline. However, the absence or presence of dishonesty is but one of a number of factors that must be considered.

### **3 2 Serious Misconduct of such Gravity to Make a Continued Employment Relationship Intolerable**

In a case dating back to 1996, the Appellate Division held in *Council for Scientific and Industrial Research v Fijen*<sup>67</sup> that it is well established that the relationship between employer and employee is "in essence one of trust and confidence".<sup>68</sup> It also stated that, at common law, conduct clearly inconsistent with such trust and confidence entitled the "innocent" party to cancel the agreement. The court referred to an old decision of the Supreme Court of the Transvaal dating back to 1908. In *Angehrn and Piel v Federal Cold Storage Co Ltd*,<sup>69</sup> a case concerning misconduct and breach of faith, it was held that "trust and confidence were of the essence of the relationship which existed between each ... [employee] and his employer".<sup>70</sup> The court formulated the legal question to be decided as follows - whether any of the acts of misconduct alleged against the plaintiffs were sufficient (either singly or in the aggregate) to justify the employer dismissing them? As to what is required of an employee in an employer-employee relationship (still referred to as master and servant relationship back then) the court noted that it includes<sup>71</sup>

to be just and faithful to the company, that is to say, ... conduct ... in its service with diligence, integrity and single-mindedness and generally in such a way as to show that the confidence intended by the contract [ie the contract of employment] could be safely reposed in them.

The court concluded that if the employees could be shown to have been guilty of conduct clearly inconsistent with the "faithfulness and single-mindedness" required of them it would be a violation of an essential term

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65 *Ibid.*

66 *Idem* par 117.

67 [1996] 6 BLLR 685 (AD) 691I.

68 *Idem* 691I.

69 1908 TS 761.

70 777.

71 *Ibid.*

of the contract which would justify immediate dismissal.<sup>72</sup> In 1991 the (then) Labour Appeal Court held, in *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others*,<sup>73</sup> that the relationship of trust, mutual confidence and respect “which is the very essence of a master-servant relationship” cannot continue where there was gross insubordination.<sup>74</sup> In this matter, Spoelstra J stated that in the absence of facts “showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship”. This approach is out of step with the onus in dismissal disputes as now regulated in section 192 of the LRA. However, it is submitted that the substantive finding remains valid, ie where the trust relationship has been breached it will normally be considered a material breach of an essential term that may justify dismissal. Another matter from the same year considered trust as a tacit contractual term.<sup>75</sup>

In the often quoted *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*<sup>76</sup> the court stated that the employment relationship can only be healthy if the employer can be confident that it can trust the employee not to steal from it. The court continued that if that confidence is destroyed or substantially diminished due to a theft

the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth he will, as it were, have to be continually looking over his shoulder to see whether this employee is being honest.<sup>77</sup>

Importantly, the court held<sup>78</sup> “the correct test to apply ... to be whether or not respondent’s actions had the effect of rendering the continuation of the relationship of employer and employee intolerable.”

In *Council for Scientific and Industrial Research v Fijen*<sup>79</sup> the court held that with relation to the duty of good faith and confidence such reciprocal duty simply flows from *naturalia contractus* and there is no need to work with the concept of an implied term to such effect in our law.<sup>80</sup> The court also confirmed that if there is a material breach of the contract a dismissal would be substantively fair – this includes conduct

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72 778. The court stated that one act would be sufficient, provided that it was clear and unequivocal, but in the absence thereof that unfaithfulness might be established by the cumulative force of a succession of acts each insufficient when taken alone.

73 1991 12 ILJ 1032 (LAC).

74 1037.

75 *Central News Agency v Commercial Catering and Allied Workers Union of SA* 1991 12 ILJ 340 (LAC) 344G: “This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and the relationship between employer and employee”.

76 1992 13 ILJ 573 (LAC).

77 591A.

78 591B.

79 [1996] 6 BLLR 685 (AD) 691I.

80 692A.

of the employee that destroys the faith and goodwill of the employer towards the employee.<sup>81</sup>

## 4 2 Approach of Courts pre *Sidumo*

The Labour Appeal Court held in *Lahee Park Club v Garratt*<sup>82</sup> that

[i]t is an entirely reasonable stance for an employer to adopt that it wishes to terminate its relationship with the employee who has breached the trust reposed in her and who acted dishonestly. Dismissal was the appropriate sanction.

