

Fairness of Dismissal as a Sanction

Who decides whether the Dismissal was an Appropriate Sanction and therefore fair?

Even though the Supreme Court of Appeal 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 transgression of a workplace rule. The Constitutional Court has stated that employees are a vulnerable group in society 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, meaning for a fair reason. The Constitutional Court in the Sidumo case did not agree with the Supreme Court of Appeal's approach to determining the fairness of a dismissal for misconduct and held that:

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. Navsa AJ also reconfirmed the decision of the Labour Appeal Court in County Fair Foods (Pty) Ltd v CCMA47

that CCMA arbitrations are in fact hearings de novo. The court referred to sections 138(1) and (2) of the LRA, which accord commissioner's 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* 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.

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**. Put differently, rather than to defer to the decision of the employer the 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**". Therefore as long as the **decision is one that a reasonable decision maker could make a court won't interfere**.

The questions to ask are:

1. Was the decision of yourself that of a reasonable decision maker taken into account the reasons for your guilty finding and your sanction?

2. Did you take into account the totality of circumstances or only the Polygraph test results and non-supportive evidence witnesses towards the so called guilt of Me Oliver?
3. Was the decision based on all the evidence available to you including the tests of all other employees?
4. Was the dismissal substantively fair? Was the reasons for dismissal fair based on facts in this case and was the dismissal an appropriate sanction for Me Oliver?

The Code of Good Practice in relation to Dismissal 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**. The code proceeds to state that the courts have endorsed the concept of corrective or progressive discipline, meaning that the purpose of discipline is viewed as a means for employees to know and understand what standards are required of them.

Mischke 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 us that what *Edcon Ltd v Pillemer NO (Reddy)* 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 relationship of trust and confidence has been destroyed**. This can be summarised by stating that up to the *Edcon* case, 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 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 the substantive law has not changed much at all.

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