

Title: Determining a Fair Sanction for Misconduct

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DECLARATION

I, Shaun Henman do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the day of

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ABSTRACT

This paper focuses on determining a fair sanction for misconduct. This will be considered within the context of our common law and legislative provisions. Emphasis will be placed on the requirements for determining a fair sanction for misconduct and the assessment mechanisms that commissioners utilise in adjudicating the fairness of the sanctions imposed by employers. In determining a fair sanction for misconduct an analysis will be made of all the relevant factors that need to be taken into consideration when making a determination in respect to sanction. This paper will also consider two specific examples of misconduct, namely dishonesty and negligence, and the sanctions that the courts deem most appropriate for such workplace misconduct. This paper will then consider factors relating to dismissal disputes and finish off with concluding remarks.

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ABBREVIATIONS

LRA	Labour Relations Act 66 of 1995
CC	Constitutional Court of South Africa
SCA	Supreme Court of Appeal of South Africa
LAC	Labour Appeal Court of South Africa
LC	Labour Court of South Africa
ULP	Unfair Labour Practice as defined in section 186(2) of the Labour Relations Act 66 of 1995
Code	Schedule 8, Code of Good Practice: Dismissal
CCMA	Commission for Conciliation, Mediation and Arbitration

CHAPTER 1: INTRODUCTION

1.1 Background

This dissertation will attempt to unravel the mystery around determining a fair sanction for misconduct. This will be considered within our legislative and legal framework from the perspective of both employers and arbitrators who adjudicate on the fairness of dismissals as well as other disciplinary action short of dismissal.¹ An analysis will also be made of termination of employment under the common law and terminations in terms of our statutory dispensation and the need now for fairness as opposed to mere lawfulness. Thereafter, considerable focus will be given to the migration from the reasonable employer test to the reasonable commissioner test in determining a fair sanction for misconduct.² This is per the Constitutional Court decision in *Sidumo v Rustenberg Platinum Mines Ltd*.³ This paper will also focus on factors that may mitigate or aggravate sanction and will consider how much relevance they have in determining a fair sanction for misconduct. A comparison will be made between intentional and negligent acts of misconduct and determining a fair sanction for such acts of misconduct. However, this paper will not consider collective acts of misconduct and the determination of a fair sanction for such collective transgressions.

1.2 Aims and objective

The primary objective of this paper is to consider our legal position in so far as the determination of a fair sanction for misconduct is concerned and whether our jurisprudence adequately assists employers and arbitrators in making that determination. Although all disciplinary action must be procedurally and substantively fair, the most contentious issue is establishing when it is fair to

¹ Sections 185 to 188 of the LRA

² *Country Fair Foods (Pty) Ltd v CCMA & others* (1999) 20 ILJ 1701 (LAC), *Sidumo v Rustenberg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)

³ *Ibid*; reference to the *Sidumo* decision in this paper will be that of the Constitutional Court unless it is specifically stated that reference is being made to the decisions of the courts a quo (this includes the footnotes)

dismiss. Section 188(2) of the Labour Relations Act⁴ (hereinafter referred to as the LRA) enjoins any person considering the fairness of a dismissal to take cognisance of any code of good practice issued in terms of the Act.⁵ Item 7(b)(iv) of Schedule 8, Code of Good Practice: Dismissal (hereinafter referred to as the Code) states that dismissal must be an appropriate sanction for breach of the rule or standard.⁶ But over and above this, employers and arbitrators must also have due regard for the contract of employment, judicial precedent, collective agreements and other codes as well as the severity of the misconduct, nature of the job and the personal circumstances of the employee who transgressed.

1.3 Research question / issue

This paper will attempt to unpack all the factors that need to be taken into account in order to determine a fair sanction for misconduct, with particular focus on when it will be fair or appropriate to dismiss an employee who has transgressed and whether these principles adequately guide and assist employers and arbitrators in making such determination.

1.4 Research methodology

The research methodology for this paper is desk based research. Articles, case law, books and journals that provide insight into the topic of determining a fair sanction for misconduct have been consulted. The material has been considered within the parameters of our Constitutional and legislative framework and with due regard to our common law position on terminations of employment.

⁴ Act 66 of 1995

⁵ Schedule 8, the Code of Good: Practice: Dismissal

⁶ The other provisions relating to substantive fairness, namely Items 7(b)(i) to (iii) will not be considered in this paper

1.5 Structure of dissertation

Chapter one is an introduction to the topic of determining a fair sanction for misconduct whilst chapter two deals with the background issues as well as the common law and legislative position in so far as determining a fair sanction for misconduct is concerned. Chapter three focuses on the actual determination of a fair sanction for misconduct and the role of the reasonable commissioner test in so far as it relates to the adjudication of the fairness of a dismissal. Chapter four considers the relevant factors that need to be taken into account when determining a fair sanction for misconduct. Chapter five deals with dismissal disputes and chapter six provides concluding comments in respect of this topic.

CHAPTER 2: BACKGROUND

2.1 Common Law and the employment relationship

Once the employment relationship is established, it is regulated by the common law, legislation, the contract of employment and collective agreements. The dismissal of employees is regulated by the LRA.⁷ In terms of the LRA, dismissal must be both procedurally and substantively fair. Substantive fairness entails, inter alia, that the sanction imposed for misconduct must be fair.

Notwithstanding statutory intervention, the common law contract of employment still remains relevant in modern day society and is an integral part of our labour law jurisprudence.⁸ It is still founded on the 'master and servant' relationship of the common law.⁹ The contract of employment is the founding act of the employment relationship which is thereafter regulated by way of legislation and collective agreement.¹⁰ The relationship is reciprocal in which both parties have

⁷ J Grogan *Dismissal* (2010) 1

⁸ Rycroft...et al. *A Guide to South African Labour Law* 2nd ed. (1992) 44

⁹ Ibid

¹⁰ J Grogan *Workplace Law* 10th ed (2009) 47

duties and responsibilities.¹¹ The employees' duties, amongst others, are to be respectful and obedient and to refrain from misconduct in general, as this undermines confidence and trust.¹² It is trite that trust is the pillar of the employment relationship and the breach of this duty generally renders the employment relationship intolerable and thereby justifies dismissal. However, it is important to take cognisance of the fact that the common law of employment is being developed to bring it in line with the Constitution.¹³

In terms of the contract, a breach by either party entitles the other to accept the breach and sue for damages, or to reject the breach and sue for specific performance. However, under the LRA an employer's acceptance of an employee's repudiation and cancellation of the contract constitutes a dismissal.¹⁴ The common law provides no security of employment and the employer is free to terminate the contract at any stage with no reason or even an unfair reason as long as the required notice period is given. There is no requirement of a fair reason for termination of the contract. At common law the court will not interfere because the dismissal was unfair.¹⁵ The intention of the LRA is to provide employees with additional remedies where their employment agreements have been terminated, it does not however preclude employees from still enforcing common law rights.¹⁶ Further, the Code is not the exclusive domain of employees' rights and remedies.¹⁷ Section 185 of the LRA also does not impliedly create a contractual right to fairness in a contract of employment.¹⁸ In this regard, where the LRA adequately gives effect to constitutional rights there is no need for the common law to be developed so as to duplicate these rights.¹⁹ It is self evident that terminations under the common law are concerned with

¹¹ Ibid

¹² Ibid 51 & 52

¹³ Constitution of the Republic of South Africa, 1996; Ibid 2

¹⁴ J Grogan *Workplace Law* 10th ed (2009) 45

¹⁵ Ibid 3 and footnote 6

¹⁶ Ibid

¹⁷ Ibid

¹⁸ *SAMSA v McKenzie* [2010] 5 BLLR 488 (SCA)

¹⁹ Ibid

lawfulness whilst terminations under the LRA are concerned with fairness. The word 'dismissal' is foreign to the common law.²⁰ In terms of the LRA, a termination that complies with the required notice period in terms of the contract of employment or legislation governing employment, still constitutes a dismissal.²¹ In short the common law did not recognise the right not to be unfairly dismissed.

2.2 Legislation

The erstwhile courts established under the Labour Relations Act 28 of 1956, first traversed the equity based approach to dismissal.²² This was done through the legislative creation of an 'unfair labour practice' which allowed the labour courts to move beyond the confines of the law of contract that focused on lawfulness into the uncertain sphere of fairness.²³ The question in dismissal disputes was not whether the employer was contractually entitled to terminate the contract but whether it acted fairly in doing so.²⁴ Under the common law, the contract of employment could be terminated by mutual consent or by either party giving the requisite notice of termination.²⁵ This effectively meant that the employer could dismiss at will and an employee's claim was limited to the payment of damages for any outstanding notice pay.²⁶ The labour tribunal established in terms of the 1956 Act, developed the concepts of procedural and substantive fairness in so far as dismissal disputes were concerned, which was foreign under the common law.²⁷ The concept of an 'unfair labour practice' and the courts power to adjudicate the fairness of a dismissal revolutionised our labour law.²⁸ The right now not to be unfairly dismissed or subjected to an 'unfair labour practice' now

²⁰ J Grogan *Dismissal* (2010) 2

²¹ Section 186(a) and Item 2(1) of the LRA

²² J Grogan *Dismissal* (2010) 2

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid; notice pay – in the amount that the employee would have earned had he or she worked his or her notice period

²⁷ J Grogan *Dismissal* (2010) 3

²⁸ Ibid

forms part of our law under the current LRA.²⁹ The intention of the requirement of a fair sanction or fair dismissal was not intended to protect hoodlum employees or frustrate employers, but was seen as a necessary antidote to the employers' right to dismiss. It is there to ensure that employees can work in a conducive environment without fear of unjust treatment and for employees to be able to freely exercise their rights.³⁰

The need for discipline in the workplace is not only related to productivity and efficiency requirements. It is also derived from the employers' common law and statutory requirements to ensure a healthy and safe working environment. The need for discipline is also reinforced by the application of the common law doctrine of vicarious liability wherein the employer is held responsible for damage caused by an employee within the course and scope of employment.³¹ The employer's right to discipline emanates from the contract of employment. The employee when entering into a contract of employment, places his or her capacity to work at the disposal of the employer. It is for the employer to decide how the capacity to work is utilised within the parameters of the law. Therefore, the employer's power to control the manner in which the employee behaves both in and outside the workplace is a distinctive feature of the contract of employment.³² When an employee breaches rules or standards, the employer is entitled to discipline an employee. This includes transgressions that are committed outside the workplace or outside working hours as long as the conduct in question somehow relates to or impacts on the working relationship or image of the organisation. However, managing the conduct of employees in a fair and positive manner can lead to a harmonious and productive workforce.³³

It is self evident that the common law and law of contract on their own provide no assistance in ensuring that terminations are fair or that fair sanctions are

²⁹ Section 185 of the LRA; J Grogan *Dismissal* (2010) 3

³⁰ J Grogan *Dismissal* (2010) 3

³¹ [http://www.irnetwork.co.za/nxt/gateway.dll/tehj/tnzm/lv5m?f=templates\\$fn=document](http://www.irnetwork.co.za/nxt/gateway.dll/tehj/tnzm/lv5m?f=templates$fn=document)

³² *Ibid*

³³ J Grogan *Workplace Law* 10th ed (2009) 159

imposed. The focus is on lawfulness and adherence to contractual provisions in the contract of employment itself. Through the unfair labour practice provisions under the erstwhile 1956 LRA the courts introduced the requirements of equity based dismissals and the right not to be unfairly dismissed or subjected to unfair labour practices has now been codified in our present LRA.³⁴ The courts have however acknowledged that the contract of employment impliedly imposes on employers a duty of 'fair dealing with their employees'.³⁵ However, the courts have made it clear that section 185 of the LRA does not impliedly create a contractual right to fairness in a contract of employment.³⁶ Although employees retain their common law rights, they cannot sue in terms of the common law or contract of employment for an unfair dismissal. Their claim must be based on unlawful termination of the contract. As the court stated – where the LRA adequately protects constitutional rights there is no need to develop the common law so as to duplicate these rights.³⁷

2.3 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa, 1996 provides that 'everyone has the right to fair labour practices'.³⁸ This is a fundamental right that has been given effect through legislative enactment. The LRA provides that every employee has the right not to be unfairly dismissed or subjected to unfair labour practices.³⁹ This provision gives legislative effect to the constitutional right to fair labour practices.

2.4 The right not to be unfairly dismissed and subjected to unfair labour practices

³⁴ Section 185 of the LRA

³⁵ *Murray v Minister of Defence*, *supra*

³⁶ *SAMSA v McKenzie*, *supra*

³⁷ *Ibid*

³⁸ Section 23 of the LRA

³⁹ Section 185 of the LRA

As stated above, the right not to be unfairly dismissed is now codified in the LRA (section 185), and the relevant Codes of Good Practice in terms of section 138(6) of the LRA. The relevant codes are Schedule 8, The Code of Good Practice: Dismissals and the CCMA Guidelines for Commissioners for Dismissal Arbitrations. Section 185(b) of the LRA also states that every employee has the right not to be subjected to unfair labour practices. Section 186 of the LRA defines dismissals and unfair labour practices. It is also interesting to note in terms of section 186(2)(b) of the LRA, that any unfair disciplinary action short of dismissal (such as a warning, for example) can amount to an unfair labour practice. But the operative word for unfair dismissals and unfair labour practices is unfairness itself, which needs to be established. In the workplace, dismissal is generally justified if an employee has breached a material term of the contract of employment or his or her conduct has rendered the continued employment relationship intolerable.⁴⁰ Misconduct occurs where an employee breaches rules that exist within a workplace. These rules may emanate from the express or implied terms of the contract, from the disciplinary code and procedure applicable in the workplace or from general standards and practices that are accepted as applicable in the particular workplace.⁴¹

2.5 Types of Dismissals

The LRA recognises many forms of dismissal and the statutory definition of dismissal is set out in section 186(1) of the LRA. In terms of this section 'dismissal' is defined as the termination of a contract of employment with or without notice;⁴² the failure to renew a fixed term contract of employment when an employee had an expectation of renewal;⁴³ the refusal to allow an employee to resume work after she took maternity leave;⁴⁴ an employer dismissed a number of employees for the same or similar reason and has only offered to re-

⁴⁰ J Grogan *Dismissal* (2010) 142

⁴¹ Ibid 143

⁴² Section 186(1)(a) of the LRA

⁴³ Section 186(1)(b) of the LRA

⁴⁴ Section 186(1)(c) of the LRA

employ one or more of them but has refused to re-employ the others;⁴⁵ constructive dismissal wherein the employer made the employment relationship so intolerable for the employee that he or she had no option but to resign⁴⁶ and where an employee terminates a contract of employment, after a transfer in terms of section 197 or section 197A of the LRA, as the employer provided the employee with working conditions that were substantially less favourable to the employee than those provided by the old employer.⁴⁷

Paragraph (a) of the dismissal definition is the only termination (dismissal) recognised by the common law.⁴⁸ At common law the contract could be terminated lawfully by either party giving the required notice or in the case of a fixed term contract, by the expiry of the time period or the occurrence of a specified event.⁴⁹ Under the common law a termination with the required notice was regarded as lawful and left an employee with no legal remedy for his or her dismissal. Summary dismissal (ie: dismissal without notice) left an employee with a remedy for breach of the notice period unless there was a justifiable reason for not giving notice.⁵⁰ Technically speaking, a summary dismissal would only bring the contract to an end if the other party accepted the repudiation.⁵¹ In terms of the common law dismissed employees may sue for breach of contract, if by the termination, they can prove that the employer breached an express, implied or tacit term of the contract.⁵² Where the employer repudiates the employment contract, an employee may elect to either accept the repudiation and sue for contractual damages or hold the employer to the contract and sue for specific performance.⁵³

⁴⁵ Section 186(1)(d) of the LRA

⁴⁶ Section 186(1)(e) of the LRA

⁴⁷ Section 186(1)(f) of the LRA

⁴⁸ J Grogan *Dismissal* (2010) 12

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *SAMSA v McKenzie, supra*; J Grogan *Dismissal* (2010) 13

⁵³ J Grogan *Dismissal* (2010) 13

In terms of section 186(1) of the LRA a lawful termination of the contract of employment now amounts to a dismissal. Further to that, the failure to renew a fixed term contract, refusal to allow an employee to resume work after a pregnancy, selective non re-employment and certain resignations can now also amount to a dismissal.⁵⁴ The common law would not have regarded these as a repudiation of contract.⁵⁵

The question of whether a dismissal occurred is a separate issue, and must be answered first, before an enquiry into its fairness is determined. The onus of establishing that a dismissal occurred rests with the employee. The duty of proving that the dismissal was fair rests with the employer.⁵⁶

2.6 Permissible Grounds for Dismissal

The LRA provides that there are only three permissible grounds for dismissal, and that the dismissal must be for a fair reason [section 188(1)(a)], and that a fair procedure must be followed [section 188(1)(b)]. Within the workplace dismissal can occur on three recognised grounds, namely in respect to the conduct of the employee, the capacity of the employee to perform the job and the operational requirements of the employer.⁵⁷ All types of dismissals must be both procedurally and substantively fair. Section 185 of the LRA provides that 'every employee has the right not to be unfairly dismissed and section 188(1) provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason relating to the employee's conduct or capacity or was based on the employer's operational requirements. The dismissal must also be effected in accordance with a fair procedure.' If an employer fails to do or prove this then the dismissal is unfair.⁵⁸ Automatically

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Section 192(2) of the LRA; Ibid

⁵⁷ H Landis ...et al. *Employment and the Law* (2005) 159; Section 188(1) of the LRA

⁵⁸ Item 2(4) of Schedule 8, Code of Good Practice: Dismissal

unfair dismissals are dealt with in terms of section 187(1) of the LRA, and are beyond the scope of this dissertation.

2.7 Substantive Fairness

Section 188(2) of the LRA provides that:

‘any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant Code of Good Practice issued in terms of this Act.’

The Code emphasises the need for employment justice, efficiency and mutual respect between employers and employees.

Item 1(3) of the Code states that:

‘The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.’

The substantive fairness of a dismissal is thus determined with reference to item 7 of the Code. The LRA provides that dismissal must be in accordance with a fair procedure and for a fair reason. In other words, the dismissal must be both procedurally and substantively fair.⁵⁹ In fact all disciplinary action must be in accordance with a fair procedure and the outcome or sanction imposed must also be fair and just, in relation to the infraction committed by the employee. The

⁵⁹ Section 188 of the LRA

requirements of procedural and substantive fairness do not only relate to dismissal cases, but extend to disciplinary action short of dismissal in terms of section 185 of the LRA.

Item 7 of the Code outlines the requirements of substantive fairness: namely that the 'rule which the employee is alleged to have contravened existed, that the employee was aware of the rule or could be expected to have been aware of the rule, that the rule was valid or reasonable, that the rule has been consistently applied, that the employee transgressed the rule and that dismissal was an appropriate sanction for contravention of the rule.' The determination of an appropriate or fair sanction for misconduct is one of the most problematic areas for employers in so far as discipline is concerned. This is especially so when determining whether dismissal is an appropriate sanction for breach of a rule.

At common law, employees have the responsibility to refrain from misconduct generally, especially that which undermines the employment relationship.⁶⁰ The Code states that employers should adopt rules that regulate the standards and conduct required from employees in the workplace.⁶¹ It is also evident from the CCMA Guidelines that the employer's disciplinary code is of fundamental importance in determining the fairness of the sanction of dismissal. This also accords with the *Sidumo*⁶² decision which states that the employer is at liberty to set the rules and standards of conduct required from employees in terms of its operational risk requirements. It is necessary for employers to communicate the standards and rules that exist within the workplace clearly and understandably to employees and reaffirm them from time to time if any indulgence has been shown.⁶³

⁶⁰ *Country Fair Foods v CCMA and others*, *supra* at para 11, *Sidumo & others v Rustenberg Platinum Mines & others (CC)*, *supra* at paras 67 & 176, CCMA Guidelines: Misconduct Arbitrations Gazette No. 34573 para 89 to 91; J Grogan *Workplace Law* 10th ed (2009) 52

⁶¹ Item 3(2) of Schedule 8, Code of Good Practice: Dismissals

⁶² *Sidumo v Rustenberg Platinum Mines (CC)*, *supra*

⁶³ A Myburgh "Determining and Reviewing Sanction after *Sidumo*" (2010) (31) ILJ 11 - 12

If an employee is found to have committed misconduct the next question, is whether dismissal is an appropriate sanction.⁶⁴ In this regard, the Code must be referred to.