In *Nampak Corrugated Wadeville v Khoza*<sup>83</sup> the Labour Appeal Court stated that

[t]he determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.<sup>84</sup>

This dictum was cited with approval by the Supreme Court of Appeal in the *Sidumo* case.<sup>85</sup> However, the Constitutional Court<sup>86</sup> interpreted this to be close to a “reasonable employer” test and rejected such approach.

In *Visser and Standard Bank of SA Ltd*<sup>87</sup> the applicant was employed as a sales manager with sixteen years’ service. He was dismissed for breaching confidentiality and misrepresenting facts in a meeting with subordinates (alienating or inciting the subordinate employees). He was charged with dishonesty which had destroyed the trust relationship with his employer. The commissioner was not convinced that Visser was guilty of serious misrepresentation as alleged but continued to consider the relationship between Visser and the bank. The commissioner found that the employer and the employee had a duty to maintain trust in the relationship<sup>88</sup> and when there is a problem in the relationship parties must try to resolve it.<sup>89</sup> The commissioner stated that the decision on an appropriate sanction in any individual case is a discretionary act that must be exercised in good faith after considering relevant facts and

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81 Refer to 692C-E.

82 [1997] 9 BLLR 1137 (LAC) 1139.

83 [1999] 2 BLLR 108 (LAC); 1999 20 ILJ 578 (LAC).

84 Par 33.

85 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* [2006] 11 BLLR 1021 (SCA) par 29.

86 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

87 2003 24 ILJ 890 (CCMA).

88 *Idem* 900.

89 *Idem* 900. If it is relationship problems an employer’s response ought to be: “(a) to try to isolate the problems, (b) to identify their causes and (c) to find ways to remedy the problem. Only if no solutions are forthcoming, should the employer move to termination of the relationship”.

excluding irrelevant ones.<sup>90</sup> On the facts the employer's argument could not succeed but the award stated that<sup>91</sup>

[a]n employer is not required to retain a person in employment if the evidence discloses that a continued employment relationship had been irreparably damaged and that the more senior the position, the greater the need for high levels of trust relationship.

In *De Beers Consolidated Mines Ltd v CCMA*<sup>92</sup> in an appeal against the judgment of the Labour Court relating to a review application brought for the purpose of setting aside a certain arbitration award which was issued by a commissioner of the CCMA, the court considered the following: The two respondent employees had both been truck drivers in the employ of the appellant who were dismissed for fraudulently claiming overtime pay for work they had not performed. The CCMA commissioner, subsequently held that their dismissal was unfair in that they served the appellant for many years without previously committing similar misconduct and because the relationship of trust between the respondent employees and the applicant had not been destroyed. The respondent employees were reinstated retrospectively subject to a final warning. In a subsequent review of the commissioner's award, the Labour Court declined to intervene. In an appeal against that decision, the appellant contended that the Labour Court had erred by not setting the award aside, because the commissioner's conclusion was irrational.

The court noted that the commissioner had found that the respondent employees had committed serious misconduct but then held that the commissioner had erred by finding that the relationship of trust had not broken down. The respondent employees had attempted to defend themselves by lying. The appellant had correctly concluded that this was a further reason not to trust them. Furthermore the appellant reposed a high degree of trust in the respondent employees who were responsible for valuable consignments. The court held further that the commissioner had misunderstood the significance of the respondent employees' relatively long periods of services. The court held that unless a commissioner is able to make a positive finding that a dismissal is unfair, he or she lacks the power to order reinstatement. The approach of the court was that the onus rests on an employer to prove the facts upon which it relies for a dismissal and once these facts have been proven the commissioner decides whether the dismissal is unfair.<sup>93</sup> The court held that in deciding whether a dismissal is fair, the prevailing norms of society must be taken into account. The appeal was upheld.

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90 *Idem* 904.

91 *Idem* 901.

92 [2000] 9 BLLR 995 (LAC); 2000 21 ILJ 1051 (LAC).

