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### ***List of abbreviations:***

AAPSS	Annals of the American Academy of political Science and Social Science
CMR	Contemporary Management Research
ELJ	Employment Law Journal
ILJ	Industrial Law Journal
Indus, L.J	Industrial Law Journal
ILJMA	International Journal of Law and Management
LRA	Labour Relations Act
CCMA	Commission on Conciliation, Mediation and Arbitration

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## CHAPTER 1: INTRODUCTION

In terms of the Code of Good Practice: Dismissal,<sup>1</sup> one of the requirements of a fair dismissal for misconduct is that the sanction imposed must be ‘appropriate’.<sup>2</sup> Whilst the Code does not carry the weight of law, the Labour Relations Act 55 of 1996 (LRA) which regulates unfair dismissals, explicitly states that the Code must be taken into account. With regard to the ‘appropriateness of sanction’, this requirement does not stand alone but is supplemented by other, equally important considerations such as the validity of the workplace rule<sup>3</sup> that was breached and the consistency<sup>4</sup> in which it has been applied in the past.

The consideration of the ‘appropriateness of sanction’ has led to a plethora of case law which seeks to define this term. The South African courts have grappled with the determination of a definitive test to determine the appropriateness of sanction. In the past, our courts have relied upon legal tests from foreign jurisdictions along with the incumbent flaws that may accompany it. A difficulty arises however with applying foreign law to a domestic legal framework, which is characterised by significantly different considerations when dealing with dismissals for misconduct.

The English ‘reasonable employer’<sup>5</sup> test, adopted by the Industrial Court to determine the appropriateness of sanction, was later rejected as a ‘palpable mistake’<sup>6</sup> and no longer applicable to South African law.<sup>7</sup> Subsequently, a modified version of the reasonable employer test (herein referred to as the ‘deferential approach’) was relied upon by the South African courts to determine the appropriateness of sanction. This approach too was rejected as being unduly deferential to employers. The ‘reasonable commissioner’ test as developed by the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>8</sup> Constitutional Court judgment is not free from its fair share of criticism. The practical implementation of the

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<sup>1</sup> Schedule 8 of the Labour Relations Act 66 of 1995 (LRA), hereafter the ‘Code’.

<sup>2</sup> Item 7 (b) (iv) of the Code.

<sup>3</sup> Item 7 (b) (i) of the Code.

<sup>4</sup> Item 7 (b) (iii) of the Code.

<sup>5</sup> The ‘reasonable employer test’ as derived from English law.

<sup>6</sup> See *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC).

<sup>7</sup> J Myburgh & A Van Niekerk ‘Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches’ (2000) 21 ILJ 2145, 2145. Author states that ‘a distinction was drawn between the concepts of reasonableness and fairness, and it was considered that the application of a test of reasonableness limited the discretion of the Industrial Court to determine alleged unfair labour practices’.

<sup>8</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

test and whether it satisfies its objectives of meting out fairness (namely to balance the interests of the employer and employee) are controversial. It is debateable whether the reformed test satisfies the Constitutional imperative of fairness<sup>9</sup> in light of its potential to be excessively deferential to commissioners.

## **1.1. RATIONALE, OBJECTIVES OF THIS DISSERTATION AND RESEARCH QUESTIONS**

The rationale behind this research paper is to determine the meaning of an ‘appropriate’ sanction for misconduct. It will consider the legal tests the courts have used in the past, as well as consider the various factors the courts take into account when applying the test as it currently stands. As the tests adopted by our courts in establishing the fairness of a sanction have been developed and reformed in recent years; it is important to clarify the current, applicable legal principles and tests as well as to evaluate the merits of these recent developments.

The objective of this paper is to establish clarity regarding this newly reformed area of law and to make recommendations to combat any inherent deficiencies that may be identified during the course of this research.

The aim of this paper is to clarify the legal standard against which the appropriateness of dismissals for misconduct is measured. Bearing in mind that South Africa had initially adopted the legal test for the ‘appropriateness of sanction’ from English law, there will be consideration of: the deficiencies in the English ‘reasonable employer’ test, some of the issues our legal system inherited when we embraced a similar approach to sanction and why this approach was ultimately rejected by the Constitutional Court.