Item 3(4) of the Code states the following:

‘Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.’

The Code adds an important proviso: that each case should be judged on its own merits and even these listed types of disciplinary offences do not always justify dismissal.

With respect to dismissal for misconduct the Code states further at Item 3(5) that in addition to the severity of the offence the personal circumstances of the employee need also to be taken into account. This would include length of service, previous disciplinary record and other personal circumstances. Other factors that also need to be considered are the nature of the job and the circumstances in which the misconduct occurred. The employer must also be consistent in the application of discipline.⁶⁵

⁶⁴ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (1999) 353

⁶⁵ Item 3(6) of the Code

The CCMA has also issued guidelines for misconduct arbitrations to promote consistent decision making when dealing with dismissals for misconduct.⁶⁶ The guidelines were drafted after the *Sidumo*⁶⁷ decision and highlight how the CCMA has interpreted the judgment.⁶⁸ In terms of the guidelines commissioners must consider the following factors when determining whether dismissal was an appropriate sanction.⁶⁹ These are, the gravity of the contravention of the rule, the consistent application of the rule and any other factors that may justify a different sanction.

In line with the *Sidumo*⁷⁰ decision, the CCMA Guidelines state the following:

‘The test is whether the employer *could fairly have imposed* the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct.’⁷¹ (Emphasis added)

In respect to the gravity of the misconduct, commissioners are required to consider the sanction stipulated in the disciplinary code and procedure and then mitigating and aggravating factors that may make the transgression more or less severe.⁷² In respect to sanctions prescribed in the disciplinary code, they would be considered appropriate sanctions if they are serious and accord with the disciplinary code and judicial precedent. Any sanction provided for in the disciplinary code must be considered in the light of any relevant factors in aggravation and mitigation of sanction.⁷³ With respect to aggravating and mitigating factors, this enquiry would require an analysis of the actual

⁶⁶ CCMA Guidelines: Misconduct Arbitrations, *supra*

⁶⁷ *Sidumo v Rustenberg Platinum Mines (CC)*, *supra*

⁶⁸ A Myburgh “Determining and Reviewing Sanction after *Sidumo*” (2010) (31) ILJ 10

⁶⁹ Para E of the CCMA Guidelines: Misconduct Arbitrations, *supra*

⁷⁰ *Sidumo v Rustenberg Platinum Mines*, *supra*

⁷¹ Para 92; A Myburgh “Determining and Reviewing Sanction after *Sidumo*” (2010) (31) ILJ 10

⁷² A Myburgh “Determining and Reviewing Sanction after *Sidumo*” (2010) (31) ILJ 10

⁷³ *Ibid* 11

circumstances surrounding the transgression. Aggravating factors would entail a consideration of whether the act was willful or intentional, whether there was lack of remorse, failure to admit responsibility when there was overwhelming evidence, dishonesty during the hearing, nature of the job and damage or loss caused to the employer.⁷⁴ Mitigating factors would include remorse shown, no loss or damage caused to the employer, accepting responsibility for the misconduct and owning up thereto and whether the employee is willing to submit to a lesser sanction and corrective behaviour.⁷⁵ Depending on the circumstances of the case, aggravating factors may warrant a more severe sanction than that stipulated in the disciplinary code whilst mitigating factors may call for a lesser sanction.⁷⁶

With respect to the requirement that sanctions be imposed consistently, this entails the requirement of both historical and contemporaneous consistency. Where inconsistency is raised, an employer must have a legitimate reason for differentiating between the two employees otherwise the disparity will be regarded as unfair.⁷⁷ This aspect will be discussed in more detail hereunder.

In respect of factors justifying a lesser sanction than dismissal, the main factor to be considered relate to operational risk, being the risk of further acts of misconduct and the risk of harm to the enterprise as a consequence thereof.⁷⁸ Other factors to be considered in this regard are the employee's personal circumstances (including the employee's service record and length of service), the nature of the job (risk of repetition of misconduct poses an operational risk to the enterprise and destroys the trust relationship) and the circumstances of the contravention (including provocation, remorse, coercion and the absence of

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

dishonesty).⁷⁹ The parity principle is also important. This requires that discipline be administered consistently and fairly.

In summary, when considering dismissal an employer must bear various factors in mind.⁸⁰ These include the internal policies and procedures, legislative obligations, the various Codes of Good Practice issued in terms of Acts, obligations established in terms of contract and collective agreements, judicial precedent created through case law and arbitration awards, best practices within the industry and the CCMA guidelines for dismissal arbitrations.⁸¹

By following these requirements the employer will go a long way towards ensuring that dismissals are procedurally and substantively fair. This will also prevent unfair dismissal disputes as well as dismissals being found to be unfair at arbitration. This will save the employer in terms of time and litigation costs.⁸²

The requirements of a substantively fair dismissal exists to ensure that there is a fair reason for finding that an employee has transgressed a rule and that the sanction imposed for doing so is also fair. As stated above, employers will be guided by a variety of factors including the Code of Good Practice, the disciplinary code, the norms within the sector, the CCMA guidelines for arbitrators as well as jurisprudence developed by the courts. Substantive fairness essentially deals with the reasons or grounds for the dismissal of an employee. However, even for sanctions short of dismissal the same principle applies.⁸³ In other words, the employee must actually be guilty of the misconduct for which he or she has been charged and the sanction imposed must be commensurate with the misconduct for which the employee has been found guilty.

⁷⁹ Ibid; CCMA Guidelines: Misconduct Arbitrations

⁸⁰ H Landis ...et al. *Employment and the Law* (2005) 159

⁸¹ Ibid

⁸² Ibid 159 - 160

⁸³ *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC) at para 50

The Code although recognising an employer's right to dismiss, even for a first offence, also encourages and promotes the concept of corrective and progressive discipline. In this regard an employee's conduct is corrected through a graduated system of counselling and warnings.⁸⁴ This will be discussed in more detail in chapter four below. The Code by its very nature and considering the complexities as well as the uniqueness of workplace relations is purposely general.⁸⁵ The Code also recognises that disciplinary cases are unique and that therefore departures from the Code may be justified in certain circumstances.⁸⁶ The LRA and the Code provides an informative framework to guide and assist employers in fairly and correctly instituting disciplinary action. This is bolstered by adding into the mix the employer's disciplinary code, the norms within the sector, the CCMA guidelines for arbitrators as well as jurisprudence developed by the courts. Therein lies the recipe for determining a fair sanction for misconduct, however as can be seen from judicial precedents this recipe is not always foolproof. It is not a simple 'tick box' exercise. The reason for this is that the dynamics in workplaces are different and cases need to be judged on their own merits with due regard to the parity principle. However, the most pressing issue in going about determining a fair sanction for misconduct is the concept of fairness itself. It is a relative concept with no universal application. What one may regard as fair another may regard as unfair. One's appreciation of fairness is influenced by one's background, upbringing, culture, religion and the like. From this perspective one makes a judgment in respect of fairness and these decisions are not always the same. Some may say that we are still star gazing in so far as determining a fair sanction for misconduct is concerned but at the end of the day the decision is based on reasonableness and one must not act irrationally or capriciously, just fairly.⁸⁷ In this regard in a dismissal dispute, a commissioner will need to decide the issue with his or her own sense of fairness based on the facts

⁸⁴ Items 3(1) & (4) of Schedule 8, Code of Good Practice: Dismissal

⁸⁵ Item 1(1) of of Schedule 8, Code of Good Practice: Dismissal

⁸⁶ Ibid

⁸⁷ *Fidelity Cash Management Services v CCMA and others* [2008] 3 BLLR 197 (LAC); *Sidumo & others v Rustenberg Platinum Mines & others* (CC), *supra*

before him or her. A value judgment is made when considering the fairness of the employer's decision to dismiss, taking all relevant circumstances into account. A commissioner must not determine afresh what the appropriate sanction is but must determine whether the employer's decision to dismiss is fair.⁸⁸ This aspect will be analyzed in more detail in Chapter three, below.

CHAPTER 3: DETERMINING THE APPROPRIATE SANCTION

3.1 Overall Test

This chapter will further consider the question on how to determine a fair sanction for misconduct. In respect of dismissal matters the overall test is whether there has been an irretrievable breakdown of the employment relationship. The determination of a fair sanction will be considered from the perspective of the employer and the arbitrating commissioner. Particular emphasis will be placed on the consideration of fairness and how our legal position has transformed from the 'defer to the employer position' that is inherent in the reasonable employer test to the reasonable commissioner test. Historically, employers determined the standards of conduct required of employee and the sanctions to be imposed for breaches thereof. Commissioners would only interfere with sanctions if the sanction imposed was 'shocking' and manifestly unfair.⁸⁹ However, the position has changed and commissioners are no longer required to defer to the employer's choice of sanction. This will be considered in detail hereunder. Then an in depth analysis will be made in order to establish whether the position in so far as determining a fair sanction for misconduct has become any clearer for employers and commissioners or whether there is there still a veil of uncertainty in so far as determining a fair sanction for misconduct.

⁸⁸ *Sidumo & others v Rustenberg Platinum Mines & others (CC)*, *supra*

⁸⁹ *Country Fair Foods (Pty) Ltd v CCMA & others*, *supra*

As stated above, the determination of an appropriate sanction for misconduct is one of the most problematic areas of our labour law jurisprudence.⁹⁰ The basic requirement is that the sanction imposed must be appropriate.⁹¹ This is one of the requirements of substantive fairness. In terms of Item 3(4) of the Code of Good Practice: Dismissal, the appropriateness of a sanction is dependent on the seriousness of the infraction and its impact on the trust relationship.⁹² The use of the word 'appropriate' indicates that it is impossible to lay down rigid rules in this regard. Each case must be considered on its own merits.⁹³

3.2 Value Judgment

When a chairperson of a disciplinary enquiry makes a decision in respect to whether or not an employee has committed misconduct, this decision needs to be made in a two stage process.⁹⁴ Firstly, the guilt of the employee must be established in terms of the evidence presented.⁹⁵ The second part of the enquiry is the determination of an appropriate sanction. This is done with reference to the severity of the misconduct committed and the impact that it has had on the employment relationship. However, all relevant factors need to be taken into consideration in determining a fair sanction. The requirement of this two stage approach is desirable but not absolute. In *Eddels (SA) Pty Ltd v Sewcharan & others*,⁹⁶ the court held that although the two stage approach is desirable it noted that it would be unfair to expect an employer to observe this approach when commissioners are not required to do so.⁹⁷ In other words, it is preferable that mitigation is dealt with separately after a finding of guilt has been made. However, chairpersons of disciplinary enquiries are lay persons and they cannot be expected to be familiar with the law. So the mere failure to have a distinct two

⁹⁰ J Grogan *Dismissal* (2010) 155

⁹¹ Items 3(4) & 7(b)(iv) of Schedule 8, Code of Good Practice: Dismissal

⁹² A Van Niekerk: *Unfair Dismissal* (2002) 46; Item 3(4) of Schedule 8, Code of Good Practice: Dismissal

⁹³ J Grogan *Dismissal* (2010) 155

⁹⁴ J Grogan *Dismissal* (2010) 245

⁹⁵ *Ibid*

⁹⁶ (2000) 21 ILJ 1344 (LC)

⁹⁷ J Grogan *Dismissal* (2010) 245

stage enquiry is not a material procedural breach that will render the enquiry unfair. The rider here is that mitigating factors must have been considered or at least dealt with in the initial stage of the enquiry. In determining an appropriate sanction chairpersons are required to make up their own minds but they are permitted to seek advice before making a final decision on sanction. However, the decision should not be prescribed by third parties.⁹⁸

When determining whether dismissal is an appropriate sanction, an arbitrator is essentially making a value judgment over which reasonable people may disagree. However, arbitrators will be guided by the codes of good practice (in terms of section 138(6) of the LRA), the employer's disciplinary code, principles established by the courts and the context of the misconduct.

When determining whether a sanction is appropriate the manner of assessment by a court or commissioner becomes relevant. It is also important to consider the stage at which the assessment occurs. Is the court or arbitrator exercising an independent decision as to whether the sanction is fair or is the court or arbitrator merely assessing whether the employer's decision is reasonable and fair?⁹⁹ If a party is exercising an independent decision with respect to sanction then that party is free to draw up his or her own conclusion in respect of the fairness of the sanction chosen by the employer.¹⁰⁰ However, a party confined to assessing the reasonableness and fairness of the sanction imposed by an employer may only interfere with the sanction imposed if the sanction is found to be unreasonable and unfair when judged against independent criteria.¹⁰¹ This will be discussed more fully hereunder.

In *Mzeku v Volkswagen SA (Pty) Ltd* the LAC stated:

⁹⁸ Ibid 245

⁹⁹ Ibid 155

¹⁰⁰ Ibid

¹⁰¹ Ibid

‘Where the conduct for which the employees are dismissed is unacceptable but the sanction is, in all the circumstances not a fair sanction, the dismissal cannot be said to be substantively fair.’¹⁰²

In terms of the Code, a dismissal will be unfair if it is not in accordance with a fair procedure and for a fair reason, even if the prescribed notice period is given in terms of the contract of employment or legislative provisions. The decision as to whether the dismissal is substantively fair is established by the facts of the case, and the appropriateness of dismissal as a sanction.¹⁰³ In this regard a commissioner needs to establish, as was put in *Engen Petroleum Ltd v CCMA & others* [2007] 8 BLLR 707 (LAC), the following: ‘Is this dismissal fair?’ This question is answered by the commissioner alone.¹⁰⁴ In *Engen Petroleum* the LAC stated that:

‘The ordinary and natural meaning of the word ‘fair’ suggests that commissioners must answer that question of their own sense of fairness. The question cannot possibly be answered on the basis of someone else’s notion of fairness. This was the position adopted by the courts under the 1956 LRA. There is no basis for assuming that the position has changed under the current LRA.’

Employers are entitled to dismiss employees who commit misconduct. However, dismissal is only justified if the reason advanced for doing so is fair in relation to the nature of the misconduct committed. Therefore the nature of the misconduct must be serious or repetitive in nature.¹⁰⁵ As a starting point, discipline should be corrective and progressive in nature whereby an employee’s unacceptable conduct is modified through a process of graduated disciplinary action,

¹⁰² [2001] 8 BLLR 857 (LAC) at para 15

¹⁰³ *Westonaria Local Municipality v SALGBC & others*, *supra* at para 18

¹⁰⁴ *Ibid*

¹⁰⁵ Item 3(3) of Schedule 8, Code of Good Practice: Dismissal

commencing with counselling and warnings.¹⁰⁶ However, certain acts of misconducts are so serious that they justify dismissal even for a first offence.¹⁰⁷

The Code of Good Practice: Dismissal also requires that dismissal must be an appropriate sanction, in respect of the circumstances of the case.¹⁰⁸ There is no hard and fast rule that indicates when it is appropriate to dismiss. There is also no exact legal principle for determining whether dismissal or a lesser sanction would be appropriate.¹⁰⁹ Therefore chairpersons of disciplinary hearings are required to exercise their discretion in determining a fair sanction reasonably, honestly and fairly.¹¹⁰

Further, before deciding on an appropriate sanction an employee's personal circumstances, nature of job and circumstances surrounding the transgression need to be taken into consideration. This would include, amongst others, length of service, previous disciplinary record and personal circumstances.¹¹¹ The employer must also be consistent in the application of discipline.¹¹²

The LAC held in *Nampak Corrugated Wadeville v Khoza*¹¹³ that when determining the appropriateness of a dismissal sanction, adjudicators have a limited role of ensuring that dismissals do not exceed a 'band of reasonableness' the extent of which is determined by fairness.¹¹⁴ This essentially entails a value judgment and is not based on law.¹¹⁵ Therefore it is possible for two people to disagree on whether dismissal was an appropriate sanction and there are other situations where no reasonable person would agree that dismissal was an

¹⁰⁶ Ibid Item 3(2) of Schedule 8, Code of Good Practice: Dismissal

¹⁰⁷ Ibid Item 3(4) of Schedule 8, Code of Good Practice: Dismissal

¹⁰⁸ Ibid Item 7(iv) and states that any person determining whether a dismissal for misconduct is unfair should consider whether dismissal was an appropriate sanction for the contravention of the rule or standard.

¹⁰⁹ J Grogan *Dismissal* (2010) 155

¹¹⁰ Ibid

¹¹¹ Item 3(5) of Schedule 8, Code of Good Practice: Dismissal

¹¹² Ibid Item 3(6) of Schedule 8, Code of Good Practice: Dismissal

¹¹³ (1999) 20 ILJ 578 (LAC)

¹¹⁴ J Grogan *Dismissal* (2010) 156; This test was ultimately rejected in the constitutional court decision of *Sidumo*, *supra*

¹¹⁵ Ibid

appropriate sanction.¹¹⁶ The role of an arbitrator is to safeguard against the latter occurring.¹¹⁷

In *Branford v Metrorail Services (Durban) & others*,¹¹⁸ the court stated:

‘The concept of fairness, in this regard, applies to both the employer and 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. In *National Union of Metal Workers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A), Smalberger JA made the following remarks on fairness at 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 establish facts and circumstances (NUM v Free State Cons at 4461). And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down, any universal applicable test for deciding what is fair.’¹¹⁹ (at 2278H – 2279A)

The central question remains as to how you establish that a dismissal is so unreasonable and unfair that no reasonable person would agree that it was an appropriate sanction.¹²⁰ We need to bear in mind that we are dealing with a value judgment which is informed by an individual’s upbringing, life experiences and cultural beliefs. There is no absolute test for determining whether dismissal is an appropriate sanction.¹²¹ As stated above, the decision is based on a value

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ (2003) 24 ILJ 2269 (LAC)

¹¹⁹ Also see *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others* (2010) 5 BLLR 513 (LAC) at para 26

¹²⁰ J Grogan *Dismissal* (2010) 156

¹²¹ Ibid

judgment although it is underpinned by judicial precedent. After all fairness is a relative concept.

The LAC in *Country Fair Foods (Pty) Ltd v CCMA & others*,¹²² stated that:

‘It remains part of our law that it lies in the first place within the province of the employer to set the standards of conduct to be observed by its employees and to determine the sanction with which non compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.’

The court also went on to state that interference would only be justified if the sanction ‘is so excessive or lenient that in all good conscience it cannot be allowed to stand.’¹²³ However, if the decision maker merely thinks that he or she would not have imposed the same sanction, then it is not open to interference.¹²⁴ Therefore a dismissal for misconduct may be unreasonable and inappropriate if it induces a ‘sense of shock’.¹²⁵ In other words, it is ‘so excessive as to shock one’s sense of fairness.’¹²⁶

In *Consani Engineering (Pty) Ltd v CCMA & others*,¹²⁷ the court stated the following with respect to the determination of a fair sanction:

‘As has been stated in various cases, a commissioner should appreciate that the question of sanction for misconduct is one on which reasonable people can readily differ. There is a range of possible sanctions on which one person might take a view different from another without either of them being castigated as unreasonable. If the sanction falls within a range of

¹²² Ibid; (1999) 20 ILJ 1701 (LAC) at para 11

¹²³ Ibid

¹²⁴ Ibid at para 43

¹²⁵ J Grogan *Dismissal* (2010) 156

¹²⁶ *Country Fair Foods (Pty) Ltd v CCMA & others*, *supra*

¹²⁷ (2004) 13 LC 1.11.13

reasonable options a commissioner should generally uphold the sanction, even if the sanction is not one that the commissioner herself would have imposed.¹²⁸

The labour court went on to state that interference with sanction would only be justified if there was a 'striking disparity' between the employer's choice of sanction and the one that the commissioner would have imposed.¹²⁹

In *Toyota SA Motors (Pty) Ltd v Radebe & others*,¹³⁰ the LAC indicated that the basis for interference with sanction is if there was a 'yawning chasm between the sanction which the court would have imposed and the sanction imposed by the commissioner'.