93 See also par 17: "Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended".

In *Toyota South Africa Motors (Pty) Ltd v Radebe*<sup>94</sup> an appeal was considered against a judgment of the Labour Court dismissing an application brought by the appellant to review and set aside an arbitration award. Radebe, an employee of the appellant, enjoyed car lease benefits as part of his conditions of employment. After he had been involved in four accidents in the car in less than 12 months, his lease benefits were suspended. When the first respondent was again permitted to lease a car he was involved in a further accident. He drove the damaged car to a public parking area and abandoned it with the keys in the ignition and reported that the car had been hi-jacked. The first respondent subsequently admitted that he had lied about the hi-jacking. He was charged with fraudulent and dishonest conduct and negligently damaging company property and accordingly dismissed. The CCMA commissioner, subsequently found that dismissal was too harsh a penalty and ordered that he be re-employed.<sup>95</sup>

As to whether the arbitrator's decision amounted to a gross irregularity, the court noted that the irregularities may be patent or latent. Patent irregularities are defects in the way in which the proceedings are conducted and latent irregularities are defects that are ascertainable only from the reasons given by the administrative functionary. Theft and fraud have always constituted grounds for dismissal of employees because of the breach in the trust relationship between employer and employee. However there is no invariable rule that offences involving dishonesty should incur the supreme penalty of dismissal.

The question *in casu* was whether the third respondent had misconceived the nature of the question of a fair sanction and his duties in connection therewith to such a degree that interference with the award was warranted. The parties could not be held to have had a fair hearing if the commissioner selected a sanction that was grossly inappropriate even if the award was otherwise unimpeachable. However, the irregularity must be so egregious that a court is satisfied that the commissioner has misconceived his function of selecting a fair sanction. The test is whether the sanction selected by the commissioner is so out of kilter with variations within the continuum of a fair sanction that it induces a sense of shock and alarm. The conduct of the first respondent amounted to fraud, perjury and an attempt to defeat the ends of justice. His abandonment of the vehicle was a gross dereliction of his duties to the appellant to preserve its property. The first respondent's disregard for

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94 [2000] 3 BLLR 243 (LAC).

95 On appeal, the appellant contended that the third respondent had committed a gross irregularity, had exceeded his powers and that his decision was not justifiable according to the reasons provided. The court held that the only ground upon which the award could be reviewed was under s 145 LRA which refers to gross irregularity in the proceedings. The contention that an award was not "justifiable according to the reasons given" did not provide a ground for review because it blurred the distinction between appeal and review.

the appellant's rights coupled with his gross dishonesty rendered the third respondent's choice of penalty so egregious and out of kilter with the penalty that the court would have imposed that it could be said to amount to a gross irregularity. Furthermore the third respondent had erred in finding that the appellant should not have selected dismissal as a sanction because other penalties were available. The commissioner had therefore failed to explain the finding that the dismissal was unfair. The first respondent's length of service was of no relevance and did not mitigate his gross misconduct. Contrary to the third respondent's finding that the first respondent has shown remorse and had "come clean" about the hi-jacking, the first respondent had continued to lie to the employer and had even attempted to deceive the arbitrator and the reviewing court about his alleged decision to tell the truth. The third respondent had in fact found that the first respondent was guilty of gross dishonesty. By ruling that in spite of this finding, dismissal was not an appropriate penalty the third respondent had misconceived his functions. The appeal was accordingly upheld.

In *Consani Engineering (Pty) Ltd v CCMA*<sup>96</sup> the court considered whether to review and set aside an arbitration award of a CCMA commissioner. In the arbitration the employee, dismissed for theft, was reinstated as from the date of the award without any back pay on the grounds that the sanction of dismissal was too harsh because the trust relationship had not in fact irretrievably broken down, especially in the light of the evidence of the chairperson of the inquiry that Shoko was a good worker and that he regretted having to dismiss him. The applicant submitted that the second respondent's findings in regard to substantive unfairness were not rationally justified in relation to the evidence presented to her at the arbitration.