This research paper will also attempt to trace recent developments in this area of law by considering the ‘reasonable commissioner’ approach in determining the appropriateness of a dismissal for misconduct and the rationale behind adopting such an approach. Most importantly an evaluation will be undertaken of whether the ‘reasonable commissioner’ test satisfies the legislative requirement of fairness and sufficiently balances the rights of the employer and the employee.

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<sup>9</sup> See section 23 of the Constitution, Act 108 of 1996.

There will also be contemplation of how the test for the appropriateness of sanction can be modified to promote equity for both employer and employee. In so doing, there will be consideration of the factors laid down in the Code of Good Practice: Dismissals and the CCMA Guidelines<sup>10</sup> to assist commissioners in adopting a balanced approach to dismissals for misconduct. These factors including progressive discipline, the relationship of trust and tolerability will be considered and interpreted.

## **1.2. RESEARCH METHODOLOGY AND CONTEXTUAL FRAMEWORK**

The Constitution ensures that every person is entitled to ‘fair labour practices’<sup>11</sup> as a fundamental human right. The LRA, which is the primary mechanism for regulating employment matters in South Africa, explicitly states that ‘every employee has the right not to be unfairly dismissed and subjected to unfair labour practices’.<sup>12</sup> Therefore this research paper will be conducted in light of the notion of ‘fairness’ as enunciated by the Constitution and the LRA;<sup>13</sup> which permeates the enquiry into the appropriateness of sanction. This research will be based on legislation and case law analysis; literature from textbooks and journal articles will also be relied upon to consolidate research in this area of law.

## **1.3. HISTORICAL BACKGROUND**

The origin of the employment contract can be traced back to Roman law. In terms of Roman law, a distinction was made between the letting of one’s physical property known as *location conduction rei* and the hiring of one’s personal services known as *locatio conduction operum*.<sup>14</sup> However it was only after the Industrial Revolution that the contract of employment became readily utilised and developed into what it is today.<sup>15</sup>

The South African legal system originally viewed the employment relationship as solely contractual.<sup>16</sup> In terms of the common law of South Africa, the employer could dismiss the employee on the basis of employee misconduct, even if the misconduct was not serious, by merely giving the employee the required notice. If the misconduct was sufficiently serious

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<sup>10</sup> CCMA Guidelines: Misconduct Arbitrations Notice 602 of 2011.

<sup>11</sup> Section 23 (1) of the Constitution.

<sup>12</sup> Section 185 of the LRA.

<sup>13</sup> The LRA is supplemented by the Code of Good Practice: Dismissals and the CCMA Guidelines: Misconduct Arbitrations Notice 602 of 2011. Published by the Commission for Conciliation, Mediation and Arbitration (herein the CCMA) in terms of section 115 (2) (g) of the LRA, to become effective of 1 January 2012.

<sup>14</sup> A Basson, P.A.K Le Roux & E.M.L Strydom *Essential Labour Law* 5 ed (2009) 22.

<sup>15</sup> Ibid.

<sup>16</sup> J Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 6.

enough, the employer could summarily dismiss the employee; that is dismiss the employee without notice.<sup>17</sup> Dismissal was not the only sanction available to the employer; he could impose other sanctions such as suspensions insofar as his actions did not amount to a breach of contract (unlawful conduct). In practice the employer was not limited to the penalties provided for in the contract of employment and through his stronger bargaining power and the right to lawfully dismiss on notice, the employer could in fact treat the employee unfairly as long as this did not breach the terms of the employment contract.<sup>18</sup>

Therefore the common law was primarily concerned with unlawful as opposed to unfair dismissals. In 1979 a newly created Industrial Court was empowered to determine disputes concerning 'unfair labour practices'. The Industrial Court and the Labour Appeal Court<sup>19</sup> used the concept of *unfair labour practices* as a means of developing new principles in the 'individual employment relationship'.<sup>20</sup> In the 1980's the courts finally accepted that dismissals could constitute an unfair labour practice in terms of the Labour Relations Act 28 of 1956 and consequently accepted that a lawful dismissal could also be rendered unfair.<sup>21</sup>