In *Minister of Correctional Services v Mthembu NO*¹³¹ the Labour Court held that an arbitrator's function is to determine whether the employer's decision to dismiss is 'fair' and he or she is not to exercise an independent discretion in this regard.

The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*¹³² finally brought some clarity in respect of determining the appropriateness of sanction. One of the issues that the court had to decide was whether it was sufficient for an employer to prove that the sanction of dismissal was a fair sanction as opposed to the only fair sanction.¹³³ The SCA¹³⁴ had endorsed the concept that sanctions move along a sliding scale and that commissioners should only interfere with the sanction if it 'fell outside the band of reasonable sanctions'.¹³⁵ The SCA was

¹²⁸ (2004) 13 LC 1.11.13 at para 17

¹²⁹ *Ibid*

¹³⁰ (2000) 21 ILJ 340 (LAC)

¹³¹ (2006) 27 ILJ 2114 (LC)

¹³² (2007) 28 ILJ 2405 (CC)

¹³³ J Grogan *Dismissal* (2010) 160

¹³⁴ *Rustenburg Platinum Mines (Rustenburg section) v Commission for Conciliation, Mediation & others* (2006) 27 ILJ 2076 (SCA)

¹³⁵ J Grogan *Dismissal* (2010) 160

endorsing the concept that commissioners must determine if the sanction is a fair one as opposed to the only fair sanction.¹³⁶ This was effectively the 'defer to the employer' notion or the 'reasonable employer' test.¹³⁷ The SCA held that commissioners must recognise that employers are vested with the right to determine the appropriate sanction for proven misconduct and that interference with the sanction is only justified if the decision is manifestly or demonstrably unfair.¹³⁸ The court, per Cameron AJ, held that in terms of the Code of Good Practice: Dismissal that employers have the right to determine the appropriate sanction for proven misconduct. The court stated that: 'The fact that the commissioner may think that a different sanction would also be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction.'¹³⁹ The SCA did not expressly refer to the 'reasonable employer test' when dealing with the appropriateness of a sanction. The court was not concerned with reasonableness but rather fairness. In respect of fairness Cameron AJ stated the following:

'The criterion of fairness denotes a range of possible responses, all of which could properly be described as fair. The use of "fairness" in everyday language reflects this. We may describe a decision as "very fair" (when we mean that it was generous to the offender); or "more than fair" (when we mean that it was lenient); or we may say that it was "tough, but fair", or even "severe, but fair" (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair). It is this latter category, particularly, that CCMA commissioners must exercise great caution in evaluating decisions to dismiss. *The mere fact that a CCMA commissioner may have imposed a*

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ A van Niekerk...et al. *Law@Work* (2008) 247

¹³⁹ At para 46; A van Niekerk...et al. *Law@Work* (2008) 247- 248

*different sanction does not justify concluding that the sanction was unfair.*¹⁴⁰ (Emphasis added)

Cameron JA went on to state the commissioners must be vigilant when determining whether an employer's sanction was fair and there must be a deference to the employer's choice of sanction. The reason for this was that, in terms of the LRA, it was primarily the responsibility of the employer to determine an appropriate sanction.¹⁴¹ Further, a commissioner need not be convinced that dismissal is the only fair sanction. The LRA requires the employer to merely establish that dismissal is a fair sanction. The fact that a commissioner may think that another sanction may also be fair does not justify interference with the employer's choice of sanction.¹⁴²

It has been argued that Cameron JA transformed the 'reasonable employer test' into the 'fair employer test' and established the principle that as long as the employer's decision fell within a range of fairness, as opposed to reasonableness, the commissioner should defer thereto.¹⁴³

Cameron JA, at the request of the parties, went on to determine the fairness of the dismissal in line with his approach to determine sanction in relation to the facts of the case. He considered the gravity of the misconduct which exposed the mine to serious risk but also took into account the employee's clean record and long service. However, as the employee's conduct breached the core duty which was entrusted to him his conduct had violated the trust relationship. Although Cameron JA accepted that the sanction of dismissal may appear severe it was in his view impossible to say that it was not a fair sanction. He found that it fell

¹⁴⁰ *Rustenburg Platinum Mines (Rustenburg section) v Commission for Conciliation, Mediation & others (SCA)*, *supra* at para 46

¹⁴¹ *Rustenburg Platinum Mines (Rustenburg section) v Commission for Conciliation, Mediation & others (SCA)*, *supra* at para 48(d)

¹⁴² *Rustenburg Platinum Mines (Rustenburg section) v Commission for Conciliation, Mediation & others (SCA)*, *supra* at para 48(e)

¹⁴³ A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 4

within a range of sanctions that an employer may fairly impose.¹⁴⁴ Ultimately the dismissal was held to be a fair sanction.

However, the Supreme Court of Appeal's decision was subsequently overruled by the Constitutional Court. As will be seen, the Constitutional Court was in agreement with Cameron JA's approach of weighing up the employee's clean record and length of service against the severity of the offence when considering the fairness of the sanction of dismissal.¹⁴⁵ However, the Constitutional Court found that Cameron JA erred by not deciding himself whether the dismissal was fair and rather finding that the dismissal fell within a notional range of fair responses to the misconduct committed.¹⁴⁶

The Constitutional Court examined both the Constitution and our legislative framework and found that nothing therein indicates that when determining the fairness of a sanction a commissioner must approach the matter from the employer's perspective. The court held that our legislation indicates the contrary and commissioners are required to determine the fairness of the dismissal as an 'impartial adjudicator.' In performing this role, a commissioner must, amongst other things, consider and show 'respect' for the employer's decision with respect to sanction.¹⁴⁷ This is also in line with Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982. The court held that SCA was incorrect in finding that the 'defer to the employer' approach is part of our labour law jurisprudence.¹⁴⁸ This would invariably tilt the scale against employees which would be contrary to our constitutional standards and the right to fair labour practices. This approach would also not promote labour peace.¹⁴⁹

¹⁴⁴ *Rustenburg Platinum Mines (Rustenburg section) v Commission for Conciliation, Mediation & others (SCA)*, *supra* at para 51

¹⁴⁵ A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 4

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *Sidumo & others v Rustenburg Platinum Mines & others (CC)*, *supra* at para 61

¹⁴⁹ *Sidumo & others v Rustenburg Platinum Mines & others (CC)*, *supra* at paras 74- 76

The Constitutional Court stated the following:

‘It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing ‘discretions’. Employers and commissioners each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately 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.’¹⁵⁰

In terms of the Constitutional Court judgment in *Sidumo* the test now for determining the appropriateness of sanction for misconduct is based on fairness and the misconduct must be sufficiently serious to justify dismissal. There is no longer deference to the employer’s decision regarding sanction. Whether dismissal is fair will depend on whether the misconduct itself rendered the employment relationship intolerable or whether cumulatively with past transgressions it had done so. In this regard a commissioner needs to decide the issue with his or her own sense of fairness based on the facts before him or her. A value judgment is made when assessing the fairness of the employer’s decision to dismiss, taking all relevant circumstances into account. A commissioner must not determine afresh what the appropriate sanction is, but must determine whether the employer’s decision to dismiss is fair.¹⁵¹ The ‘reasonable employer test’ or any variation thereof has been replaced by the ‘impartial commissioner test’. Whilst the former was skewed in favour of the

¹⁵⁰ *Sidumo & others v Rustenberg Platinum Mines & others (CC)*, *supra* at para 75

¹⁵¹ CCMA Guidelines for Misconduct Arbitrations, *supra* at paras 92-93; *Metro Cash & Carry Ltd v Tshela* (1998) 7 LAC 8.22.1

employer the latter is neutral and is not biased in favour of employees.¹⁵² The 'impartial commissioner test' endeavours to ensure unconditional neutrality on the part of commissioner's in determining sanction.¹⁵³

The Constitutional Court held that when a commissioner considers a dismissal dispute he or she must do so impartially and take the totality of circumstances into account. He or she must consider the importance of the rule that has been breached as well as the reason why the employer imposed the sanction of dismissal. The commissioner must also consider the reason for the employee's challenge to the sanction of dismissal. Other factors that require consideration are the harm caused by the employee's misconduct and whether further instruction and training may result in the employee not committing the offence again. A commissioner must also consider what impact the dismissal will have on the employee as well as the employee's personal circumstances, such as long service. The list is not exhaustive and all relevant circumstances need to be taken into consideration.¹⁵⁴

This means that a commissioner does not 'start with a blank page' and determine afresh what the appropriate sanction is.¹⁵⁵ The starting point is the employer's decision to dismiss. In this regard a commissioner's function is not to ask what the appropriate sanction is, but whether the employer's decision to dismiss is fair.¹⁵⁶ The answer to the question is not always easy and the commissioner must pass a value judgment. The 'exercise of a value judgment is something that reasonable people may differ over.'¹⁵⁷ However, this is not an unconstrained value judgment that is determined by the views, background and perspective of

¹⁵² A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 6

¹⁵³ Ibid

¹⁵⁴ *Sidumo & others v Rustenberg Platinum Mines & others(CC)*, *supra* at para 78–79 ; and also see *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others* (2010) 5 BLLR 513 (LAC) at para 27

¹⁵⁵ A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 6

¹⁵⁶ Ibid

¹⁵⁷ Ibid

the commissioner.¹⁵⁸ Fairness dictates that regard must be given to the interests of both the workers and employers.¹⁵⁹

In *Fidelity Cash Management Services v CCMA and others*,¹⁶⁰ Zondo JP (as he then was) applied the *Sidumo* test as follows:

*‘Once the commissioner has considered all the above factors and others not mentioned herein, he or she would have to answer the question whether dismissal was, in all the circumstances, a fair sanction in such a case. In answering that question, he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of the dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.’*¹⁶¹ (Emphasis added)

It is also worth noting that whilst the Constitutional Court decision in respect of *Sidumo* was pending the LAC in *Engen Petroleum Ltd v CCMA & others*¹⁶² considered whether the ‘reasonable employer test’ had any place in our law.¹⁶³ The court examined two lines of thinking, the first being the ‘own approach’ in terms of which commissioners must make up their own mind whether or not the dismissal was fair. This test is also premised on what Zondo JP referred to as the ‘reasonable citizen’ test whereby a commissioner must place himself in the position of a ‘reasonable citizen’ and reach conclusions that he thinks a ‘reasonable citizen’ would make with all the relevant information placed before him. The ‘reasonable citizen’ is ‘neutral and his values are neither exclusively the

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ [2008] 3 BLLR 197 (LAC)

¹⁶¹ *Fidelity Cash Management Services v CCMA and others*, *supra* at paras 94 -95

¹⁶² [2007] 8 BLLR 707 (LAC)

¹⁶³ J Grogan *Dismissal* (2010) 160

employer's nor the employee's'.¹⁶⁴ The second approach considered was the 'reasonable employer' approach which requires commissioners to respect the employers' decision with respect to sanction and only to interfere with the sanction if it is so severe that it 'induces a sense of shock.'¹⁶⁵ The LAC held that the 'defer to the employer' approach was in contravention of our statutory dispute resolution procedure which provided impartial commissioners to resolve disputes. The court found that when adjudicating unfair dismissal disputes commissioners are enjoined to exercise their own opinion in respect of the fairness of the dismissal.¹⁶⁶ However, ultimately the court held that it was bound by the Supreme Court of Appeal's decision in *Sidumo* which was binding at the time. As will be seen hereunder, the 'reasonable citizen test' accords with the 'impartial commissioner' approach that was advocated by the Constitutional Court which had the final say in the *Sidumo* decision.

After *Sidumo*, an employer who complies with all the requirements of Item 7 of the Code of Good Practice: Dismissal may still find that a commissioner may rule that the dismissal is an inappropriate sanction, as the test is that of a reasonable commissioner and no longer that of a reasonable employer.¹⁶⁷

Since *Sidumo*, the Constitutional Court has again had the opportunity to consider the role of commissioners and their process related obligations when conducting arbitrations. In *CUSA v Tao Ying Metal Industries and others*,¹⁶⁸ the court held that a commissioner is compelled to apply his or her mind to the issues in a case. Commissioners who do not comply with their obligations will not be acting lawfully and/or reasonably and therefore that decision will constitute a breach of the right to fair administration. The commissioner is enjoined to determine the material facts of the case and thereafter to apply the provisions of the LRA to

¹⁶⁴ *Engen Petroleum Ltd v CCMA & others*, *supra* at paras 124–125; A Myburgh "Determining and Reviewing Sanction after *Sidumo*" (2010) (31) ILJ 5

¹⁶⁵ A van Niekerk...et al. *Law@Work* (2008) 248

¹⁶⁶ J Grogan *Dismissal* (2010) 160

¹⁶⁷ J Grogan *Dismissal* (2010) 164

¹⁶⁸ [2009] 1 BLLR 1 (CC); *Cadbury SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others* [2013] 8 BLLR 761 (LC) at para 16

those facts in answering the question whether the dismissal was for a fair reason.¹⁶⁹

In *Fidelity Cash Management Services v CCMA & others*,¹⁷⁰ the LAC provided a 'checklist' for commissioners when considering substantive fairness. The LAC stated that in terms of the *Sidumo* judgment commissioners must take into account the totality of circumstances, they must consider the importance of the rule that has been breached and the reasons the employer imposed the sanction of dismissal, and he or she must take into account the basis of the employee's challenge to the dismissal. Commissioners must consider the harm caused by the employee's conduct and whether additional training and instruction may result in the employee not repeating the misconduct. Commissioners must also take the employee's service record and what effect the dismissal will have on the employee, into consideration.¹⁷¹

This list is not exhaustive and commissioners are also required to consider the code and the relevant provisions of any statute.¹⁷² The court went on to state that:

*'Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was, in all the circumstances, a fair sanction in such a case. In answering the question, he or she would have to use his or her own sense of fairness.'*¹⁷³ (Emphasis added)

¹⁶⁹ *Cadbury SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*, *supra* at para 8; *Herholdt v Nedbank Ltd* [2012] 33 ILJ 1789 (LAC) at para 39

¹⁷⁰ *Fidelity Cash Management Services v CCMA & others*, *supra*

¹⁷¹ *Fidelity Cash Management Services v CCMA & others*, *supra* at paras 94 & 95; this was re-affirmed by the Labour Court in *Theewaterkloof Municipality v SALGBC (Western Cape Division) & Others* (2010) 11 BLLR 1216 (LC) at para 5

¹⁷² *Fidelity Cash Management Services v CCMA & others*, *supra* at paras 94 – 95; See also *Edgars Consolidated Stores Ltd v CCMA & others* [2008] 8 BLLR 761 (LC) at para 13; *Worldnet Logistics (Cape) (Pty) Ltd v Maritz NO & others* (2009) 30 ILJ 1144 (LC) at para 25; A Myburgh "Determining and Reviewing Sanction after *Sidumo*" (2010) (31) ILJ 8

¹⁷³ A Myburgh "Determining and Reviewing Sanction after *Sidumo*" (2010) (31) ILJ 8

It is self evident from this passage that a commissioner is only in a position to decide on the fairness of the sanction of dismissal after considering all relevant factors and must use his own sense of fairness in deciding on sanction.¹⁷⁴ They must not substitute their personal opinions for that of the employer by deciding afresh what they would have done as the employer with respect to sanction.¹⁷⁵ What this effectively means is that when a commissioner decides on the issue of guilt, he or she does so afresh without any regard to the employer's decision. However, when determining the fairness of the sanction of dismissal, then this enquiry does not commence afresh. The commissioner, although not required to defer to the employer's decision in respect to sanction, must show respect to the position adopted by the employer and attempt to appreciate and understand it.¹⁷⁶ The commissioner's function is not to establish what the appropriate sanction is but rather to determine whether the employer's decision to dismiss was fair.¹⁷⁷

In *Theewaterkloof Municipality v SALGBC (Western Cape Division) & Others*,¹⁷⁸ the court noted that when determining an appropriate sanction for proven misconduct, various factors need to be considered and weighed against the reasons advanced by the employer for its decision. While arbitrators are required to consider a range of factors, they are in the final analysis required to compare the reasons advanced by the employer to justify the dismissal with the reasons provided by an employee for challenging it. This is not altered by the fact that arbitrations under the LRA are hearings de novo. The court held that in terms of section 192 of the LRA the onus is on the employer to prove the fairness of the dismissal and the commissioner's role thereafter is to consider whether the dismissal was indeed for a fair reason. Although commissioners are required to exercise their own discretion they are not entitled to consider afresh the issue

¹⁷⁴ Ibid

¹⁷⁵ Ibid 9

¹⁷⁶ See dictum of Ngcobo J in *Sidumo & others v Rustenberg Platinum Mines & others (CC)*, *supra* ; A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 10

¹⁷⁷ A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 10

¹⁷⁸ (2010) 11 BLLR 1216(LC)

regarding sanction. When exercising their own discretion in respect of sanction, commissioners will be making a value judgment but they must guard against simply importing their own value judgments. The court went on to state that dismissal arbitrations are a two fold process. The first phase requires the arbitrator to establish whether the employee was in fact guilty of misconduct. This is determined by the rules of evidence and no value judgment is made at this stage. The second phase requires arbitrators to identify and weigh up relevant factors to determine the appropriateness of sanction. Various factors must be considered including the facts of the case, statutory and policy framework and jurisprudence developed by the courts. Thereafter a value judgment must be made and will produce an unbiased answer to whether the dismissal was fair. In some cases the answer may be straightforward but in others a proper assessment will have to be made as to how the factors considered relate to the employer's operational requirements. A complete analysis of all these factors will provide a framework for placing a value on one factor or another.¹⁷⁹

Notwithstanding this, the *Sidumo*¹⁸⁰ judgment has still created some uncertainty in determining a fair sanction for misconduct. In *Palaborwa Mining Co Ltd v Cheetham & others*,¹⁸¹ the LAC held as follows in this regard:

'Sidumo enjoins a court to remind itself that the task to determine the fairness or otherwise of a dismissal falls primarily in the domain of the commissioner. This was the legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create.'

After the *Sidumo* decision, reviewing courts will be constrained in their ability to interfere with arbitration awards of commissioners regardless of whether they

¹⁷⁹ *Theewaterkloof Municipality v SALGBC (Western Cape Division) & Others*, at paras 4 to 8

¹⁸⁰ *Sidumo & others v Rustenberg Platinum Mines & others (CC)*, *supra*

¹⁸¹ (2008) 29 ILJ 306 (LAC) at para 13

adopt a strict or sympathetic approach.¹⁸² This became self-evident in *Palaborwa Mining*,¹⁸³ where the Labour Court found that the commissioner had adopted too strict an approach and set the award aside on review. The LAC after considering the implications of *Sidumo* and on comparing the facts of the two cases found that the 'obvious, inevitable and necessary conclusion' was that the LC judge had substituted her views of fairness for that of the commissioner, and had thereby made incorrect findings.¹⁸⁴ The facts of the case were as follows: Mr Cheetham, a company secretary was asked to blow into a breathalyzer during a random test. He was found to have had alcohol in his bloodstream and due to the company's 'zero tolerance' approach to being drunk on duty he was dismissed. The LC had found that the dismissal was unfair as the commissioner had failed to consider that Mr Cheetham had no outward signs of intoxication, he was a first offender and he was fifty eight years old. The LC awarded him compensation.¹⁸⁵ As stated, above the LAC found that the LC judge had substituted her views for that of the commissioner and that in terms of the *Sidumo* judgment that was not permitted. A commissioner, acting impartially, must make a decision in respect of whether or not a dismissal is fair with all the material placed before him or her. The commissioner must not impose his or her value judgment by determining afresh whether or not the dismissal is fair. He or she must make a decision, after considering all relevant factors, as to whether or not the employer's decision to dismiss is fair. The LAC found that the commissioner had complied with his duties in this regard.