From the arbitration award and record, it was evident that in the period prior to Shoko's dismissal the applicant had experienced significant stock losses as a result of theft perpetrated by employees. The disciplinary code classifies theft as a dismissible offence, but explicitly states that each case has to be considered on its merits. The applicant had spent considerable time and effort readdressing its policy relating to stock loss problems and had opted for a firmer policy regarding theft and unauthorised possession of company property. The applicant described

<sup>96</sup> [2004] JOL 12846 (LC). Mr Joseph Shoko after approximately five years of employment was found in unauthorised possession of a roll of rubber tape that was concealed under his jacket. A security guard who had conducted a body search of Shoko when he was leaving the applicant's premises at the end of his shift discovered the rubber tape under his jacket. Shoko was accordingly charged with theft of company property, alternatively attempted theft of company property and pleaded guilty at a disciplinary enquiry. After consideration of mitigating factors, the chairperson of the enquiry dismissed Shoko, who then lodged an internal appeal in terms of the disciplinary code, which was unsuccessful.

its policy in this regard as a “zero-tolerance” approach and in order to effect such approach had effected certain changes and in particular notifying its employees through various notices posted at different places throughout its premises that unauthorised removal of company property will result in a disciplinary action possibly leading to dismissal.

The court found that the second respondent had erred in substituting her own standard for that of the employer’s. She failed to recognise that the employer’s conduct fell within the range of reasonable options in the circumstances, and, albeit on the harsh side, dismissal as a sanction fell within the band of reasonableness in this instance and accordingly that no rational objective basis existed in terms of which the second respondent was justified in not endorsing the employer’s sanction. The award of the second respondent was set aside.

#### **4 3 Approach of Courts Post *Sidumo***

*Westonaria Local Municipality v SALGBC*<sup>97</sup> dealt with misconduct in that an employer dismissed an employee for falsely claiming at a pre-appointment interview that she possessed a matriculation certificate. However, the employer had failed to dismiss another employee guilty of the same misconduct. This inconsistency led the court to presume that the misconduct did not necessarily destroy the trust relationship. The dismissal was therefore held to be unfair. The court held that the onus to show that the employee was guilty of the offence and that the dismissal was fair rests with the employer and that the employer also bears the duty to show that the trust relationship between it and the employee has broken down because of the employee’s conduct.<sup>98</sup> *In casu* the court also took into account the fact that the employee “owned up to her wrongdoing”.<sup>99</sup> The court summarised the position post *Sidumo*<sup>100</sup> to state that the key question which an arbitrator has to ask is simply “Is this dismissal fair?”<sup>101</sup>

In answering this question the Labour Appeal Court in *Mutual Construction Co Tvl v Ntombela*<sup>102</sup> cited with approval the *dictum* in the earlier *De Beers* case:<sup>103</sup> “Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him or her and the employer has been destroyed”.<sup>104</sup> The court thus proceeded to find that it was satisfied that the decision of the commissioner in that case was indeed one which a reasonable decision maker could not make.

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97 [2010] 3 BLLR 342 (LC).

98 *Idem* par 16 and 26.

99 *Idem* par 30.

100 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

101 Par 18.

102 2010 31 ILJ 901 (LAC).

103 *De Beers Consolidated Mines Ltd v CCMA* [2000] 9 BLLR 995 (LAC); 2000 21 ILJ 1051 (LAC).

104 The *Mutual Construction Co Tvl* case par 38.

In *Shoprite Checkers (Pty) Ltd v CCMA*<sup>105</sup> the employee, in a supervisory position was dismissed for “unauthorised consumption”. The employee had a clean record and 30 years’ service. He was captured on video putting a piece of food into his mouth on two separate occasions and, on a third occasion, consuming a plate of food in the company’s delicatessen. The commissioner found the sanction of dismissal unfair and reinstated the employee on a “severe final warning” without backpay. The company brought a review on the merits and the union a cross-review regarding the forfeiture of backpay. The Labour Court set aside the award due to the absence of a record of the arbitration. In the subsequent appeal, the Labour Appeal Court found that there was “no doubt that the result of the award met the test for reasonableness”.<sup>106</sup> Zondo JP stated that he

would go so far as to say that there is no prospect that a reasonable decision maker - including a CCMA commissioner – could, on the facts of this case, find that dismissal was a fair sanction.<sup>107</sup>

