

Breach of the trust relationship in employment: What to prove and how to prove it

By Xander Wehncke

The Code of Good Practice: Dismissal requires CCMA Commissioners and Bargaining Council Panellists to have regard to an Employer's reasons for imposing the sanction of dismissal. It is said that this ultimate endorsement should be reserved for instances where the employee's conduct have a particularly adverse impact on the employment relationship.

It often happens, that notwithstanding the seriousness of the employee's misconduct; the Arbitrator is not convinced that such was sufficiently serious to warrant a fair discharge, and then calls for the employer to foot the bill.

It is important to note, that in this regard one is not referring to the employer's discretion to enforce discipline in the workplace, but rather how the element of appropriateness ought to be established at Arbitration.

Case law on this topic supposes a holistic approach.

This means that in addition to the employee's length of service, disciplinary record, personal and adjacent circumstances, the significance of the effect which the particular misconduct had on the employers business deserves equal scrutiny. An Employer is therefore required to present compelling evidence in justification of its decision to terminate employment, therefore that the trust relationship broke down irretrievably.

In *Edcon Ltd v Pillemer NO & Others (2009) 30 ILJ 2642 (SCA)* the Supreme Court of Appeal noted that the sole witness called by the company didn't know the employee personally, and merely presented evidence about the inquiry and the company's disciplinary code. Since the employer was unable to present sufficient evidence to convince the Arbitrating Commissioner why employment had become intolerable, the outcome was reasonably connected to the facts before the Commissioner and the Court therefore refused to set it aside.

More recently in *Lubbe v Roop NO and Others* (unreported case no JR 1303/09, 20-1-2012) Lagrange J considered the SCA's reasoning in *Edcon* and stated as follows:

"... It is now clear that it will normally not be sufficient for an employer simply to make submissions that there has been an irretrievable breakdown in the relationship, unless a clear basis has been laid in evidence to justify such a conclusion.

It is also evident that such a conclusion will not be easily drawn simply because of the nature of the misconduct at issue in the case."
(*emphasis added)

While the Code of Good Practise: Dismissal recognise certain instances where an employee's misconduct are sufficiently serious to warrant the inference that dismissal was the only reasonable outcome; there are other instances where the employer will be unable to justify dismissal unless it leads evidence during the disciplinary hearing of someone who have personal knowledge of the, employee, his/her position and the particular misconduct in question.

This witness must be able to explain in detail how the employee's conduct impacted on the employment relationship and why the employee cannot be granted a further opportunity to correct his/her behaviour. Normally this function will fall on the shoulders of the line manager or supervisor.

It will be prudent of the employer to ensure the following:

1. Make sure that there are sufficient facts to prove the seriousness of the misconduct;
2. Make sure that a witness is ready to testify on the breach of the trust relationship. The chairperson cannot assume this evidence from his own experience or assumptions.
3. Make sure that a witness testifies about the trust relationship, why it is broken and what the effect of the misconduct on the employer is;
4. This evidence must be directly linked to the employee, his/her position, the specific misconduct and the specific effect thereof on the trust relationship.
5. Be careful to call a witness to testify on these factors when the witness is not directly linked with the alleged offender – the best witness will be the direct supervisor or manager.

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