The development by the Labour Courts under the previous Act of the notion of an unfair dismissal has been cemented in the Labour Relations Act 66 of 1995 which prohibits the unfair dismissal of an employee.<sup>22</sup> While the right not to be unlawfully dismissed is protected by contractual law, this right does not automatically incorporate the right not to be unfairly dismissed in terms of the LRA, however, 'the courts have accepted that an unlawful dismissal will seldom, if ever, be fair'.<sup>23</sup>

#### **1.4. APPLICABLE LEGISLATION AND GUIDELINES**

The right to fair labour practices has now been entrenched in the 1996 Constitution<sup>24</sup> and the following Acts promulgated to give effect to it; the LRA, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.<sup>25</sup>

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<sup>17</sup> See the Basic Conditions of Employment Act 75 of 1997. Section 37(6) (b) deals with the right of the employer to dismiss the employee for any cause recognised by law without prior notice.

<sup>18</sup> Basson, Le Roux & Strydom op cit note 14 at 113.

<sup>19</sup> The Labour Appeal Court was established in 1988.

<sup>20</sup> Grogan op cit note 16 at 6 & 7.

<sup>21</sup> Ibid. Author referring to *Marievale Consolidated Mines Ltd v The President of the Industrial Court and Others* (1986) 7 ILJ 152 (T).

<sup>22</sup> Section 185 of the LRA.

<sup>23</sup> Grogan op cit note 16 at 216.

<sup>24</sup> Section 23 of the Constitution.

In terms of section 188 (1) of the LRA a dismissal is unfair if it is not effected for a ‘fair reason’ and in accordance with a ‘fair procedure’, even if it complies with any notice period in a contract of employment or in legislation governing employment. In addition whether or not a dismissal is for a fair reason is determined by the ‘facts of each case and the appropriateness of dismissal as a penalty’.<sup>26</sup> What can be concluded is that all dismissals are measured against the benchmark of fairness as articulated in the LRA. It is of importance to note that the provisions of the LRA in regulating dismissals are supplemented by both the Code and the recently enacted CCMA Guidelines.

The relevant guidelines in the Code<sup>27</sup> state that:

‘Any person who is determining whether a dismissal for misconduct is unfair should consider -

a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

b) if a rule or standard was contravened, whether or not –

i) the rule was a valid or reasonable rule or standard;

ii) the employee was aware or could reasonably be expected to have been aware, of the rule or standard;

iii) the rule or standard has been consistently applied by the employer; and

iv) dismissal was an *appropriate sanction* for the contravention of the rule or standard.’

As mentioned above, the test is one of fairness but in arriving at a determination of what is fair and what is not, it is imperative that the various elements of this test are carefully examined. In terms of factors (i – iii) above, there has been numerous examples of case law that succinctly interprets these provisions and their significance. In terms of factor (iv) however, there has been inconsistent judgments regarding the determination of the appropriateness of the sanction and the correct legal tests to be applied. This in turn has resulted in the lay person being denied clarity on what are the legal standards to be satisfied

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<sup>25</sup> Grogan op cit note 16 at 8.

<sup>26</sup> Item 2 of the Code.

<sup>27</sup> Item 7 (1) of the Code.



when contemplating a dismissal as a sanction for misconduct. Furthermore the judiciary has failed to hand down consistent judgments due to the lack of consistent precedent surrounding this area of law. It seems that the crux of the matter lies in the interpretation and development of the test for the ‘appropriateness’ of sanction; bearing in mind that while it is an objective enquiry, it may yield contrasting subjective responses.

According to the CCMA Guidelines:

‘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.’<sup>28</sup>

The CCMA Guidelines, in considering various types of employee misconduct that may justify dismissal, found it necessary to include instances of serious once - off offences as well as instances of repeated offences. The Guidelines goes one step further to specifically list these types of serious offences that may render a dismissal justified.