In respect to dismissal dispute it is important to take cognizance of the remedies that are available to employees whose dismissals are found to be substantively unfair. These are contained in section 193(2) of the LRA. Generally employees whose dismissals are found to be unfair are re-instated unless any of the circumstances contemplated in section 193(2) are applicable. In unfair dismissal

¹⁸² J Grogan *Dismissal* (2010) 163

¹⁸³ *Palaborwa Mining Co Ltd v Cheetham & others*, *supra*

¹⁸⁴ *Palaborwa Mining Co Ltd v Cheetham & others*, *supra* at para 7; See also *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 378 (LC); *Ibid* 163-164

¹⁸⁵ J Grogan *Dismissal* (2010) 163

disputes, and in order to avoid re-instatement or re-employment, the employer would need to show that reinstatement is not appropriate as contemplated by sections 193(2)(b) and/or (c) of the LRA, namely that 'the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable' and/or that 'it is not reasonably practicable for the employer to reinstate or re-employ the employee.'¹⁸⁶

An issue that arises is whether an employer must actually adduce evidence that the employment relationship has irreparably broken down or whether that can be inferred from the nature of the misconduct itself.¹⁸⁷ *Sidumo*¹⁸⁸ suggests that the employer must prove how the misconduct has impacted on the employment relationship and that progressive discipline is inappropriate.¹⁸⁹

Exactly what evidence is required to be led by the employer can be gleaned from the case of *Edcon v Pillemer*.¹⁹⁰ The employee was dismissed for breaching the trust relationship by failing to report an accident that her son had had in the company vehicle. She had in fact repaired the vehicle at her husband's panel beating workshop at her own cost. The employer found out about this some six months later and confronted the employee who initially denied that the vehicle had been involved in an accident and that her son was driving the vehicle. She subsequently recanted and admitted to the incident but was still untruthful regarding where and how the accident occurred. A CCMA commissioner found the dismissal substantively unfair as no evidence was led as to whether the trust relationship had broken down. The commissioner also took into account the applicant's clean record and long service as well as the fact that the applicant was 2 years away from retirement. On appeal to the SCA, the court found that the award was not reviewable because the commissioner's reliance on the fact

¹⁸⁶ See *Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) & *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others* (2010) 5 BLLR 513 (LAC) at para 24

¹⁸⁷ *J Grogan Dismissal* (2010) 164

¹⁸⁸ *Sidumo v Rustenberg Platinum Mines Ltd* (CC), *supra*

¹⁸⁹ *Ibid*

¹⁹⁰ (2010) 1 BLLR 1 (SCA); see also *Westonaria Local Municipality v SALGBC & others*, *supra*

that the company had not led evidence to prove that the trust relationship had broken down could not be faulted.¹⁹¹ At the arbitration proceedings at the CCMA the company called the investigator, Ms Naidoo as a witness and submitted the minutes of both the disciplinary and appeal enquiry as documentary evidence. The SCA held as follows:

‘What becomes immediately apparent is that Naidoo’s evidence did not, and could not, deal with the impact of Reddy’s conduct on the trust relationship. Neither did Naidoo testify that Reddy’s conduct had destroyed the trust relationship. This was the domain of those managers to whom Reddy reported. They are the persons who could shed light on the issue. None testified. Edcon’s policy regarding the misconduct at issue here was also before [the commissioner]. But this document is just that – a policy – and is no evidence of the consequences of misconduct based on it. On its own it evinces Reddy’s failure to comply with its dictates. It cannot be correct that mere production thereof would suffice to justify a decision to dismiss. The gravamen of Edcon’s case against Reddy was that her conduct breached the trust relationship.’¹⁹²

The SCA explained further that what would have been required was for someone in management who supervised Ms Reddy or interacted with her in the employment context, had to testify and explain to the commissioner how Ms Reddy’s conduct had breached the trust relationship. Evidence needed to be adduced to indicate what her duties and responsibilities were, what her position was within the organisation as well as the importance of trust in so far as her position was concerned, and what operational risk she posed to the organisation.¹⁹³

¹⁹¹ A Myburgh “Determining and Reviewing Sanction after Sidumo” (2010) (31) ILJ 14

¹⁹² Ibid

¹⁹³ Ibid

This case clearly spells out the nature of the evidence that is required to be presented and by whom, in order to prove the breakdown of the trust relationship and thereby substantiate a dismissal. The case illustrates the following: A witness is required to testify in respect of the breakdown in the trust relationship. The person who testifies must be a manager or supervisor who deals with the employee in the employment context. The manager or supervisor must tell the hearing in what way the employee's conduct breached the trust relationship. It would appear that a company's disciplinary code which only sets out rules and does not state what the consequences are for breaches, is not sufficient. Chairperson or presiding officer, who are managers within the organisation do not represent management when they are chairing disciplinary proceedings. Their role is not of a witness but an impartial chairperson who is appointed to consider the evidence presented and make a fair decision. Thus the chairperson cannot represent management in respect to the impact of the misconduct on the trust relationship.

The *Edcon* decision does not change the principle that misconduct by an employee that undermines the trust and confidence, fundamental to the employment relationship will justify the termination of the employment relationship.¹⁹⁴ However, it is clear from the *Edcon* decision that a manager or supervisor of the employee in question must testify in person to this effect.

3.3 Conclusion

The complex jurisprudential issues discussed above provide little assistance to employers who want to know when they are entitled to dismiss and if they do dismiss for misconduct when is it likely that the decision will be interfered with by a commissioner.¹⁹⁵ After *Sidumo*, even if an employer satisfies all the requirements of Item 7 of the Code of Good Practice: Dismissal, there will still be a possibility that a commissioner may find that dismissal is an inappropriate

¹⁹⁴ Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (AD) at para 26E-G

¹⁹⁵ J Grogan *Dismissal* (2010) 163

sanction and therefore unfair.¹⁹⁶ The test is now whether a reasonable commissioner, with all the relevant information placed before him or her, will agree that the sanction of dismissal is fair and therefore an appropriate sanction.¹⁹⁷ As stated above, the test is no longer that of a reasonable employer. The commissioner is required to take a holistic view of the case but the test may leave employers in a precarious position of trying to second guess what a commissioner may decide if they go ahead and dismiss an employee for misconduct.¹⁹⁸

CHAPTER 4: RELEVANT FACTORS

This chapter will consider factor that may impact on the severity of a sanction that is imposed on an employee who is found guilty of misconduct. These factors have no relevance on whether or not an employee is guilty of misconduct but play a role on mitigating or aggravating sanction. Presiding officers and commissioners are required to consider all relevant factors when determining an appropriate sanction for misconduct.

4.1 Provision of the employer's disciplinary code

A disciplinary code contains the rules and standards of conduct required of employees in the workplace. It also contains the procedural step relating to the disciplinary process. The nature and content of rules may differ according to the size and type of business in question.¹⁹⁹ The nature and size of the business may also dictate how discipline is applied in the workplace. Smaller entities may follow a more informal approach whereas bigger businesses tend to have a more formal and structured approach to discipline and their disciplinary hearings at times mimic court proceedings. Notwithstanding this, the overriding principle for

¹⁹⁶ Ibid 164

¹⁹⁷ Ibid

¹⁹⁸ Ibid 163

¹⁹⁹ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (1999) 352

both approaches is fairness.²⁰⁰ The rules and standards of conduct required from employees must be clearly communicated to them in a manner that they understand. In order for employers to discharge their obligation of ensuring procedural and substantive fairness, employees need to be aware of the standards of conduct required in the workplace and the procedures that can be invoked. The existence of a disciplinary code is therefore preferable as this will ensure that the procedure and rules to be followed are clearly outlined and they must also be communicated to all employees in a manner and form that they understand. However, employees can also be disciplined for rules not specifically contained in the disciplinary code if the rule is obvious or the employee ought to know that that was an unwritten rule within the sector.

The case of *Transvaal Mattress & Furnishing Company Ltd v CCMA & others*,²⁰¹ involved an employee who had been dismissed for unauthorised use of a company vehicle. The commissioner found that the dismissal was unfair and reinstated the employee. On review the LAC held that the commissioner was correct when he concluded that the employer had not properly communicated the consequences of non-compliance with the rule against unauthorised use of company vehicles, to its employees.²⁰² Employees must be made aware of the rules that the employer regards as severe, unless this is obvious.

The existence of a disciplinary code within a workplace is not mandatory.²⁰³ If one does not exist then the provisions of the Code of Good Practice need to be complied with.²⁰⁴ Even if an employer does have a disciplinary code then that code needs to be consistent with the provisions of the Code of Good Practice: Dismissal. The fairness of a disciplinary code is assessed against the general

²⁰⁰ H Landis ...et al. *Employment and the Law* (2005) 160; See item 3(1) of the Schedule 8, Code of Good Practice: Dismissals – Disciplinary measures short of dismissal. This section also states that 'all employers should adopt disciplinary rules that establish the standard of conduct required of their employees'.

²⁰¹ (1999) 8 LAC 1.11.56

²⁰² (1999) 8 LAC 1.11.56 at para 6

²⁰³ However, Item 3(1) of the Schedule 8, Code of Good Practice: Dismissals states that: 'All employers should adopt disciplinary rules that establish the standard of conduct required of their employees'.

²⁰⁴ J Grogan *Dismissal* (2010) 143

requirements of the Code of Good Practice: Dismissal contained in Schedule 8 of the LRA. The Code is a guideline on the important aspects of dismissal for misconduct and incapacity as well as the correct procedures to follow.²⁰⁵ Disciplinary codes and procedures in the workplace need to be in line with the provisions of the Code.

Certain disciplinary codes specify particular sanctions for certain types of misconduct.²⁰⁶ This enhances the application of consistency with respect to disciplinary transgressions. However, the fairness of disciplinary codes must still meet the yardstick of fairness set by the Code. Disciplinary codes are not inflexible documents and are regarded as guidelines and are directive in nature.²⁰⁷ Employers may depart from the specified sanction in particular cases where the misconduct was extreme.²⁰⁸ However, as a general rule employers must follow the sanctions stipulated in their disciplinary code.²⁰⁹ Should an employer want to impose a harsher sanction for particular misconduct in the future, then this must be communicated to all employees up front.²¹⁰ Disciplinary codes should always embrace the notion of corrective and progressive discipline and avoid being punitive from the onset.²¹¹

4.2 Nature and gravity of the offence

The severity of the offence is generally informed by the nature of the misconduct and the circumstances in which it was committed. To warrant dismissal, the misconduct must be so severe that it renders the continued employment relationship intolerable. Item 3(4) of the Code of Good Practice: Dismissal gives

²⁰⁵ Ibid; H Landis ...et al. *Employment and the Law* (2005) 160; *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & another* (1998) 19 ILJ 635 (LC)

²⁰⁶ Ibid 165

²⁰⁷ Ibid; *SA/SAIWU & de Beer v ASEA Electric SA (Pty) Ltd* (1987) 1 ICJ 8.12.39; *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC)

²⁰⁸ J Grogan *Dismissal* (2010) 165

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers – A member of Investec* (1994) 15 ILJ 1140 (IC)

the following examples of serious misconduct, namely 'gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer or gross insubordination.' These are merely examples of misconduct which will usually be regarded as sufficiently serious to justify dismissal. The list is however not exhaustive and is subject to the requirement that each case must be judged on its own merits.²¹² The mere fact that an instance of misconduct falls in the category of serious misconduct is not *carte blanche* for an employer to automatically impose a sanction of dismissal. An employer must still consider mitigating factors and the possibility of imposing a lesser sanction.²¹³ Over and above the examples provided in the Code, the courts have found that dismissal is an appropriate sanction for a host of other transgressions such as racial abuse,²¹⁴ sexual harassment,²¹⁵ unauthorised possession of company property²¹⁶ and conflict of interests,²¹⁷ to name but a few.

Further, relatively minor transgressions may be considered in a serious light if they are repeat offences and progressive discipline has failed. Infractions which are usually regarded as minor may also be more serious as a result of the circumstances in which they were committed. For example, an employee who smokes in a factory that contains flammable products may be dismissed for a first offence whilst a secretary who works in the administration section of a company may receive a written warning for the first offence.²¹⁸ It is also important to note that progressive and corrective discipline will generally not be appropriate for offences that destroy the trust relationship, such as acts of dishonesty.²¹⁹

²¹² Item 3(4) of Schedule 8: Code of Good Practice: Dismissal

²¹³ J Grogan *Dismissal* (2010) 168

²¹⁴ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v KAPP* [2002] 6 BLLR 493(LAC)

²¹⁵ *Reddy v University of Natal* (1998) 19 ILJ 49 (LAC)

²¹⁶ *Rainbow Farms (Pty) Ltd v CCMA* (2011) 11 BLLR 451 (LAC)

²¹⁷ *Lubbers v Santech Engineering (a division of Scaw Metals)* [1994] 10 BLLR 124 (IC)

²¹⁸ J Grogan *Dismissal* (2010) 167

²¹⁹ *Ibid*

4.2.1 Specific examples considered

This work will briefly consider two types of misconduct, namely acts of dishonesty and negligence. Dishonesty is an intentional based act or omission whilst negligence is one that is based on the failure to perform to the standard of the reasonable person.

4.2.1.1 Dishonesty

Dishonesty in the employment context is a 'generic term' covering all intentional acts or omissions involving deception.²²⁰ However, in the workplace dishonest conduct does not have to constitute a criminal offence where all the elements of the crime would need to be proven.²²¹ Dishonesty in the workplace would include theft, fraud, corruption, misappropriation of money or goods, bribery, failing to account for funds, amongst others.²²² Obviously intention plays a role in conduct of this nature. The LAC has taken a very strict approach to dishonest conduct and has found that dishonest conduct will generally have the 'effect of rendering the relationship of the employer and employee intolerable,' and will thus justify dismissal regardless of the length of service or previous clean disciplinary record of the employee.²²³ The requirement of 'intolerability' has also been codified in item 3(4) of the Code. Further, the Code specifically mentions gross dishonesty as a possible dismissal offence. Therefore the legislature contemplated gross dishonest conduct as a fair reason to dismiss, even for a first offence. The only leniency shown by the courts in respect of dishonest conduct is where the conduct does not pose an operational risk to the employer. This would be for example where the dishonesty constituted a 'forgivable white lie' or was

²²⁰ J Grogan *Dismissal* (2010) 188

²²¹ *Ibid*; In the criminal context a person cannot be convicted of dishonest per se, it must form part of a recognized criminal offence

²²² J Grogan *Workplace Law* 10th ed (2009) 21; S Bendix *Industrial Relations in South Africa* 5th ed 2010 380; Thompson...et al *South African Labour Law* (2009) 430

²²³ *Anglo American Farms Boschendal Restaurants v Komjwayo* (1992) 13 ILJ 573 (LAC); *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 3 BLLR 243 (LAC) and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industries & Others* (2008) 3 BLLR 241 (LC)

regarded as 'foolish'. In such cases the dishonest conduct would not be regarded as gross.²²⁴

Theft is clearly an offence involving dishonesty. Historically, the industrial courts drew a distinction between theft and petty theft (*petty pilfering*) and required that a '*thieving propensity*' was required to be proven on the part of the employee in order for the conduct in question to justify dismissal.²²⁵ However, this distinction was rejected by the LAC in *Anglo American Farms Boschendal Restaurants v Komjwayo*,²²⁶ where it was held that the test was whether the employee's conduct had rendered the continued employment relationship intolerable.²²⁷ Further, the court held that there are no degrees to theft and that it would be impractical to attempt to draw distinctions between 'degrees' of theft. Therefore, the value of an item stolen is generally deemed immaterial.²²⁸ However, the courts have been somewhat more lenient where the goods in question are destined for disposal or are no longer of economic value.²²⁹ For example, in the case of *Simba Quix Ltd v Rampersad & another*,²³⁰ the court held that the dismissal of an employee was unfair because the employer had not established a clear rule that employees were not authorised to remove the allegedly stolen goods and where the goods held no economic value for the employer.

Dishonesty is not confined to conduct in which the employee enriches him or herself at the expense of the employer but also includes any instances in which the employee intentional deceives the employer.²³¹ This would include

²²⁴ *Ehrke v Standard Bank of SA & others* (2010) ILJ 1397 (LC), *Nedcor Bank v Frank* (2002) 23 ILJ 1243 (LAC); J Grogan *Dismissal* (2010) 188

²²⁵ *Nkomo v Pick 'n Pay Retailers* (1995) 1 ICJ 8.8.59; *CWIU & Mashego v Hoescht (Pty) Ltd* (1993) 1 ICJ 8.8.8; *SATAWU v Esselen Park* (2001) 10 AMSSA 8.8.5

²²⁶ (1992) 13 ILJ 573 (LAC)

²²⁷ J Grogan *Workplace Law* 10th ed (2009) 212; Thompson...et al *South African Labour Law* (2009) 430

²²⁸ *Miyambo v CCMA & Others* (2010) 31 ILJ 2031 (LAC); *Rainbow Farms (Pty) Ltd v CCMA* (2011) 11 BLLR 451 (LAC); *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & another* (1991) 12 ILJ 340 (LAC); J Grogan *Workplace Law* 10th ed (2009) 212

²²⁹ *Simba Quix Ltd v Rampersad & another* (1993) 14 ILJ 1286 (LAC)

²³⁰ (1993) 14 ILJ 1286 (LAC)

²³¹ J Grogan *Workplace Law* 10th ed (2009) 212

falsification of documents such as attendance registers or making a false statement to a supervisor in order for an employee to cover up his whereabouts.

Although gross dishonesty is specifically mentioned in the Code as a form of serious misconduct, the employer is still obliged to consider an employee's personal circumstances, the nature of job and circumstances surrounding the transgression before deciding on the appropriate sanction. This would include considering length of service, previous disciplinary record and personal circumstances.²³²

What follows is a discussion of cases involving the determination of the appropriateness of the sanction of dismissal in cases involving dishonesty.

In *Miyambo v CCMA & Others* (2010) 31 ILJ 2031 (LAC) the employee took scrap metal without authority. His representative argued that there should be a distinction between theft in the 'technical sense' and theft in the 'strict sense'. However, the court held that there are no degrees to theft and that it would be impractical to do so. The employee in this case had 25 years service and a clean disciplinary record. The court followed a strict approach to dishonest conduct in the workplace and held that dismissal was fair based on the employer's operational requirements. The court followed the approach adopted in *De Beers Consolidated Mines Ltd v CCMA & Others* (2009) 9 BLLR 995 (LAC) and *Shoprite Checkers (Pty) Ltd v CCMA & Others* (2008) BLLR 838 (LAC) and stated as follows at paragraph 13:

"It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust."

²³² Ibid item 3(5)

In *Rainbow Farms (Pty) Ltd v CCMA*,²³³ the court held that an employee who had removed 'free issue' milk without authority (there was a strict rule prohibiting this conduct) had destroyed the trust relationship and therefore dismissal was an appropriate sanction. In *Komane v Fedsure Life*,²³⁴ it was held that theft of a packet of powdered milk justified dismissal. In *Fiphaza / Overine 47 CC t/a Mugg & Bean Stellenbosch Square*,²³⁵ the employee was dismissed for consuming a piece of 'crispy' bacon. The commissioner found that the dismissal was fair as there was a clear rule prohibiting the eating of food in the kitchen, whether spoiled or not. Employees had also been repeatedly warned that this conduct amounted to theft. The commissioner also stated that although the sanction may appear harsh, this was outweighed by the employer's need to protect its business interests and that the conduct had, under the circumstances, breached the trust relationship.