However, another case involving the same employer, *Shoprite Checkers (Pty) Ltd v CCMA*<sup>108</sup> led to a completely different result. In this instance an employee, an assistant baker with a clean record and nine years’ service was dismissed after being captured on video eating (from the company’s delicatessen) *pap* on two days and a slice of bread on another day. The commissioner, finding that the employer had failed to prove that the employee was in fact guilty of misconduct, reinstated him. On review the Labour Court did hold that the commissioner had erred with such finding but nevertheless held the sanction of dismissal to be unfair and thus reinstated the employee on a final warning. *Shoprite Checkers* was convinced that this was a decision that a “reasonable” decision maker could not make. On appeal the court therefore considered the Labour Court’s decision on the sanction of dismissal and the court examined the case by analysing the Labour Appeal Court’s jurisprudence on theft (specifically theft of items of relatively small value). The court, per Davis J, came to a different conclusion than that of Zondo JP in the earlier *Shoprite* case.<sup>109</sup> The court also stated that in the earlier judgment the court “appears to adopt a different approach to the body of jurisprudence as analysed in this judgment”.<sup>110</sup> However, Davis J then distinguished the two cases on the facts (or at least set out to do so) having regard of the fact that the employee *in casu* had less service, had produced “manufactured evidence” and had consumed more produce. The outcome was that the employee’s dismissal was held to be fair.

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105 *Shoprite Checkers (Pty) Ltd v CCMA* [2008] 12 BLLR 1211 (LAC).

106 Par 19 and Myburgh “*Sidumo v Rustplass*: How have the courts dealt with it?” 2009 30 ILJ 1.

107 Par 19.

108 2008 29 ILJ 2581 (LAC).

109 *Shoprite Checkers (Pty) Ltd v CCMA* [2008] 12 BLLR 1211 (LAC).

110 Par 24.

In a recent matter, *Miyambo v CCMA*<sup>111</sup> the Labour Appeal Court decided that dismissal after the theft of scrap metal was an appropriate dismissal, and a fair operational response from the employer's side. The court also rejected a rather technical distinction being made between theft and petty pilfering.

#### **4 4 Factors to be Considered and Evidence to be Led**

The factors listed in the code (and even those listed by the Constitutional Court in the *Sidumo* case)<sup>112</sup> have been raised in numerous cases over more than a decade. A few factors have however been regarded more significant than others.

##### **4 4 1 Progressive Discipline and the Harm Caused by the Misconduct**

*Cash Paymaster Services, North-West (Pty) Ltd v CCMA* (2009) 30 ILJ 1587 (LC) concerned an application to review and set aside the award that the dismissal of the employee for misconduct was too harsh.<sup>113</sup> The commissioner reasoned as follows when finding the sanction of dismissal was inappropriate in the circumstances:<sup>114</sup>

In as much as I have found that the Applicant's conduct was dishonest I do not find that it is of such a serious nature that it is deemed to have affected the trust relationship between him and the Respondent beyond repair. Whilst I may not prescribe to the Respondent the type of sanctions to give to employees I believe that the procedures should act as a guideline. As correctly submitted by Mr Grudlingh, in this instance, the Applicant was untruthful in handing in an assignment, which related to a training programme organised by the Respondent. He should have been put on terms and advised of the consequences of him and not fulfilling the training modules designed for his advancement. ... An appropriate sanction would be a written warning.

The court approached the review by stating that the central question does not relate to the substance of the offence, but whether the commissioner performed her duties properly in the assessment of the fairness of the dismissal. The court reiterated that the approach to be adopted by commissioners in performing their duties of assessing whether or not the

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<sup>111</sup> [2010] 10 BLLR 1017 (LAC). See also par 20: "To my mind, a disciplinary procedure that draws subtle distinctions between degrees of theft, and likens the lesser or "technical" sort of theft to negligence, is impractical."

<sup>112</sup> *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

<sup>113</sup> The respondent who was employed on a fixed term contract as a support supervisor at the Vryburg branch was charged with and disciplined for a number of offences, including the failure to obey instructions in that the respondent was alleged to have failed to submit a compact disc with assignments in it and dishonesty in that the employee submitted a compact disc with the full knowledge that it did not contain any of the assignments. During the arbitration hearing it was testified that the manager could no longer trust the employee because of the incident involving (non)submission of his assignment.

<sup>114</sup> Par 11.

sanction of dismissal in the circumstances of a given case is fair is that which was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>115</sup> “Ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view.”