The CCMA Guidelines also state that:

‘The arbitrator must make a value judgement as to the fairness of the employer’s decision, taking into account all relevant circumstances. This must be a balanced and equitable assessment taking into account the interests of both the employer and employee. In making this assessment, the arbitrator must give serious consideration to, and seek to understand the rationale for, the employer’s rules and standards.’<sup>29</sup>

The role of the arbitrator as contemplated in the CCMA Guidelines is derived from the legal principles pronounced in recent case law.<sup>30</sup> Consequently in order to fully understand how the arbitrator is to exercise his or her ‘value judgment’, regard must be had to the approach of the courts in such matters.

It has been contended that there are various situations where the determination of ‘what may constitute an appropriate sanction may be relatively easy’<sup>31</sup> but there are situations where one

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<sup>28</sup> Paragraph 93 of the CCMA Guidelines (‘Guidelines’).

<sup>29</sup> Paragraph 93 of the Guidelines.

<sup>30</sup> Supra note 8.

<sup>31</sup> P.A.K Le Roux ‘Dismissals for Misconduct: Some Reflections’ (2004) 25 *ILJ* 868, 873.

person's perspective on fairness differs significantly to that of another.<sup>32</sup> The inquiry into the general fairness of the dismissal requires a value judgment on the part of the commissioner, which in essence incorporates a range of responses to the appropriateness of the imposition of a specific sanction.

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<sup>32</sup> Ibid.

## CHAPTER 2:

### THE UNITED KINGDOM 'REASONABLE EMPLOYER' TEST

The aim of this chapter is to examine the 'reasonable employer test' which has been used to determine the appropriateness of sanction. The enquiry looks at the perspective of the reasonable employer and incorporates a hypothetical and objective test in determining the fairness of the dismissal. This test was developed in the United Kingdom; however, the 'reasonable employer' approach was adapted and applied by South African courts in the past. A further objective in this chapter is to evaluate the flaws of this approach as evident from English case law.

The inquiry into the appropriateness of sanction has often initiated a debate into when an arbitrator may intervene and interfere with the decision of the employer to dismiss. This is an issue that has not only dominated South African jurisprudence but English case law as well.

Le Roux points out the crux of this controversial debate with reference to opposing viewpoints on the matter:

'Supporters of some form of deference to managerial decisions in this regard point out that, in the absence of bias on the part of the employer, there is no good reason why the value judgement of a third party as to whether the dismissal is justified should override the value judgement of a manager who knows and understands the needs and circumstances of the employer's business or organization. Detractors point out that too great a deference to managerial decisions in this regard would undermine the protection against unfair dismissals.'<sup>33</sup>

These contrasting viewpoints can be seen in the Supreme Court of Appeal<sup>34</sup> and Constitutional Court<sup>35</sup> judgements of *Sidumo* which have ultimately brought South African jurisprudence to its current position. Before an analysis of South African case law can be undertaken, it is of necessity to briefly examine the origins of the 'reasonable employer' test.

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<sup>33</sup> Ibid.

<sup>34</sup> *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* (2006) 27 ILJ 2076 (SCA).

<sup>35</sup> Supra note 8.

### 2.1. Origin of the 'reasonable employer' test

In terms of English law, unfair dismissals are regulated by statute. The Employment Rights Act 1996, section 98 (1) states that:

'In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to *justify* [emphasis added] the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.'

Section 98 (4) of the Act states that:

'In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair...

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted *reasonably or unreasonably* [emphasis added] in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

Although South African law derives much of its substance from English law, it is important to be aware of the fact that the requirements set forth in the United Kingdom Employment Act, although dealing with the fairness of the dismissal, are primarily engaged with the concepts of 'justification' and 'reasonableness'. There is no supplementary requirement specifically relating to the appropriateness of the sanction, as we have within our Code of

Good Practice. It is nevertheless relevant to consider the English ‘reasonable employer’ test, which has been modified and applied by South African courts in the past.