With respect to misrepresentations, the courts have also held that employees who make a misrepresentation (ie: making false statements / lying) about their qualifications or previous conduct are deserving of dismissal, even if this is discovered at a later stage.²³⁶ However, the courts have held that not all lies are severe enough to warrant a sanction of dismissal. The determination of an appropriate sanction is therefore dependant on the merits of the particular case.

In *Ehrke v Standard Bank of SA & Others*,²³⁷ the applicant was employed as a home loans consultant. Due to under performance he was placed on a performance improvement program (PIP) and was also required to attend a one week training course. Whilst on the course the applicant received a voice message on his cell phone from a co-worker, to the effect that she was going to

²³³ (2011) 11 BLLR 451 (LAC)

²³⁴ (1998) 2 BLLR 215 (CCMA)

²³⁵ (2009) 18 CCMA 8.8.3

²³⁶ *Auret v Eskom Pension & Provident Fund* (1995) 16 ILJ 462 (IC); *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC); *J Grogan Dismissal* (2010) 189

²³⁷ (2010) ILJ 1397(LC)

complain about him to management. The co-worker had been informed by another bank employee that her application to open a bank account had been declined (the applicant was the one who was handling the matter and therefore she blamed him for her application being declined). Although the applicant was not at fault, he nevertheless arranged to meet with the co-worker at a time he knew he was meant to attend a function regarding the PIP. To cover up his absence from the function he lied to management by informing them that he was urgently attending to a client's account application. When he was later called to a meeting to explain his absence from the function he persisted with the lie. However, later the applicant decided to clear his conscience and informed management that he had lied to them.

The applicant was charged with dishonesty and called to a disciplinary hearing to account for 'deliberately giving untrue, misleading or wrong information' as per the company's disciplinary code (this was listed as dismissible conduct). The applicant was found guilty, dismissed and his name was blacklisted on the interbank register of employees dismissed (RED). The applicant challenged the dismissal as unfair and referred the matter to the CCMA. The commissioner held that the dismissal was substantively fair. The applicant then approached the LC.

On review, the LC (per Zilwa AJ) set the arbitration award aside. The court held that it was 'baseless fear and panic' on the part of the applicant that caused him to tell the lie in question (ie: he was under the mistaken impression that he could possibly lose his job if there was a complaint against him, as he was already on a performance improvement plan). The lie and conduct of the applicant did not prejudice the respondent in any material way. Although the respondent's disciplinary code specified dishonest conduct, which included 'deliberately giving untrue, misleading or wrong information' as dismissible, certain lies may well be given for an 'understandable or forgivable reason', and do not really break the trust relationship. These fall into the category of 'white lies'. Considering the matter in its entirety, ie: the importance of the rule, the reason for dismissal, the

harm caused by the employee's conduct, other possible remedial action, the court found that no reasonable decision maker, with the material placed before him or her, would have concluded that the dismissal was substantively fair.²³⁸ Finally, no evidence was led by the respondent at the arbitration to prove that the trust relationship had irretrievably broken down, thereby justifying a sanction of dismissal.²³⁹

In *Timothy v Nampak Corrugated Containers*,²⁴⁰ an employee tried to assist a colleague by obtaining information on the balance of a garnishee order. The employee phoned the law firm administering the order and made out that he was an attorney representing the company, and as such required the information. He also became very abusive towards the collections clerk. The collections clerk became suspicious and requested the name of the firm and the telephone number. When the collections clerk noticed that the telephone number that was provided was in fact that of the company, she complained about the employee's conduct. The employee was dismissed. A CCMA commissioner found that the sanction was too harsh as the employee was merely attempting to help a colleague. The LAC held that this was not a 'reasonable decision' as the company's name and image had been tarnished and the employee had also contravened the Attorneys Act 53 of 1979. Further, he had 'compounded his dishonesty' by being abusive to the collections clerk and had shown no remorse. Dismissal was confirmed as an appropriate sanction.

However, in *Nedcor Bank v Frank*,²⁴¹ the LAC held that employees who had disengaged the card reader of an ATM at Durban Airport that had run out of cash (and thereby made it to appear to be working), in order to shield the bank from

²³⁸ *Sidumo and Others v Rustenburg Platinum Mines Ltd (CC)*, *supra*

²³⁹ *Edcon Ltd v Pillemer & Others* (2009) 18 SCA 1.11.3

²⁴⁰ *Timothy v Nampak Corrugated Containers (Pty) Ltd* (2010) 8 BLLR 830 (LAC)

²⁴¹ (2002) 23 ILJ 1243 (LAC); *J Grogan Dismissal* (2010) 188

the wrath of airport management had not acted dishonestly. The court held as follows²⁴²:

“Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently (see *Toyota SA Motors (Pty) v Radebe & others* (2000) 21 ILJ 340 (LAC) at 345 F–H; *R v Brown* 1908 TS 21; *R v White* 1968 (3) SA 556 (RAD); *Ex parte Bennett* 1978 (2) SA 380 (W) at 383H-384C; *S v Manqina*; *S v Madinda* 1996 (1) SACR 258 (E) at 260 e-h and the Oxford Dictionary). In the Canadian case of *Lynch & Co v United States Fidelity & Guaranty Co* [1971] 1 OR 28 at 37, 38, Ont SC, the following was said: (per Fraser J):

‘Dishonesty is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary definition.’

Certainly, insofar as the appellant or its customers are concerned, no intention to steal, cheat, lie or act fraudulently is manifest. And what of the intention to conceal the true state of affairs from management of the airport? That is not covered by the charge. In any event it is, to my mind, impossible for the appellant to claim that as a result of the first and second respondents’ conduct the relationship of trust between them and the appellant has been destroyed.”

In *Edcon v Pillemer*,²⁴³ the employee was dismissed for breaching the trust relationship by failing to report an accident that her son had had in the company vehicle. She had in fact repaired the vehicle at her husband’s panel beating workshop at her own cost. The employer found out about this some six months

²⁴² *Nedcor Bank v Frank*, *supra* at para 15

²⁴³ *Supra*

later and confronted the employee who initially denied that the vehicle had been involved in an accident and that her son was driving the vehicle. She subsequently recanted and admitted to the incident but still told untruths as to where and how the accident occurred. A CCMA commissioner found the dismissal substantively unfair as no evidence was led as to whether the trust relationship had broken down. The commissioner also took into account the applicant's clean record of 17 years as well as the fact that the applicant was 2 years away from retirement. The SCA, using the test in *Sidumo*,²⁴⁴ held that the dismissal was substantively unfair. The case of *Edcon v Pillemer*,²⁴⁵ also involved dishonest conduct in respect of making false statements or lying. In this case the court did not equate the lies to a 'white lie'. However, a defective disciplinary charge sheet²⁴⁶, length of service and a clean record coupled to the employer's failure to lead evidence to prove that the trust relationship had irretrievably broken down, probably saved the employee. It is worth noting that the company argued that the employee had persisted in lying during the investigation, but the court did not accept this, as this should have been 'specifically alleged' in the charge sheet so that the employee could appreciate the 'real nature of the charges'²⁴⁷ and respond accordingly.

In *Westonaria Local Municipality v SALGBC*,²⁴⁸ the court went on to accept that generally dishonesty renders the employment relationship intolerable and irreconcilable. However the court also accepted that not every act of dishonesty will justify dismissal.²⁴⁹ The court went on to state that the duty to prove that the trust relationship between the parties has broken down as a consequence of serious misconduct vests with the employer.²⁵⁰ The court referred to the case of

²⁴⁴ 2008 (2) SA 24 (CC)

²⁴⁵ *Supra*

²⁴⁶ [2008] JOL 21412 (LAC) at para 26

²⁴⁷ *Ibid*

²⁴⁸ *Supra*

²⁴⁹ *Westonaria Local Municipality v SALGBC*, *supra* at para 25; See *Toyota SA Motors (Pty)Ltd v Radebe & others*, *supra* where the court found that it is not a rigid rule that all acts of dishonesty should attract the sanction of dismissal.

²⁵⁰ *Westonaria Local Municipality v SALGBC*, *supra* at para 26

Edcon Ltd v Pillemer,²⁵¹ where the commissioner had found that dismissal was unfair in a case involving dishonest conduct (misrepresentation) because there was no evidence before her that could prove that the trust relationship had irretrievably broken down.

In *De Beers Consolidated Mines Ltd v CCMA & others*,²⁵² the learned judge had the following to state in respect to fraudulent conduct:

‘The commissioner characterised the misconduct as serious. Despite that, she concluded that the relationship of trust between the appellant and the employee had not broken down. 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. When the employer then asserts that this has in fact happened, it would be startling to hear a commissioner proclaim that, despite what one might expect and despite what the employer says in fact occurred, the relationship of trust has not broken down.’²⁵³

The learned judge in *De Beers Consolidated Mines*²⁵⁴ went on to state that a commissioner is not bound to agree with the employer’s assessment of the damage caused to the trust relationship due to the misconduct committed by the employee. However, in cases of fraud only extraordinary circumstances would ‘warrant a conclusion’ that the relationship could be restored.

In *Department of Health, Eastern Province v PHWSBC & others*,²⁵⁵ an employee fraudulently completed forms making out that he had been interviewed and recommended for appointment to a promotional post. When the transgression was uncovered he was charged with misconduct and summoned to a disciplinary

²⁵¹ Supra

²⁵² (2000) 21 ILJ 1051 (LAC) at para 17

²⁵³ *De Beers Consolidated Mines Ltd v CCMA & others*, supra at para 23

²⁵⁴ Supra

²⁵⁵ [2009] 2 BLLR 131 (LC)

hearing. The employee pleaded guilty to the charge, showed remorse and also indicated that he had acted out of desperation as he acted in a higher post for a number of years and his efforts had not been recognised by the employer. The applicant was nevertheless dismissed, however he remained in service for approximately a year pending the finalisation of his internal appeal. The employee lodged an unfair dismissal dispute and the arbitrator found that the dismissal was too severe under the circumstances as the employee had acted in a higher post for some time without compensation and in all fairness should have been promoted. The employee was re – instated with retrospective effect.

On review the LC could not fault the findings of the commissioner. The court noted that the employee had long service, some 23 years and that the employer had suffered no loss. Further, the employee whilst in service had referred an unfair labour practice dispute to the CCMA regarding the fact that he had acted in a higher post for a number of years, and the commissioner ordered the department to advertise the post which they failed to do. The employee also remained in service for a year pending the finalisation of his appeal. The commissioner had considered all these factors and accordingly the LC found no basis to interfere with the award.

The case of *Shoprite Checkers (Pty) Ltd v CCMA & others*,²⁵⁶ requires special consideration. This case gives insight into the LAC determination of the fairness of the sanction of dismissal.

The facts of the case are as follows: The employee was an assistant baker with nine years service and a clean service record. He was dismissed after being caught on camera eating ‘pap’ on two days and a slice of bread on another day. Having found that the commissioner’s ruling that the employee was not guilty of misconduct was reviewable the court went on itself to determine the fairness of

²⁵⁶ (2008) 29 ILJ 2581 (LAC). Compare with *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) overturned in part in *Shoprite Checkers (Pty) Ltd v CCMA & others* (2009) 30 ILJ 829 (SCA) at para 24

the sanction of dismissal. The court considered the body of jurisprudence in which dismissal of employees with long service for theft of items of small value, were upheld.²⁵⁷ The court held that the employee had breached rules on a number of occasions and acted in blatant disregard of company rules that had been implemented for justifiable operational reasons. The employer had acted consistently in its application of discipline and had dismissed other employees who had committed similar offences. The company was experiencing high shrinkage levels for which the employee was the cause, which it could not afford and because of the nature of his job, which was the preparation of food, they could not afford to have him back in his position as his conduct had destroyed the trust relationship. With respect to the latter point, there was unchallenged evidence presented to this effect during the disciplinary hearing. The court held that dismissal was a fair sanction.²⁵⁸

This case highlights the following. It remains the employer's prerogative to set rules and standards of conduct in terms of its operational requirements.²⁵⁹ Case law remains an important factor in determining the fairness of the sanction of dismissal.²⁶⁰ It confirms that theft justifies dismissal regardless of the value of the item and length of service.²⁶¹ The court held that the following factors constitute aggravating factors – the misconduct constituted dishonesty, there was no remorse, the misconduct related to the nature of the job, the problem of shrinkage had been identified by the employer and communicated to all within the business and dismissal had been consistently applied for this type of transgression.²⁶² Convincing evidence must be led on the breakdown of the trust relationship.²⁶³

²⁵⁷ A Myburgh "Determining and Reviewing Sanction after Sidumo" (2010) (31) ILJ 12

²⁵⁸ Ibid

²⁵⁹ Ibid 13

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Ibid

²⁶³ Ibid

Notwithstanding, some indulgence granted in some cases involving dishonest misrepresentation the usual natural consequences of dishonest conduct is that of dismissal. In this regard, it has been long established that any conduct on the part of an employee that is incompatible with the trust and confidence, necessary for the continuation of the employment relations will entitle the employer to bring the relationship to an end.²⁶⁴ In summary, it is generally accepted that theft (which breaks the trust relationship) justifies dismissal, regardless of the value of the item involved. It is also justified in order to deter other theft in the workplace and for operational reasons.²⁶⁵ Even length of service and a clean disciplinary record has not saved dishonest employees from dismissal.²⁶⁶

4.2.1.2 Negligence

Negligence is tantamount to carelessness.²⁶⁷ In other words, it is an objective standard based on the 'failure to exercise the degree of care expected of a reasonable person.'²⁶⁸ In the workplace, this is correlated to that of a reasonable employee with the 'experience, skill and qualifications comparable to the accused employee' and whether that employee 'would have foreseen the possibility of harm and taken steps to avoid that harm'.²⁶⁹ If the negligent act or omission did not actually cause harm, an employee can still be disciplined for his or her negligent conduct as it had the potential to cause harm or prejudice the organisation.²⁷⁰ Intentional conduct is invariably more serious than negligent conduct and therefore negligent conduct would usually warrant corrective disciplinary action for a first offence.²⁷¹ However, negligent conduct that endangers lives and safety may warrant a more severe sanction, for a first

²⁶⁴ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (AD) at 26E-G

²⁶⁵ *Anglo American Farms Boschendal Restaurants v Komjwayo*, *supra*; *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & another*, *supra*

²⁶⁶ *Toyota SA Motors (Pty) Ltd v Radebe & Others*, *supra* and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industries & Others*, *supra*

²⁶⁷ J Grogan *Workplace Law* 10th ed (2009) 226

²⁶⁸ *Ibid*

²⁶⁹ *Ibid*

²⁷⁰ *Ibid*

²⁷¹ *Ibid*

offence, even including dismissal. Further, in very senior managerial positions with high levels of skill where a 'drop of a pen' may have significant consequences, negligence will be dealt with severely.²⁷² It is important to note that negligently performed work is also work performed poorly and to this extent it overlaps with the incapacity provisions in the Code.²⁷³

4.3 Nature of business and operational requirements

The gravity of misconduct must always be weighed against other relevant factors relating to the employee, which for instance may include remorse, length of service and disciplinary record. However, the impact of the misconduct must also be considered in relation to the harm it caused to the employer's business (this would include the future harm if it is repeated). This after all is part of risk management.

In *De Beers Consolidated Mines Ltd v CCMA & Others*,²⁷⁴ the Court, per Conradie JA, held the following regarding risk management:

"Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in a 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."²⁷⁵

²⁷² *Somyo v Ross Poultry Breeders (Pty)(Ltd)* (1997) 2 LLD 130 (LAC) at 866C-F; J Grogan *Workplace Law* 10th ed (2009) 226

²⁷³ Item 9 of Schedule 8, Code of good Practice: Dismissal; J Grogan *Workplace Law* 10th ed (2009) 226

²⁷⁴ (2009) BLLR 995 (LAC)

²⁷⁵ *De Beers Consolidated Mines Ltd v CCMA & Others*, *supra* at para 1058e-g and also see *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others* (2010) 5 BLLR 513 (LAC) at para 25

Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others,²⁷⁶ dealt with a review application regarding an unfair dismissal dispute. In this case the Commissioner found that the dismissal was unfair as the employer failed to prove that the employee intended to commit fraud and failed to produce the time sheets at the disciplinary hearing. However, the LAC found that there was clear evidence that the employee had committed an act of gross dishonesty by falsifying his time sheets and was therefore a fair reason to justify dismissal.²⁷⁷ The court held that the Commissioner failed to take the totality of circumstances into account when making a decision. As an administration clerk who recorded employees working hours he occupied a position of responsibility and trust.²⁷⁸ He was an operational risk and his conduct caused harm and prejudice to the employer and was potentially prejudicial if he was reinstated to his position as he could continue to falsify his and other employees' time sheets.²⁷⁹ The employee showed a lack of remorse and attempted to shift the blame to the site manager who signed off on the falsified time sheet. The employee also had relatively short service, namely two and a half years.²⁸⁰ The court found that for the employer to retain the employee under the circumstances would be inappropriate and detrimental to the employer's operational requirements. The court further held that the employee's conduct had rendered the continued employment relationship intolerable. The court referring to Conradie JA in *De Beers Consolidated Mines Ltd*,²⁸¹ stated that:

'Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him and the employer has been destroyed.'²⁸² (at 1057C-D)

²⁷⁶ (2010) 5 BLLR 513 (LAC)

²⁷⁷ *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others*, *supra* at para 35

²⁷⁸ *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others*, *supra* at para 36

²⁷⁹ *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others*, *supra* at para 37

²⁸⁰ *Ibid*

²⁸¹ *Supra*

²⁸² *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others*, *supra* at 38

In *BEMAWU obo Pathers & others and SABC*,²⁸³ the commissioner who was dealing with a dismissal dispute relating to a misconduct involving elements of dishonesty wherein the employees were also manipulated by a colleague, found that the dismissal was too harsh as the employees had impeccable disciplinary records and long service and they also did not appreciate that their conduct could destroy the employment relationship. The commissioner also found that after balancing the actions of the employees against the harm caused to the employer that dismissal was not a fair sanction.²⁸⁴ In this case the operational risk did not tilt the scale against clean record, long service and appreciation of wrongfulness.

It is clear that conduct that poses an operational risk or potential operational risk to an employer's business interests justifies dismissal. However, the totality of circumstances needs to be taken into account in deciding on an appropriate sanction.

4.4 Principles of corrective and progressive discipline

The primary purpose of disciplinary action is to correct wrongful behaviour through a graduated process of warnings. This usually commences with a verbal warning through to a final written warning. The idea is to correct wrongful behaviour through the issuing of warnings and progress to more severe warnings should the conduct persist. This will depend on the merits of the particular case and there is no requirement that an employer must start with a verbal warning. The starting point is informed by the nature of the misconduct committed.

In *Timothy v Nampak Corrugated Containers*,²⁸⁵ the following was stated in regard to progressive discipline:

²⁸³ [2008] 3 BALR 251 (CCMA)

²⁸⁴ *BEMAWU obo Pathers & others and SABC*, *supra* at paras 63 & 64

²⁸⁵ (2010) 8 BLLR 830 (LAC)

‘...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.’