The court held that in the present case there was no reason why the court should interfere with the conclusion reached by the commissioner regarding the finding that the sanction was too harsh and that it is apparent from the reading of the award that the commissioner in arriving at her decision took into account the seriousness of the failure by respondent to submit his assignment. This however did not in her view affect the core of the trust relationship. In conclusion, the court found that there is no basis upon which the court can fault the commissioner in arriving at the conclusion that the sanction of dismissal was unfair. However, the powers and authority of the commissioner in the circumstances of the present case was limited to the terms of the contract of employment agreed to by the parties and by extending the contract of employment beyond the fixed term agreed to by the parties, the commissioner exceeded her powers.

Furthermore, in *Timothy v Nampak Corrugated Containers (Pty) Ltd*<sup>116</sup> the Labour Appeal Court was satisfied that in a case of gross dishonesty coupled with a complete lack of showing remorse, progressive discipline was not called for and dismissal was fair.<sup>117</sup>

#### 4.4.2 Long Service

In the *De Beers Consolidated Mines Ltd* case<sup>118</sup> Conradie JA declared that

[L]ong 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. Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a

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115 [2007] 12 BLLR 1097 (CC).

116 [2010] 8 BLLR 830 (LAC). In a matter where an employee posed as an attorney representing the employer to obtain privileged information for a colleague from a firm of attorneys.

117 835: “Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer’s organisation, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. In these circumstances, where there is nothing more than an aggressive denial and a perpetuation of dishonesty, it is extremely difficult to justify a progressive sanction, particularly in a case where the dishonesty is as serious as this dispute.”

118 2000 21 ILJ 1051 (LAC) par 22.

sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.

More recently, in *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO*,<sup>119</sup> Ndlovu AJA in a case involving gross dishonesty held that even if the respondent had much more than two and a half years' service with the appellant, that "would not (and should not) have spared him in the circumstances of the case".<sup>120</sup> The court quoted with approval the earlier dictum in *Toyota SA Motors SA (Pty) Ltd v Radebe & others*:<sup>121</sup>

Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point. I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.

#### **4 4 3 Disciplinary Record**

In *NCAWU obo Van Niekerk and Moolman*<sup>122</sup> the applicant was employed as a bench supervisor in the respondent's factory. He was dismissed on 12 March 2009 after a disciplinary enquiry at which three witnesses testified that he had entered the production manager's office where others were present, and had called him "arrogant", a "liar" and a "coward". He was suspended and charged with gross insubordination, serious disrespect, impudence and insolence, and was summarily dismissed. He filed an internal appeal application at which the appeal chairperson considered the record of the enquiry and decided that there was no need for a new hearing. The sanction of dismissal was accordingly upheld.

Regarding substantive fairness the applicant claimed that his words had been taken out of context, that there had been no contravention of a rule and no evidence that he had committed the offences charged. The commissioner found that the employee had failed in his duty to show respect to the production manager, and was guilty of insolence, disrespect and impudence. The applicant's words and actions were wilful and deliberate, and there was no evidence that the production manager

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119 2010 31 *ILJ* 901 (LAC).

120 Par 37.

121 2000 21 *ILJ* 340 (LAC) 344C-F.

122 2010 31 *ILJ* 241 (CCMA).

had provoked the applicant. Taking into account that the applicant had four previous disciplinary actions on record the sanction of dismissal was not unfair.

#### **4 4 4 Consistency**

In some decisions dismissals were set aside where misconduct, though serious did not warrant dismissal where an employer had reinstated other employees dismissed for the same offence.<sup>123</sup> Consistency in disciplining is thus an important element of showing that a dismissal was “fair”.<sup>124</sup>

#### **4 4 5 Admitting Wrongdoing and Showing Remorse**

In a number of cases this issue has been raised<sup>125</sup> as a factor to consider in deciding whether the trust relationship has been irretrievably broken down. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others* the court held that<sup>126</sup>

“[i]t would in my view be unfair for this court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgement of wrongdoing on the part of the employee would have gone a long way in indicating the potential and possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future.”