The case of *Cadbury, SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*,²⁸⁶ dealt with the application of corrective and progressive discipline. The court stated the following in respect to an employee who was found to have committed a second act of insubordination:

‘I have considered the evidence in mitigation especially her length of services of twenty one years. I am, however, of the view that the gravity of the misconduct she made herself guilty of and the fact that she was on a final written warning for similar misconduct out-weighed misconduct by far. Her dismissal was appropriate.’²⁸⁷

The Code supports a corrective and progressive approach to misconduct.²⁸⁸ An employee’s behaviour is corrected through interventions that become progressively more severe. Minor transgressions are dealt with through informal advice and counselling. If the conduct is repeated then the employee should be given warnings which may be graduated in terms of the severity of the misconduct.²⁸⁹ More serious offences or repeated misconduct may warrant a final written warning or other disciplinary action short of dismissal (this may include a demotion or suspension without pay).²⁹⁰ Dismissal is reserved for serious misconduct or repeat offences where progressive discipline has failed.²⁹¹ Should a court find that previous warnings that were issued were defective or unjustifiably issued then those warnings cannot be relied upon to justify a

²⁸⁶ [2013] 8 BLLR 761 (LC)

²⁸⁷ *Cadbury, SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*, *supra* at para 19

²⁸⁸ Item 3(2) of Schedule 8, Code of Good Practice: Dismissal

²⁸⁹ *Ibid* Item 3(3) of Schedule 8, Code of Good Practice: Dismissal

²⁹⁰ *Ibid*

²⁹¹ *Ibid*

sanction of dismissal in relation to the case at hand.²⁹² Further, employees who are on final written warnings need to be aware of the severity and consequences of these corrective sanctions should they transgress again. In *Seardel Group Trading (Pty) Ltd t/a Cape Underwear Manufacturers v SACTWU & others*,²⁹³ the LAC stated the following in respect to repetitive misconduct:

‘The employees made themselves guilty of such misconduct when they were still on a final written warning for going on an illegal strike within the previous twelve months. This was very serious and the employees were lucky that the court a quo did not find that their dismissal was fair’²⁹⁴

Item 3(2) of the Code endorses the concept of a graduated system of disciplinary action that attempts to correct employees’ behaviour, through counselling and warnings. This system is progressive in nature whereby the issuing of different levels of warnings is encouraged and dismissal is reserved for serious misconduct or repeated offences.²⁹⁵ Obviously dismissal should not be applied if a lesser sanction would serve the purpose.²⁹⁶ One of the fundamental purposes of disciplinary action is to correct behaviour and rehabilitate offenders so that they can continue to play a meaningful role within the organisation.²⁹⁷ This rehabilitative approach is akin to sentencing in the criminal law system where the rehabilitation of offenders is encouraged and when this is no longer feasible, extreme penalties such as life imprisonment or the death sentence is imposed.²⁹⁸ However, the analogy between discipline in the labour context, and the criminal justice system is limited, as the employer has no inherent right to punish employees. The employer’s right to dismiss employees is contractual and labour law ensures that the employer exercises its right to terminate the contract for

²⁹² *Lawrence Changula v Bell Equipment* (1991) 1 ICJ 1.11.9

²⁹³ [2009] 11 BLLR 1051 (LAC)

²⁹⁴ *Seardel Group Trading (Pty) Ltd t/a Cape Underwear Manufacturers v SACTWU & others*, *supra* at para 14

²⁹⁵ Item 3(3) Schedule 8: Code of Good Practice: Dismissal

²⁹⁶ J Grogan *Dismissal* (2010) 165

²⁹⁷ *Ibid*

²⁹⁸ *Ibid* 165 & 166

breaches, fairly.²⁹⁹ However, it is trite that the sanction must 'fit the misconduct'.³⁰⁰

Further, in the disciplinary context an employer has a limited range of permissible sanctions to apply and this somewhat constrains the extent of the application of progressive discipline.³⁰¹ These sanctions are warnings, demotion, suspension without pay and dismissal.

The employer's need to discipline employees is regarded as an operational response to risk management.³⁰² However, the misconduct must have a severe effect on the business operations and therefore make progressive discipline inappropriate.³⁰³ Generally employees are dismissed as they are no longer trusted and also to deter others from committing serious misconduct.³⁰⁴ Although each case should be judged on its own merits, an employer must also be consistent in the application of discipline and sanctions imposed. Imposing a lesser sanction when it is not justified will cause an inconsistency problem for the employer and may have an adverse impact on substantive fairness.

This test is premised on the contractual relationship between the parties and whether, due to the conduct of the employee, the employer can reasonably be expected to continue with the relationship. In other words, it deals with the effect that the employee's misconduct has had on the employment relationship.³⁰⁵ The courts have dealt with this in different ways and have considered whether the 'trust' relationship has been destroyed or whether the employment relationship has been rendered 'intolerable' or 'futile'.³⁰⁶ This is also supported by item 3(4) of

²⁹⁹ Ibid 166; *NUMSA obo Davids v Bosal Africa (Pty) Ltd* [1999] 11 BLLR 1327 (IMSSA)

³⁰⁰ J Grogan *Dismissal* (2010) 166

³⁰¹ Ibid

³⁰² *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) 21 ILJ 1051 (LAC) at 1058F-G

³⁰³ J Grogan *Dismissal* (2010) 167; *Sidumo & another v Rustenburg Platinum Mines Ltd (CC)*, *supra*

³⁰⁴ J Grogan *Dismissal* (2010) 167

³⁰⁵ Ibid

³⁰⁶ Ibid; *Anglo American Farms Boschendal Restaurants v Komjwayo*, *supra*; *Pitcher & another assisted by the Western Cape Omnibus & Salaried Staff Union v Golden Arrow Bus Services (Pty) Ltd* (1995) 16 ILJ 614 (LAC) & *Matheus & others v Cycsad Engineering (Pty) Ltd* (1993) 2 LCD 307 (IC)

the Code of Good Practice: Dismissal which states that 'dismissal will only be appropriate for a first offence if the misconduct is serious and of such gravity that it makes the continued employment relationship intolerable'. In this regard, the employer must lead actual evidence that the employment relationship has irreparably broken down unless this is obvious from the circumstances of the case.³⁰⁷ If a lesser sanction would serve the same purpose than a harsher one then the lesser sanction should be applied as long as it would not have an adverse effect on risk management. But an employer must also be mindful of the parity principle.

4.5 Personal circumstances of the employee

There is little certainty as to the extent that an employer must take the personal circumstances of an employee into account when deciding on an appropriate sanction. Besides length of service and other mitigating factors it is not clear what personal circumstances should be considered, if any.³⁰⁸ After all dismissal affects not only the employee but his or her entire family as well. It also affects employees themselves in different ways. For instance older employees may find it difficult to find alternative employment, whilst young unattached employees may be less affected by a dismissal.³⁰⁹ A dismissal of a professional person may affect his or her professional reputation and his or her future employability within the particular industry whilst a general worker may be less affected in so far as professional reputation is concerned.³¹⁰

Obviously employers are at liberty to consider the personal circumstances of employees when deciding on an appropriate sanction. However, should an employer take factors such as future employability (due to being elderly) or being a sole bread winner into account they should do so with caution, as any leniency

³⁰⁷ *Edcon v Pillimer NO & others, supra*

³⁰⁸ J Grogan *Dismissal* (2010) 174

³⁰⁹ *Ibid*

³¹⁰ *Ibid*

shown in this regard may impact on consistency in so far as future similar offences are concerned.³¹¹ It is also doubtful that an otherwise fair dismissal will be deemed to be unfair based on these grounds alone.³¹²

4.5.1 Length of service

Generally the greater the length of service the more thoroughly an employer must apply his or her mind to mitigating factors. The converse is also true. The shorter the years of service, the stronger other mitigating factors will have to be to save an employee from dismissal.³¹³ An employee's length of service is indicative of his or her reliability and commitment to the organisation. It is also relevant in determining whether an employee is likely to commit the offence again.³¹⁴ Length of service impacts on an employee's future reliability however it cannot on its own render a dismissal unfair.³¹⁵ Length of service coupled with loyal and faithful service may persuade an employer to accept the risk of continuing with the employment relationship even though he or she is now aware that the employee has committed misconduct.³¹⁶ However, length of service will have little relevance in cases involving serious misconduct.³¹⁷

An example of a case in which length of service was not considered sufficient to render an employee's dismissal unfair is *Toyota SA Motors (Pty) Ltd v Radebe & others*³¹⁸ In this case the court stated the following:

'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point

³¹¹ Ibid 175

³¹² Ibid 175

³¹³ Ibid 173

³¹⁴ Ibid 172 - 173

³¹⁵ Ibid 173; *De Beers Consolidated Mines Ltd v CCMA & Others*, *supra* at para 22 & 24

³¹⁶ Ibid

³¹⁷ *ABC Powertech Transformers (Pty) Ltd v Centre for Dispute Resolution, Metal & Engineering Industries Bargaining Council & others* (2007) 28 ILJ 1232 (LC) at para 12

³¹⁸ (2000) 21 ILJ 340 (LAC)

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 provide, any mitigation for misconduct of such a serious nature such 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 appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a degree as to be described as gross, then dismissal in an appropriate and fair sanction.' (at 344C-F)³¹⁹

4.6 Consistency / The Parity principle

Generally, employers are required to apply the same standards to employees when implementing discipline in the workplace. Therefore, if two employees have committed the same transgression and the two cases are indistinguishable then both employees should receive the same sanction.³²⁰ Being consistent is part of the requirement of acting fairly. Just as employees are required to be aware of the rules within the workplace, so too is the employer is required to enforce them consistently.³²¹ The inconsistent enforcement of rules creates confusion amongst employees in so far as the standard of conduct required of them in the workplace is concerned. It also creates uncertainty in respect of whether the rule still exists

³¹⁹ (2000) 21 ILJ 340 (LAC) at para 37

³²⁰ A Van Niekerk: *Unfair Dismissal* (2002) 44

³²¹ J Grogan *Dismissal* (2010) 150

or is being taken seriously by the employer.³²² The Code requires an employer to act consistently when applying discipline especially in cases involving dismissal.³²³ The employer must be apply the same sanction to employees as it has done in the past for commission of the same offence (historical consistency) as well as between a number employees who are involved in the commission of the same or similar offence at more or less the same time (contemporaneous consistency).³²⁴ Obviously if the cases are distinguishable then an employer is entitled to apply different sanctions. Consistency is required as regards to the sanction imposed as well as in the application of discipline for breach of a rule. It would be inconsistent to discipline some employees for breaching the rule whilst turning a blind eye to others who transgress or to dismiss some employees for committing a particular offence and not others.³²⁵ Item 5 of the Code requires employers to keep disciplinary record for each employee, indicating the offence committed, the consequent disciplinary action taken by the employer and the reason the employer took that action.

It should be noted that the employer is also required to 'consider factors such as the employee's circumstances, nature of the job and the circumstances of the infringement.'³²⁶ Consistency is premised on treating 'like cases alike' this is a requirement of fairness.³²⁷ Therefore an employer may well be justified in distinguishing between two employees guilty of the same offence due to their differing personal circumstances (length of service and disciplinary record) or the differing roles they played in the commission of the offence.³²⁸ Further, should an employer be lax in enforcing rules or be overly lenient with respect to sanction and later on decides to adopt a strict approach, it must clearly inform employees of the new approach to discipline to avoid being accused of historical inconsistency.

³²² Ibid

³²³ A Van Niekerk: *Unfair Dismissal* (2002) 44; Item 3(6) of Schedule 8, Code of Good Practice: Dismissal

³²⁴ A Van Niekerk: *Unfair Dismissal* (2002) 44; J Grogan *Dismissal* (2010) 150-151

³²⁵ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (2003) 384

³²⁶ Ibid; See Item 3(5) vis a vis Item 3(6) of Schedule 8, Code of Good Practice: Dismissal

³²⁷ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (2003) 384

³²⁸ Ibid

In *Minister of Correctional Services v Mthembu NO*,³²⁹ the court held in respect of the consistency of sanction that the 'parity principle' should not be applied inflexibly and that assessing the fairness of a dismissal involves a 'moral or value' judgment. In *SACCAWU & others v Irvin & Johnson Ltd*,³³⁰ the court held that although employees should be measured by the same standards, the 'parity principle' is not in itself a separate principle but is an element of disciplinary fairness. The court went on to note that selective discipline may be unfair but notwithstanding this, if some employees who committed serious misconduct are not dismissed, even for improper motives, this does not mean that the other employees will necessarily escape dismissal. Some inconsistency is the inevitable result of flexibility, which entails the application of discretion in respect to each individual case. The determination of fairness is after all a value judgment. It is self evident that not all inconsistency is necessarily unfair.³³¹

If an employer treats a group of employees differently for committing the same offence, then the employer must show good cause or be able to justify the differentiation. For example, it may be shown that the dismissed employees conducted themselves in a more culpable manner than the other employees who were not dismissed.³³² The opposite is also true, if the comparator misconduct is less serious or different in nature to the employee who has been dismissed, then the inconsistency challenge will fail.³³³ Likewise if the personal circumstances of the employees involved in the misconduct were vastly different.

An example of a case where a dismissal was found to be unfair for inconsistency can be found in the case of *SRV Mills Services (Pty) Ltd v CCMA & others*.³³⁴ This case dealt with contemporaneous inconsistency wherein two employees

³²⁹ (2006) 27 ILJ 2114 (LC)

³³⁰ [1999] 20 ILJ 2302(LAC)

³³¹ *SACCAWU & others v Irvin & Johnson Ltd*, *supra* at para 2313C-J

³³² *CEPPWAWU & others v Metrofile* (2004) 25 ILJ 231 (LAC); J Grogan *Dismissal* (2010) 152

³³³ *Samson v CCMA & others* [2009] 11 BLLR 1119 (LC); J Grogan *Dismissal* (2010) 153

³³⁴ (2004) 25 ILJ 135 (LC)

who were absent from duty were treated differently. The following day they claimed that the car they were travelling in had broken down. When this was found to be untrue one employee was disciplined and dismissed. The disciplinary hearing for the other employee was held some time later and he was found not guilty. This was held to be unfair as the employer failed to justify the differentiation. This case is distinguishable from the case of *SACCAWU v Irvin & Johnson (Pty) Ltd*,³³⁵ since in the latter case, the employer gave a satisfactory explanation for the differentiation in treatment. The principle established by the case is thus that the employer must prove that there was an objective basis for applying different sanctions to employees who commit the same misconduct.³³⁶

Dismissals will also be held to be unfair on the basis of inconsistency where the employer selects employees for dismissal on the basis of irrelevant prior warnings and gives the other employees a lesser sanction, when they were all involved in the same misconduct.³³⁷ In *SACTWU & others v Novel Spinners (Pty) Ltd*,³³⁸ the court held that it would be unfair to utilise prior warnings for individual misconduct in a case involving collective misconduct (a stayaway).³³⁹ Lapsed or expired warnings also cannot be used for differentiation in treatment in group misconduct.³⁴⁰

In inconsistency challenges the case being relied upon must be sufficiently similar to the case at hand. It is not only the similarities in the conduct that is relevant. It must be borne in mind that similar cases can be distinguished on the basis of factors such as personal circumstances, length of service, clean disciplinary record and remorse shown. It must also be remembered that if an employer intends to apply discipline more severely in future then this must be

³³⁵ Supra

³³⁶ *Rustenburg Platinum Mines Limited (Bafokeng Rasimone Platinum Mine) v CCMA & others* (2007) 28 ILJ 408 (LC); *J Grogan Dismissal* (2010) 153 & 154

³³⁷ Ibid 153

³³⁸ [1999] 11 BLLR 1157 (LC)

³³⁹ *J Grogan Dismissal* (2010) 153; See also *SATAWU & others v Ikhwezi Bus Services (Pty) Ltd*

³⁴⁰ *NUMSA & others v Atlantis Forge (Pty) Ltd & others* (2005) 26 ILJ 1984 (LC)

clearly communicated to all employees to avoid accusations of historical inconsistency.³⁴¹

In *Westonaria Local Municipality v SALGBC & others*,³⁴² the employee was dismissed some three years after her employment as a personal assistant to the executive mayor, as it was uncovered that she did not have a matriculation qualification, which she claimed to have during her interview. The position she occupied was one that required trust. As a consequence thereof she was dismissed from service. The arbitrator found her dismissal unfair on the basis of inconsistency and reinstated her. The evidence presented had shown that another employee had been employed on the basis of a falsified matric certificate but was not dismissed as the municipality claimed that they had made a 'plea bargain' arrangement with this employee to testify against a senior official and that a matric certificate was also not a requirement of her post. In both cases of misconduct the employees admitted guilt. The LC referred to the LAC decision in *Gcwensha v CCMA & others*,³⁴³ where the LAC confirmed its decision in *SACCAWU & others v Irvin & Johnson Ltd*,³⁴⁴ that:

"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards...[and that]...when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated."³⁴⁵

The court confirmed that it was the employer's responsibility to set the standards of conduct in the workplace and to apply them consistently. The court pointed out that where the employer does not enforce rules within the workplace, this may well lead employees to believe that the rules have been changed or that non compliance with the rules is no longer regarded as serious enough to warrant

³⁴¹ J Grogan *Dismissal* (2010) 155

³⁴² *Supra*

³⁴³ [2006] 3 BLLR 234 (LAC)

³⁴⁴ *Supra*

³⁴⁵ *Westonaria Local Municipality v SALGBC & others*, *supra* at para 22

dismissal, especially in instances where employees have received lesser sanctions for non-compliance with a particular rule.³⁴⁶

In casu, the court found that the dismissal was unfair, taking into account her remorse, the fact that she was a good worker and had owned up to the misconduct, and taking into account the employer's inconsistent application of discipline.

4.7 Disciplinary record

An employee's disciplinary record is relevant in so far as future misconduct for similar offences is concerned. The disciplinary record is relevant in so far as deciding on an appropriate sanction is concerned. This is in line with the notion that discipline should be applied in a progressive manner.³⁴⁷ Therefore an employee on a final written warning for a particular offence may be regarded as 'unrehabilitatable' should he or she be found guilty of a similar misconduct during the tenancy of a valid final written warning. In such a case, dismissal would be regarded as an appropriate sanction under the circumstances.³⁴⁸ However, an employee's disciplinary record must also be weighed up against the severity of the offence. The opposite also holds true. An employee with a clean disciplinary record may call for the application of corrective discipline and leniency.³⁴⁹

The relevance of an employee's disciplinary record is premised on the principle that past warnings must be similar to the offence for which the employee has been dismissed³⁵⁰ and the past warnings must still be valid and relatively recent.³⁵¹

³⁴⁶ *Westonaria Local Municipality v SALGBC & others*, *supra* at paras 27 & 29

³⁴⁷ *J Grogan Dismissal* (2010) 168

³⁴⁸ *Ibid*

³⁴⁹ *Ibid*

³⁵⁰ *Cholota v Trek Engineering (Pty) Ltd* (1992) 13 ILJ 219 (IC); *CCAWUSA & another v Wooltru t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC); *NUM & another v Transvaal Navigation Collieries and Estate Co Ltd* (1986) 7 ILJ 393 (IC)

³⁵¹ *NUM & another v East Rand Proprietary Mines Ltd* (1987) 8 ILJ 315 (IC) & *CWIU & another v AECI Paints (Natal)*

The period of validity of warnings may be stipulated in the disciplinary code, collective agreement or be established by way of workplace practice.³⁵² If the code is silent in this regard the period of validity is generally regarded as a period between six to twelve months.³⁵³ Once the period of validity of warnings has expired the employee is regarded as having a clean disciplinary record.³⁵⁴

The general principle is that once a warning has lapsed in terms of the period stipulated in the disciplinary code, collective agreement or workplace practice then the warning cannot be utilised in aggravation of sanction for future cases of misconduct. The employee is deemed to possess a clean disciplinary record.³⁵⁵ Therefore in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*,³⁵⁶ the LAC held that the commissioner was correct in assessing the case as if the employee had a clean disciplinary record as the previous warnings were not valid.

What follows is a discussion of cases concerning the relevance of an employee's disciplinary record in determining the appropriate sanction for misconduct.

In *NUMSA obo Selepi / Recyclitt (Pty) Ltd*,³⁵⁷ the employee was dismissed for threatening and insubordinate conduct. The employee was on a final written warning for an indefinite period. A CCMA commissioner found that warnings are an essential part of corrective and progressive discipline and to allow 'indefinite warnings' would impose a disciplinary system that was not part of our law. The commissioner found that it would be unfair to utilise this warning in determining an appropriate sanction.

(Pty) Ltd (1989) 10 ILJ 311 (IC)

³⁵² *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC)

³⁵³ *NUM & another v East Rand Proprietary Mines Ltd, supra & CWIU & another v AECI Paints (Natal) (Pty) Ltd, supra*

³⁵⁴ J Grogan *Dismissal* (2010) 169

³⁵⁵ *Ibid*

³⁵⁶ *Supra*

³⁵⁷ (2003) 12 CCMA 8.21.1

In *Witcher / Hulleys Aluminium*,³⁵⁸ the employee was dismissed for absenteeism and late coming which would not ordinarily attract a sanction of dismissal for a first offence. However, the employee had been given a consolidated written warning which the employer referred to as a 'final final warning' to the effect that if he transgressed any workplace rule again he would be dismissed. This was a 'catch all' warning that if the employee breached any workplace rule or standard during the tenancy of the consolidated warning his services would be terminated. The arbitrator found that if an employee's general conduct and behaviour demonstrates a consistent and blatant disregard for disciplinary rules then a consolidated final written warning can be issued as long as the employee is made aware that any future breach of a rule will lead to dismissal. An employer cannot be expected to have to continuously tolerate ongoing misconduct where the employee escapes liability therefore by committing a variety of unrelated offences. There comes a point where an employer can fairly indicate to an employee that enough is enough and that no further misconduct will be tolerated and that any further breaches may result in dismissal.

However, there is a limit to which an employee's past record can be discarded due to the lapsing of previous warnings. In *Gcwensha v CCMA & others*,³⁵⁹ the LAC held that dismissal was a fair sanction due to the fact that an employee had a dismal past disciplinary record and had a number of warnings for negligence which were no longer valid. However, the principle established in this case is the exception rather than the norm.

In *Edgars Consolidated Stores v CCMA & others*,³⁶⁰ an employee was dismissed for gross negligence for leaving a cash drawer unlocked which resulted in R1000 going missing. He was subsequently reinstated retrospectively by a CCMA commissioner. On review the company contended that the commissioner had misdirected himself by failing to defer to the employer's choice of sanction and by

³⁵⁸ (2003) 12 MEIBC 8.3.1

³⁵⁹ *Supra*

³⁶⁰ [2008] 8 BLLR 761 (LC) paras 12-18

finding that progressive discipline was appropriate, considering the nature of its operations and the circumstances in which the offence occurred. The court held that it was trite that the 'reasonable employer' test no longer formed part of our law and that there is no closed list of factors that commissioners' must take into account when determining that appropriateness of sanction. The court held that the company's disciplinary code did not provide for dismissal for a first offence for this type of transgression but provided for a final written warning. As the company had not provided any plausible reason for not following its own disciplinary code the commissioner's decision was found to be correct. The employee had eight years' service and a clean record.

If an employee is not dismissed whilst on a final written warning and issued with another final written warning this may indicate that the offence is no longer regarded as serious. Should the employer dismiss for the same offence in future this may raise a question regarding consistency, as the employee was not dismissed previously but merely issued with another written warning. The employer's conduct of issuing final written warnings for repeated offences may signal that it does not regard the offence as so serious as to warrant dismissal.³⁶¹ The pertinent point here is that employers must be cautious in repeatedly issuing so-called 'final written warnings' as it may cause inconsistency, uncertainty in the workplace and undermines the entire disciplinary process.³⁶²

The previous warnings may only be taken into account in deciding on an appropriate sanction if the later offence is similar to the previous offence for which the employee received the warning. If the previous offence is not similar then the dismissal may be deemed unfair.³⁶³ This would require a proper categorisation of the offence in the real sense.³⁶⁴ This would not require an exact replication of the offence but the offences must be similar in the broad sense. In

³⁶¹ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*, *supra*; J Grogan *Dismissal* (2010) 170

³⁶² J Grogan *Dismissal* (2010) 170

³⁶³ *Ibid*

³⁶⁴ *Ibid* 171

other words the essence of the offences must be similar.³⁶⁵ Therefore, offences may be categorised as offences related to 'time, dishonesty, negligence and those related to unacceptable conduct in the workplace.'³⁶⁶

The courts have drawn a distinction between collective and individual action and the relevance of prior warnings in this regard.³⁶⁷ This is especially the case in respect of time related offences and unprotected industrial action. Generally speaking, prior warnings for individual absenteeism are not relevant to subsequent collective absenteeism.³⁶⁸ Collective absenteeism usually occurs in the context of an unprotected strike or stay away. In *SACTWU & another v Novel Spinners (Pty) Ltd*,³⁶⁹ the court held that an employer should distinguish between individual and collective action when disciplining employees. The court held that there may be a number of other factors that compel employees to engage in collective action, besides their individual choice. In the case of individual absenteeism it is the employee's choice to be absent whilst in the case of collective absenteeism employees may be compelled to engage in the collective action due to fear of victimisation, they may be bound by the decision of the majority or they may be bound by the union's constitution to participate in the collective absenteeism.³⁷⁰

4.8 Remorse

Conduct on the part of the employee calculated to destroy the relationship of trust and confidence with the employer will justify dismissal.³⁷¹ This can include conduct that reveals persistent defiance towards the employer and the failure to acknowledge responsibility and show remorse. Remorse does play some part in demonstrating an employee's ability to mend his ways and remain a committed

³⁶⁵ bid

³⁶⁶ bid

³⁶⁷ bid

³⁶⁸ bid

³⁶⁹ [1999] 11 BLLR 1157 (LC)

³⁷⁰ *SACTWU & another v Novel Spinners (Pty) Ltd*, *supra* at para 44

³⁷¹ *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (AD) at 26E - G

employee. But it is generally of little relevance in cases of serious misconduct. Further, persistently denying any wrong doing and only becoming remorseful after an employee has been found guilty of misconduct is of little assistance to the employee as he should have acknowledged his wrongdoing upfront.³⁷² In *Theewaterskloof Municipality v SALGBC (Western Cape Division) & Others*,³⁷³ a manager, through no fault of his own, erroneously received a monthly travel allowance and spent it. The court found that he had not been dishonest but rather defiant in refusing to repay the money back to the municipality. The court held that the municipality was entitled to expect a manager to act in its best interests and to seek to promote and safeguard its operational interests. Further, the municipality was entitled to expect him not to keep and use municipal funds which were paid to him in error and that he would expeditiously correct his conduct once he had 'strayed'. The court held that he owed a duty to repay the money expeditiously and to ensure that the error was not repeated. Any grievances he may have had should have been addressed through the appropriate channels. The court held that it was not appropriate to defiantly refuse to refund over-payments received under the pretext of unresolved grievances. The court warned that: 'An employee who embarks on recalcitrant or defiant conduct because of unresolved grievances does so at his or her own peril.'³⁷⁴ The dismissal was upheld by the LC.

In *Johannes v Polyoak (Pty) Ltd*,³⁷⁵ the court stated the following in respect to an employee's destructive conduct and lack of remorse:

'A striking feature of the case...is that ...she refused to capitulate. As a senior shop steward of her union, she could have been under no misapprehension as to what her recalcitrance may hold in store for her...it

³⁷² However, see *Eddels SA (Pty) Ltd v Sewcharan & others*, *supra* para 2

³⁷³ *Supra*

³⁷⁴ *Theewaterskloof Municipality v SALGBC (Western Cape Division) & Others*, *supra* at para 9

³⁷⁵ 1998 1 BLLR 18 (LAC)

must have been clear to her that her lonely crusade was likely to end in the disaster of dismissal.'

In the case of *Hulett Aluminum (Pty) Ltd v Bargaining Council for the Metal Industry & others*,³⁷⁶ the court held that:

'It 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 acknowledgment 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 future.'

In *Consani Engineering (Pty) Ltd v CCMA & others*,³⁷⁷ an employee was found guilty of being in unauthorised possession of a roll of scrap tape as he exited the security point. There was a strict rule against theft or unauthorised possession of company property and employees were required to first get permission before they removed company property. The employee pleaded guilty at the hearing and showed remorse, and he was the sole breadwinner. This did not save him as the LC overruled the CCMA and found that dismissal was the appropriate sanction.

4.10 Mitigating and aggravating factors

Once an employee has been found guilty of misconduct then the parties are at liberty to present factors in aggravation and mitigation of sanction. This is a separate enquiry where a variety of factors relevant to determining the appropriate sanction are considered. In respect of mitigating factors these would include length of service, disciplinary record, whether the employee owned up to

³⁷⁶ (2008) 29 ILJ 1051 (LAC) at para 45

³⁷⁷ (2004) 13 LC 1.11.13

his transgression, remorse shown, the circumstances in which the infraction occurred and any other factors that reduce the employee's blameworthiness.³⁷⁸ An employer is not required to take factors into account that merely invoke sympathy. The test is whether the mitigating factors individually or in totality indicate that the employee can be rehabilitated and will not commit the offence again.³⁷⁹ Employees faced with misconduct can either elect to plead not guilty and hope that the employer has insufficient evidence to prove the commission of the offence, or plead guilty and hope for leniency on the part of the employer. However, employees who fail to show remorse do so at their own peril and cannot expect to re-establish trust with the employer especially in cases of serious misconduct. They in fact pose an operational risk to the enterprise. Accepting responsibility for one's wrongdoing is the first step towards rehabilitation.³⁸⁰

In the *Sidumo*³⁸¹ judgment the court did not specifically refer to mitigating and aggravating factors but rather used the terminology 'relevant factors'. This needs to be considered against the backdrop of the majority decision in *De Beers Consolidated Mines*,³⁸² where Conradie JA held as follows:

'Mitigation, as the term is understood in the criminal context, 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 sensible operational response to risk management in the particular enterprise.'

However, a disciplinary enquiry does not end when an employee is found guilty of misconduct. Dismissal is not automatic, the Code requires more. Although the Code does not use the term mitigation, it requires the employer to consider besides the gravity of the offence, other factors such as the employee's

³⁷⁸ J Grogan *Dismissal* (2010) 174

³⁷⁹ *De Beers Consolidated Mines Ltd v CCMA & Others*, *supra*

³⁸⁰ *Ibid* at para 25; J Grogan *Dismissal* (2010) 174

³⁸¹ *Supra*

³⁸² *Supra*

circumstances, the nature of the job and the circumstances surrounding the infringement.³⁸³ Without considering these factors the fairness of the sanction cannot be ascertained. This would also include evidence being led as to the appropriateness or otherwise of the sanction to be imposed.³⁸⁴ Item 7(b)(iv) of the Code specifically requires an arbitrator to consider whether dismissal is an appropriate sanction. In *Sidumo*,³⁸⁵ the Constitutional Court stated that the commissioner must consider the reasons why the employer imposed the sanction of dismissal. The court stated the following:

‘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 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 dismissal on the employee and his or her long service record. This is not an exhaustive list.’³⁸⁶

In *NEHAWU obo Motsoagae*,³⁸⁷ the commissioner stated that a commissioner cannot consider the reasons why an employer imposed the sanction of dismissal unless the person who actually took the decision is called to testify. This would also allow for the evidence (the decision) to be properly tested through the

³⁸³ Item 3(5) of Schedule 8, Code of Good Practice: Dismissal; see also *Nehawu obo Motsoagae v SARS* [2010] 10 BALR 1076 (CCMA) at para 57

³⁸⁴ *Nehawu obo Motsoagae v SARS*, *supra* at para 58; *Edcon v Pillemer*, *supra*

³⁸⁵ *Supra*

³⁸⁶ Para 78

³⁸⁷ *Supra*

process of cross examination and allow for the uncovering of any ill gotten or ulterior motives on the part of the employer.³⁸⁸

However, when assessing the gravity of the offence this must be done in conjunction with an assessment of the employee's personal circumstances, the nature of the job and the circumstances within which the misconduct occurred.³⁸⁹ Further, due consideration must also be given to aggravating and mitigating factors. Aggravating factors may include the following:³⁹⁰ Willful and intentional conduct,³⁹¹ lack of remorse shown, poor disciplinary record with current warnings that are still applicable, the employee has previously been made aware of the seriousness of the misconduct but persists with committing it and disgraceful and destructive conduct, such as racial comments and insults.³⁹²

Mitigating factors may include the following:³⁹³ Clean disciplinary record, long service, the employee's personal circumstances,³⁹⁴ the employee was remorseful and accepted responsibility for his or her conduct, the employee was coerced into committing the misconduct³⁹⁵ and the employee acted out of an apprehension for his or her safety.³⁹⁶

Whilst an employer is enjoined to consider aggravating and mitigating factors, the nature of the job and the circumstances in which the misconduct occurred are more important factors than the employee's personal circumstances.³⁹⁷

³⁸⁸ Para 60

³⁸⁹ Item 3(5) of Schedule 8, Code of Good Practice: Dismissal; *Durban Confectionary Works (Pty) Ltd v Majangaza* (1993) 14 ILJ 663 (LAC) at 669C-670B

³⁹⁰ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (2003) 383

³⁹¹ *Adcock Ingram Critical Care v CCMA* [2001] 9 BLLR 493 (LAC)

³⁹² *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v KAPP* [2002] 6 BLLR 493(LAC)

³⁹³ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (2003) 383

³⁹⁴ Item 3(5) of Schedule 8, Code of Good Practice: Dismissal; See also *Rosenberg v Mega Plastics* (1984) 5 ILJ 29 (IC), *NUM V East Rand Property Mines* (1987) 8 ILJ 315 at 321D

³⁹⁵ *Maine v African Cables Ltd* (1985) 6 ILJ 234 (IC)

³⁹⁶ *SALDCDAWU v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 ILJ 544 (IC)

³⁹⁷ D du Toit...et al. *Labour Relations Law: A Comprehensive Guide*. 4ed. (2003) 383

In *Toyota SA Motors (Pty) Ltd v Radebe & others*,³⁹⁸ the LAC stated the following in respect to the relevance of mitigating factors in cases involving serious misconduct:

‘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.’³⁹⁹

The court went on to find that the employee’s length of service was irrelevant in a case involving serious misconduct, such as gross dishonesty. The court stated that it should provide no mitigation.

It is preferable for mitigating and aggravating factors to be presented after a finding of guilt. However, failure to do so does not amount to a material procedural defect to justify an award for compensation.⁴⁰⁰ Item 3(4) of the Code requires an employer to take personal and other circumstances into account but it is silent on whether this is a separate two stage enquiry or whether mitigating and aggravating factors can be dealt with in the merits of the case. Item 4 of the Code does not require an employer to hold a formal enquiry and considering that managers and supervisors are lay persons, a separate two stage enquiry is not pre-emptory.⁴⁰¹ However, failure to consider mitigating factors at all will render a dismissal procedurally unfair.⁴⁰²

³⁹⁸ *Supra*

³⁹⁹ At 344C -F; this was also referred to in *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others* [2010] 5 BLLR 513 (LAC) at para 37

⁴⁰⁰ *Eddels SA (Pty) Ltd v Sewcharan & others* (2000) 9 LC 1.11.21

⁴⁰¹ *Ibid*

⁴⁰² *Ibid*

CHAPTER 5: DISPUTES ABOUT DISMISSAL

5.1 When can employers impose a harsher penalty on appeal or deviate from the recommendations of the chairperson?

Neither the LRA nor the Code makes it mandatory for employers to grant the employee the right to an internal appeal. Therefore the failure to afford an employee a right of appeal will not render a disciplinary process procedurally unfair unless the disciplinary code specifically makes provision for an internal appeal.⁴⁰³ If there is a right of appeal then it must be conducted fairly as the appeal is a separate part of the disciplinary process.⁴⁰⁴

If an appeals tribunal overrules a disciplinary finding in respect to guilt or reduces the sanction, higher levels of management cannot elect to rather implement the decision of the disciplinary enquiry as opposed to the appeal tribunal's finding, no matter how inconceivable the appeal findings may be.⁴⁰⁵

In *Country Fair Foods v CCMA & others*,⁴⁰⁶ the senior manager overruled the decision of the presiding officer and substituted a sanction of dismissal. For this reason the CCMA commissioner found the dismissal unfair. The LAC dismissed an application for review and was not satisfied with the company's argument that they always dismissed for assault and that the presiding officer had been disciplined himself for failing to follow company policy. The court held that there was no provision in the disciplinary code for 'review' and because he acted 'without precedent'.⁴⁰⁷ The decision may have been different if the disciplinary code specifically provided for 'review'.⁴⁰⁸ For State departments the position is somewhat different. Their disciplinary code empowers the presiding officer to

⁴⁰³ J Grogan *Dismissal* (2010) 246

⁴⁰⁴ *Ibid*

⁴⁰⁵ *Ibid* 248

⁴⁰⁶ *Supra*

⁴⁰⁷ *Ibid*

⁴⁰⁸ *Ibid*

make a final decision, subject in most instances to a right of appeal. The Public Service Act, 1994 empowers Heads of Department with the authority to discharge officials 'subject to the LRA'. They therefore have the power to intervene and overturn inappropriate or 'shockingly inappropriate' sanctions and this does not constitute a rehearing. The Public Service Act, 1994 supersedes the disciplinary code which is a collective agreement.⁴⁰⁹ Notwithstanding this, an employer reviewing a disciplinary outcome would be better placed to rather afford the employee a hearing.⁴¹⁰

It would appear that an appeal tribunal may also apply a harsher sanction than that imposed by the presiding officer, unless this is prohibited in terms of the employer's disciplinary code.⁴¹¹ This is akin to the powers of the Appeal courts in criminal matters where they reconsider the merits of the matter should there be an appeal. There is no reason why this same principle should not apply in the employment context.⁴¹² However, in the employment context applying a harsher sanction when an employee appeals would seem to vitiate against the notion of fairness, which is an essential tenet of employment justice. The Labour Court has held that this is not permissible unless the employee has been forewarned of the possible consequences of an appeal and the disciplinary code specifically provides for increased sanctions on appeal.⁴¹³

Once a presiding officer has made his decision and discharged his functions he becomes *functus officio* and cannot revisit his decision. In principle reviews of disciplinary outcomes by higher levels of management are unfair as management may not be aware of the facts of the case and they are the ones who appointed the presiding officer in the first place. They obviously had faith in the presiding officer's capabilities. Heads of Department in the Public Service are empowered

⁴⁰⁹ Ibid 248; *Dlamini v CCMA & others* (2004) 25 ILJ 1060 (LC); *PSA obo Venter v Laka NO & others* (2005) 26 ILJ 2390 (LC)

⁴¹⁰ *Visser and Standard Bank of SA Ltd* (2003) 24 ILJ 890 (CCMA); J Grogan *Dismissal* (2010) 249

⁴¹¹ J Grogan *Dismissal* (2010) 249

⁴¹² Ibid

⁴¹³ *Rennies Distribution Services (Pty) Ltd v Bierman NO & others* (2008) 29 ILJ 3021 (LC); J Grogan *Dismissal* (2010) 249

by legislation to do so but this is not the case for private sector employers.⁴¹⁴ If the disciplinary code only empowers the presiding officer to make recommendations then higher levels of management would be entitled to impose a harsher sanction than that recommended by the presiding officer as long as they acted fairly in doing so and applied the *audi alterim* principle.

5.2 Onus

During a disciplinary hearing an employer who alleges an employee committed an act of misconduct must prove so, on a balance of probabilities. The employer bears the overall onus in this regard. During the disciplinary hearing, the evidentiary burden will shift between the parties as the evidence is led. If the evidence is evenly balanced or indecisive the scale will tip against the party upon whom the onus rests.⁴¹⁵

In terms of section 192(1) of the LRA, in dismissal disputes, the onus rests on the employee to prove that he was dismissed, as opposed to resigned. Once this is established the onus then rests on the employer to prove that the dismissal was both procedurally and substantively fair.⁴¹⁶ The burden of proof is that of a balance of probabilities as opposed to beyond a reasonable doubt, which applies to criminal matters.