In *Timothy v Nampak Corrugated Containers (Pty) Ltd & others*<sup>127</sup> it was held that when considering the appropriateness of a sanction, progressive discipline is not called for where an employee has committed act of gross dishonesty and had shown no remorse.<sup>128</sup>

In a 2010 judgment, *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others*,<sup>129</sup> after finding the employee guilty of gross dishonesty and fraud, the Labour Appeal Court stated that it “was also significant that the third respondent elected not to own up to this misdemeanour”. In other

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123 *SACCAWU v OK Bazaars Kimberley* [1998] 7 BALR 887 (CCMA). In this matter the commissioner stated (895) that: “The real test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable. ... The question whether the trust relationship between employee and employer has in fact broken down in a particular case is a question of fact and not a question of law. One must scrutinise the evidence on record carefully ...”.

124 See also *Gcwensha v CCMA* [2006] 3 BLLR 234 (LAC) and *SACCAWU v Irvin & Johnson Ltd* 1999 20 ILJ 2302 (LAC).

125 *Westonaria Local Municipality v SALGBC* [2010] 3 BLLR 342 (LC).

126 2008 29 ILJ 1180 (LC) par 45.

127 DA 22/08. The employee posed as the employer’s attorney in order to obtain information for a colleague from an actual attorney.

128 In the *Sidumo* case *supra* the Constitutional Court stated (par 117) that the fact that Mr Sidumo did not own up to this misconduct and his denial that he received training were factors that counted against him.

129 2010 31 ILJ 901 (LAC).

words, the court stated, he showed a complete lack of remorse or contrition for what he did.<sup>130</sup>

#### **4 4 6 Totality of Circumstances**

In the *Mutual Construction Co Tvl* case<sup>131</sup> the Labour Appeal Court held that gross dishonesty was a fair reason to justify dismissal. In considering the commissioner's contrary finding, the court held that it was important for the commissioner to take "the totality of circumstances into account in making his decision ...". The court illustrated that in this instance

... the third respondent was placed in a position of trust and responsibility. He was basically the source from which all the information was obtained by the appellant as to how the staff was to be remunerated in terms of the number of hours of work actually performed .... This role ... constituted a crucial and fundamental operational requirement in the appellant's business.<sup>132</sup>

### **5 Concluding Remarks**

Mischke<sup>133</sup> submits that linking the breakdown of the employment relationship to the employer's needs and necessities can be a useful guiding principle for cases involving dishonesty and other types of serious misconduct (for example insubordination, assault, harassment and so forth). This *Mutual Construction*-approach to deciding on the appropriateness of dismissal requires a consideration of the operational context of the misconduct as well as the operational implications or consequences thereof.

In essence this is what the Code of Good Conduct requires – an employer must indicate that the misconduct is of such a nature to make the relationship intolerable. This cannot be done simply by alleging the breakdown of the trust relationship, the employer must put enough material before a decision maker to persuade such person that having regard of the totality of circumstances (including factors relating to the employee and the employer) the sanction of dismissal was appropriate and fair. The employer must satisfy the onus that dismissal was fair and the decision maker reviewing that decision must be satisfied that having regard of the facts of the case the dismissal was indeed fair. In this context, fairness must require a consideration of factors pertaining to both the employer and employee.

In a discussion of this contribution it was justly proposed to me that what *Edcon Ltd v Pillemer NO (Reddy)*<sup>134</sup> might then suggest is that an employer should not take for granted that certain kinds of misconduct, especially those involving dishonesty, necessarily imply that the

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130 Par 37.

131 *Ibid.*

132 Par 36.

133 "The breakdown of trust: Operational perspectives on the appropriate sanction" 2010 *Contemporary Labour Law* 71 76.

134 [2010] 1 BLLR 1; 2009 30 ILJ 2642 (SCA).

relationship of trust and confidence has been destroyed.<sup>135</sup> This can be summarised by stating that up to the *Edcon* case,<sup>136</sup> the courts appear to have accepted this, and were prepared to entertain an argument to this effect based not on the basis of any evidence on this issue specifically placed before the arbitrator but on the basis of inferences that might be drawn from certain types of misconduct. After the *Edcon* case<sup>137</sup> employers are now required to table evidence at the arbitration hearing that addresses this issue, and of course, the commissioner must factor the evidence into any assessment of whether the decision to dismiss was fair. It therefore seems that after the *Edcon* case<sup>138</sup> the substantive law has not changed much at all.

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<sup>135</sup> I wish to thank A van Niekerk for commenting on an earlier draft of this contribution.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*