Therefore in unfair dismissal disputes the commissioner's first task is to determine whether the employee was in fact dismissed. Thereafter a commissioner must establish whether the employee was in fact guilty of the offence for which he or she is alleged to have committed. If it is found that the employee is in fact guilty as charged then the commissioner's second task is to enquire into the fairness of the sanction imposed. The employer bears the onus of proving that the employee was guilty of the offence on a balance of

⁴¹⁴ Section 17(1) of the Public Service Act, 1994; J Grogan *Dismissal* (2010) 258

⁴¹⁵ J Grogan *Workplace Law* 10th ed (2009) 168; M Oelchig *Evidence & Labour Law* (2005) 9-10

⁴¹⁶ Section 192 of the LRA; J Grogan *Workplace Law* 10th ed (2009) 168; M Oelchig *Evidence & Labour Law* (2005) 14

probabilities and that dismissal was a fair sanction under the circumstances. The employer must also prove that the trust relationship has irretrievably broken down due to the conduct of the employee in order to substantiate a sanction of dismissal.⁴¹⁷

The party who bears the onus should commence leading evidence in arbitration proceedings and must prove their case on a balance of probabilities.⁴¹⁸ This remains so during the entire proceedings. For instance, an employer would need to show that in terms of all the admissible evidence produced by both parties that its version is more likely than that of the employee's, at the conclusion of an unfair dismissal arbitration.⁴¹⁹ However, the evidentiary burden will shift between the parties on issues during the arbitration proceedings. This means that the employee has a duty to rebut any prima facie case established by the employer to avoid an adverse finding.

5.3 Disputes about dismissal

Section 191 of the LRA deals with the procedure that needs to be followed in challenging alleged unfair dismissals. It provides that dismissal disputes must be referred to the CCMA or bargaining council within 30 days from the date of dismissal. If an employer has an internal appeal procedure then the date of dismissal will be run from the date on which the employer took the final decision to dismiss.⁴²⁰ An employee may only refer a dismissal dispute after he or she has been dismissed or given notice of dismissal.⁴²¹ The CCMA or bargaining council may arbitrate a dispute if it remains unresolved (after conciliation) and falls within its jurisdiction and was also timeously referred. The CCMA or bargaining council must attempt to resolve the dispute within 30 days of referral, failing which the

⁴¹⁷ *Westonaria Local Municipality v SALGBC & others* [2010] 3 BLLR 342 (LC) at para 16

⁴¹⁸ In disciplinary and arbitration proceedings the standard of proof is a balance of probabilities and is a lesser standard than the criminal standard of beyond a reasonable doubt

⁴¹⁹ T Cohen...et al. *Trade Unions and the Law in South Africa* (2009) 104

⁴²⁰ J Grogan *Dismissal* (2010) 171

⁴²¹ Section 191(2A) of the LRA; J Grogan *Dismissal* (2010) 171

commissioner must certify the dispute as unresolved by issuing a certificate to that effect.⁴²² Conciliation is a consensus seeking process in which the commissioner attempts to assist the parties to settle the dispute themselves.⁴²³ If conciliation is unsuccessful an employee may refer the matter to arbitration or adjudication at the labour court depending on the true nature of the dispute.⁴²⁴ A dismissal dispute may be arbitrated if it relates to an employee's conduct, capacity, is constructive in nature or the employee does not know the reason for the dismissal.⁴²⁵ An operational requirements dismissal involving one employee may also be referred to arbitration.⁴²⁶ All other dismissals are referred to the labour court unless the parties consent to arbitration.⁴²⁷ The true reason for the dismissal will determine the correct forum for referring the dispute, as opposed to the employee's determination thereof.⁴²⁸ This prevents 'forum shopping'. Dismissal disputes must be referred to arbitration or the labour court within 90 days from certification of non resolution. Late referrals may be condoned on good cause.⁴²⁹ Arbitrations usually take place sometime after the failed conciliation unless the dispute resolution procedure is a 'Con-arb' where the arbitration happens immediately after conciliation.⁴³⁰

Section 138 of the LRA states that commissioners must conduct the arbitration 'in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly' and that they need 'to deal with the substantive merits of the dispute with the minimum of legal formalities' The CCMA guidelines for misconduct arbitrations deals with the conduct of arbitration proceedings and assessing evidence, as well as determining the appropriate sanction for misconduct.

⁴²² J Grogan *Dismissal* (2010) 172

⁴²³ *Ibid*

⁴²⁴ *Ibid*

⁴²⁵ Section 191 of the LRA

⁴²⁶ J Grogan *Dismissal* (2010) 172

⁴²⁷ *Ibid*

⁴²⁸ *Wardlaw v Supreme Moulding (Pty) Ltd* (2007) 28 ILJ 1042 (LAC); J Grogan *Dismissal* (2010) 172

⁴²⁹ J Grogan *Dismissal* (2010) 173

⁴³⁰ *Ibid* 172

As regards process, a commissioner can choose between an adversarial approach (ie: where the commissioner intervenes only to clarify points or rule on procedure) or inquisitorial approach (ie: where the commissioner plays a more active role and descends into the arena by calling and questioning witnesses).

An arbitration is not merely a review of the disciplinary proceedings but is a hearing *de novo*. However, in considering procedural fairness a commissioner's role is basically to review the procedural steps followed during the disciplinary process to ensure that it was conducted fairly. In considering substantive fairness a commissioner's role is to consider the evidence and make a determination as to whether or not an employee breached a workplace rule or standard and if so, whether the sanction imposed was appropriate.

5.4 Remedies

Section 193 of the LRA contains remedies for employees that are unfairly dismissed. These include reinstatement or re-employment which can be backdated to the date of dismissal, or compensation.⁴³¹ Reinstatement or re-employment will not be awarded where the employee does not want to return to work, where it is clear that the employment relationship is intolerable, where it is not reasonably practical for the employer to reinstate or re-employ the employee or where the dismissal was only procedurally unfair.⁴³² If a dismissal is only procedurally unfair then the award is limited to compensation that may not exceed 12 months' salary.

⁴³¹ Section 193(1) of the LRA

⁴³² Section 193(2) of the LRA

5.4.1 When will reinstatement be ordered?

Section 193(2) of the LRA states that re-instatement or re-employment must be ordered unless the employee does not want to return to work, or it is self evident that the working conditions between the parties have irretrievably broken down, or it is not reasonably practical for the employer to have the employee return to work or where the dismissal was found only to have been procedurally unfair. In respect to automatically unfair dismissals or dismissals for operational requirement the court may, in addition, make any order that it deems appropriate depending on the circumstances of the case.⁴³³ It is clear that reinstatement or re-employment is the primary remedy and compensation for unfair dismissals is the exception as opposed to the norm.⁴³⁴ The Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd*,⁴³⁵ stated clearly that there are no choices in respect to ordering reinstatement or re-employment unless one of the exceptions exists. The court stated as follows:

‘In this regard it is important to emphasise that the language of s 193(2) is such that, if none of the situations set out in paras (a) – (d), exists, the Labour Court, and, therefore, this court, or, an arbitrator, has no discretion whether or not to grant reinstatement. In the words of s 193(2) the Labour Court or the arbitrator ‘must require the employer to reinstate or re-employ the employee’ whose dismissal has been found to be unfair.’

In *National Union of Mineworkers & Another v CCMA*,⁴³⁶ the court dealt with a situation where a CCMA commissioner had awarded compensation to an employee who had been unfairly dismissed, as opposed to re-instatement as the employee had been perceived to be a bad person and the relationship between the employee and the union (the employer) was poor. The court found that the

⁴³³ Section 193(3) of the LRA

⁴³⁴ *Volkswagon SA (Pty) Ltd v Brand NO & Others* [2001] 5 BLLR 558 (LC)

⁴³⁵ (2005) 26 ILJ 2153 (LAC) at para 114

⁴³⁶ (2007) 28 ILJ 402 (LC)

reasons advanced for not reinstating the employee was not covered by section 193(2) and therefore the award was not rational. The court stated the following:

'I have perused the record of the arbitration proceedings and could not find any evidence that proved that the exceptions contained in s 193(2) of the Act were met. The commissioner appears to have introduced a fifth requirement in considering whether reinstatement should or should not be ordered, namely that because the second applicant was perceived as a bad person and the relationship between the employee and the union was bad, he should not be reinstated... The commissioner should have found that none of the exceptions referred to in s 193(2) of the Act existed and should have reinstated the second applicant.'

It needs to be noted that most dismissals whether fair or unfair effect the employment relationship on both sides and to allow this to play a prominent role when considering re-instatement or re-employment would allow employers to abuse the exceptions and undermine the very purpose of section 193(2) of the LRA.⁴³⁷

CHAPTER 6: CONCLUSION

Some may say that there is nothing mystical about determining an appropriate sanction for misconduct, it is all about fairness. However, fairness is an elusive concept and it nevertheless plays an instrumental role in determining an appropriate sanction for misconduct. Fairness is not an absolute concept and reasonable people may readily disagree on what is fair or not, in particular circumstances. Our understanding of fairness is further informed by ones background, upbringing and culture. It is clear that our law has transformed from the common law position of lawfulness to the present position of fairness in so far as determining an appropriate sanction for misconduct is concerned. Historically,

⁴³⁷ J Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) 500

a termination of employment had only to be lawful. The fairness of a termination was irrelevant and it could even be for an unfair reason or for ulterior motives.⁴³⁸ Through judicial and legislative intervention fairness now forms part of our dismissal and misconduct dispensation.⁴³⁹ Terminations or dismissals now need to be both lawful and fair. The common law position still remains the same and is concerned with lawfulness although there is now an acceptance that there is an implied duty of fair dealing in a contract of employment. However, there is no implied duty of fairness in respect to terminating a contract of employment, unless the contract specifically provides for this. The requirement of a fair sanction for misconduct is a constitutional, legislative and judicial mandate. It is now codified in the LRA and was originally developed under the erstwhile LRA.⁴⁴⁰

There is no precise answer to determine an appropriate sanction for misconduct and it would be unwise and impractical to have an exact formula for determining which types of misconducts call for which types of sanctions. Each case needs to be judged on its own merits with due regard to the parity principle. Added to the mix are the personal circumstances of the employee who transgressed, the nature of the job, the circumstances in which the misconduct occurred as well as other relevant factors that need to be taken into consideration.⁴⁴¹ Employers are guided by the LRA, the Code as well as judicial precedent and other relevant policies and procedures. What is also clear is that the nature of the job and type of business enterprise will also dictate different type of sanctions for the same type of misconduct, depending on the operational risk the misconduct posed to that particular employer.⁴⁴² The same may be said about different operational areas within the same workplace. For instance, smoking in hazardous areas will call for severe sanctions when compared to smoking in office areas or the employer may decide to treat both the misconducts as the same from a consistency point of view. However, it is clear that misconduct that poses an

⁴³⁸ J Grogan *Workplace Law* 10th ed (2009) 45

⁴³⁹ J Grogan *Dismissal* (2010) 3

⁴⁴⁰ *Ibid*

⁴⁴¹ *Sidumo v Rustenberg Platinum Mines Ltd (CC)*, *supra*

⁴⁴² *De Beers Consolidated Mines Ltd v CCMA & others*, *supra*

operational risk to an employer normally justifies dismissal.⁴⁴³ It has been seen that no sympathy is granted to employees who commit acts of dishonesty and such acts generally warrant dismissal regardless of the value of the item stolen, the employee's clean disciplinary record and length of services.⁴⁴⁴ The only concession granted is in the case of white lies or foolish conduct.⁴⁴⁵ It is also clear that actual evidence must be led that the employment relationship has irretrievably broken down. This cannot merely be inferred from the circumstances of the case.⁴⁴⁶ In respect of acts of negligence which are not intention based acts, sanctions can vary depending on the nature of the conduct, the prejudice or potential prejudice caused and whether the conduct amounts to gross negligence.

The Code encourages the concept of corrective and progressive discipline and recognises that generally it is not appropriate to dismiss an employee for a first offence unless the misconduct is serious and of such gravity that it makes the continued employment relationship intolerable.⁴⁴⁷ As stated above, this forms part of risk management on the part of the employer. The legislative requirement of a fair reason for dismissing an employee and the imposition of a fair sanction ensures that the employer acts fairly when exercising his right to discipline his employees. The employer's powers to discipline an employee are premised on the employment relationship itself. When employers implement sanctions they need to ensure that they are fair in doing so, as there are a number of tribunals⁴⁴⁸ ready to pronounce on the fairness or otherwise of the sanction imposed by the employer. These tribunals no longer consider the fairness of the sanction from the perspective of the reasonable employer, but from the perspective of the impartial commissioner with all the information placed before

⁴⁴³ Ibid

⁴⁴⁴ *Shoprite Checkers (Pty) Ltd v CCMA & others, supra; Toyota SA Motors (Pty) Ltd v Radebe & Others, supra*

⁴⁴⁵ *Ehrke v Standard Bank of SA & others, supra; Nedcor Bank v Frank, supra*

⁴⁴⁶ *Edcon v Pillemer, supra*

⁴⁴⁷ Item 3.4 of the Code

⁴⁴⁸ These are the Commission for Conciliation, Mediation and Arbitration (CCMA); Bargaining Councils and our Court structures

him or her. The commissioner does not start afresh and determine what a fair sanction is. Rather, the commissioner utilising his or her own sense of fairness and by assessing all the information placed before him or her, makes such a determination. They obviously need to consider the reasons why the employer imposed a sanction of dismissal as well as why the employee claims it is unfair as well as all other relevant factors.⁴⁴⁹ Some may argue that when a commissioner is considering the fairness of a sanction with his or her own sense of fairness, he or she would need to determine afresh what the most appropriate sanction should be. The defining point is that the commissioner is not making the determination from a blank page but rather from all the relevant information placed before him or her. The record of the disciplinary process exists, the disciplinary proceedings have come and gone. In making a determination a commissioner must deal with the substantial merits of the matter with the minimum of legal formalities.⁴⁵⁰ However, the law of evidence still plays an important role. In determining a fair sanction for misconduct, and besides the severity of the misconduct, all relevant factors need to be taken into account. These factors would include, amongst others, the requirements of the employer's disciplinary code, the employee's disciplinary record, length of service, remorse shown, the personal circumstances of the employee, mitigating and aggravating factors, whether a lesser sanction would service the same purpose and whether the misconduct has breached the trust relationship. However, these factors need to be considered against the backdrop of the provisions of the LRA, relevant Codes and judicial precedent. These other relevant factors will carry little weight when it comes to acts of dishonesty as these misconducts generally render the employment relationship intolerable. If a commissioner finds that a dismissal is unfair then he or she is compelled to re-instate an employee unless one of the exceptions in section 193(2) of the LRA exists.

From the case law discussed above the following can be highlighted:

⁴⁴⁹ *Sidumo v Rustenberg Platinum Mines Ltd (CC)*, *supra*

⁴⁵⁰ *Ibid*

The determination of a fair sanction is no longer the province of the employer. There is no longer deference to the employers' choice of sanction, espoused by the reasonable employer test. The decision to dismiss belongs to the employer, but the determination of the fairness thereof belongs to the commissioner.⁴⁵¹

Commissioners are no longer constrained and limited to interfering with sanction only when it is manifestly or shockingly unfair. In this regard, commissioners could not interfere with sanction even if they thought another sanction would be more appropriate, unless it was patently unfair. This has been found to be in contravention of our statutory dispute resolution procedures which provide impartial commissioners to resolve disputes.⁴⁵²

Commissioners must show respect and appreciation for the employer's decision with respect to the sanction, but they are not obliged to defer to the employer's choice of sanction. They are required to determine the fairness of the dismissal as an impartial adjudicator. In *Engen Petroleum*,⁴⁵³ Zondo JP referred to the 'own approach' test which requires commissioners to make up their own minds as to whether or not the dismissal was fair. This is premised on the reasonable citizen test whereby a commissioner places himself or herself in the position of reasonable citizen and reaches the conclusions that he or she thinks a reasonable citizen would make, with all the relevant information placed before him or her.

Commissioners can also not set aside the decision solely on the basis that they would have decided differently had they been in the employer's shoes, all relevant factors need to be taken into consideration.⁴⁵⁴

⁴⁵¹ Ibid

⁴⁵² Ibid

⁴⁵³ Supra

⁴⁵⁴ *Sidumo v Rustenberg Platinum Mines Ltd (CC)*, supra

A value judgment is made when considering the fairness of a dismissal, taking all relevant circumstances into account. The commissioner must not determine afresh what the appropriate sanction is (ie: what he or she would do) but must determine whether the employer's decision to dismiss is fair. This is the starting point of the enquiry. The commissioner must not substitute his or her personal views for that of the employer by deciding afresh what he or she would do in the position of the employer in respect to sanction. When making the value judgments commissioners must be mindful of simply importing their own value judgment.⁴⁵⁵

The exercising of a value judgment is something that reasonable people may disagree over differ. However, this is not an unconstrained value judgment that is influenced by the background, views and perspective of the commissioner. Fairness requires that the interests of employees and employers must be taken into consideration. The question remains whether the dismissal, in all the circumstances, was a fair sanction. The decision must be reasonable and the commissioner is compelled to apply his or her mind to the issues in respect to the case.⁴⁵⁶

Commissioners are ultimately required to weigh up and consider the reasons provided by the employer to justify the dismissal with the reasons advanced by the employee for challenging it. This is not altered by the fact that arbitrations are hearings de novo.⁴⁵⁷

In approaching a dismissal dispute impartially, a commissioner is required to take into account the totality of circumstances, this would include the importance of the rule, the reason the employer imposed the sanction of dismissal and the

⁴⁵⁵ Ibid

⁴⁵⁶ Ibid

⁴⁵⁷ Ibid

basis of the employee's challenge to the dismissal. This is not a closed list and all relevant factors need to be taken into consideration.⁴⁵⁸

In dismissal arbitration the process is two fold. Firstly, the commissioner must establish whether the employee is in fact guilty of misconduct. This is based on the rules of evidence and no value judgment is made. Secondly, if the employee is found to be guilty the commissioner must identify and weigh up relevant factors to determine the appropriateness of sanction. These include the facts of the case, statutory and policy framework and judicial precedents.

If the relationship of trust has been breached this is not the end of the matter. All relevant factors must be weighed up together in light of the seriousness of the breach. However, acts of misconduct such as dishonesty go to the heart of the employment relationship and normally justify dismissal.

The absence of dishonesty goes a long way in favour of promoting the application of progressive discipline rather than dismissal. Failure to take responsibility for actions and denials count against an employee.⁴⁵⁹

Whether a dismissal will be regarded as fair will depend on whether the misconduct alone has rendered the continued employment relationship intolerable or cumulatively with past transgressions it has done so.

An employee's clean record and length of service must be weighed up against the severity of the offence when considering the fairness of the sanction.

The *Sidumo*⁴⁶⁰ judgment has limited the reviewing courts ability to interfere with arbitration awards regardless of whether they adopt a strict or lenient approach. The decisions of different commissioners may lead to different approaches. This

⁴⁵⁸ Ibid

⁴⁵⁹ Ibid

⁴⁶⁰ Supra

is something that will have to be lived with regardless of the uncertainty it creates. The task of determining the fairness of a dismissal lies with commissioners.⁴⁶¹

In order to prove that the employment relationship has irretrievably broken down, it is established that the employer must lead the evidence of a manager or supervisor of the employee in this regard.⁴⁶²

At the end of the day, determining an appropriate sanction for misconduct is about common sense and fairness, after considering all the relevant information.

It is about a rational value judgment.

⁴⁶¹ *Palaborwa mining Co Ltd v Cheetam & others, supra*

⁴⁶² *Edcon v Pillemer, supra*

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