The ‘reasonable employer’ test can be traced back to the House of Lords in 1981. *British Leyland (U.K) Ltd v B.J. Swift*<sup>36</sup> is authority for the following legal propositions: the test is not in fact whether a reasonable employer would consider a lesser penalty appropriate but rather, ‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair’.

The court went on to state that ‘in all cases there is a band of reasonableness within which one employer might reasonably take one view and another employer reasonably take a different view’.<sup>37</sup>

In applying the ‘reasonable employer’ test, the decision of a specific employer to dismiss is compared to the objective standard of a reasonable employer. The test does not evaluate the possibility of substituting the sanction for a more suitable one but rather focuses on reasonableness of the employer’s specific decision to dismiss.

Brodtkorb states that there is a great deal of criticism regarding the ‘range of reasonable responses’ approach but ‘a unifying theme is the concern that it gives too much discretion to employers and as a result unfair dismissal law offers too little protection for employees.’<sup>38</sup>

In considering exclusively the point of view of the employer and equating the employer’s idea of reasonableness with that of fairness; the courts have developed an excessively deferential approach towards the employer in the assessment of an appropriate sanction. The ‘range of reasonable responses’ approach has been criticised for failing to adequately consider section 98 (4) (b) of the Act which refers to the ‘equity and substantial merits of the case’. It has been argued that the ‘range of reasonable responses’ approach, by deferring to employer discretion, ‘deprives industrial tribunals of the opportunity to curb management prerogative and fully consider the interests of employees or the public’.<sup>39</sup> It is distressing that the approach makes no reference to the perspective of the employee. This is essentially

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<sup>36</sup> *British Leyland (U.K) Ltd v BJ Swift* 1981 WL 187872, accessed from [www.westlawinternational.com](http://www.westlawinternational.com) (date of access 28 June 2012).

<sup>37</sup> Lord Denning (Master of Rolls).

<sup>38</sup> T Brodtkorb ‘Employee misconduct and UK unfair dismissal law: Does the range of reasonable responses test require reform’ (2010) 52, 6 *IJLMA* 429, 440.

<sup>39</sup> Brodtkorb op cit note 38 at 441. Author makes reference to Andy Freer (Freer, 1998).

destructive of the concept of fairness; which summons the balancing of competing interests of the employer and employee.

The test has also been condemned for distorting the statutory test for fairness, in terms of the reasonableness of the employer's decision, with a negative formula of whether the employer's conduct is unreasonable.<sup>40</sup> Brodtkorb contends that 'where the dismissal is neither clearly unreasonable nor clearly reasonable, if one asks if it is reasonable, one is more likely to get a negative reply than if one asks if it is unreasonable'.<sup>41</sup>

It has also been argued that the 'range of reasonable responses' approach requires a tribunal to consider the range of responses open to an employer when faced with a particular form of workplace misconduct. This range of responses incorporates 'mild to harsh'<sup>42</sup> responses, all of which may be deemed fair. The consequence is that there is potential for a dismissal to be 'harsh but fair'.<sup>43</sup> As a result, the concept of a 'band of reasonableness' provides an employer with ample scope for justifying his decision to dismiss as being fair despite its failure to take into account the harsh consequences it may have for the employee.

In *Mr AJ Haddon v Van Den Bergh Foods Ltd*,<sup>44</sup> it was held that:

'It is likely however that what the tribunals would have done will often coincide with their judgement as to what a reasonable employer would have done...The task of the tribunal is to pronounce judgement on the reasonableness of the employers' actions and whenever they uphold an employee's complaint they are in effect "substituting their own judgement for that of the employer". Providing they apply the test of reasonableness, it is their duty both to determine their own judgment and to substitute it where appropriate.'

It is not difficult to appreciate why this judgment was later overruled in *Foley v Post Office*,<sup>45</sup> as in exclusively considering the employer's perspective, the court failed to adequately consider *all* relevant circumstances. The arbitrator's role is not to substitute his own judgement for that of the employer, but to place himself in the position of the employer *only*

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<sup>40</sup> Brodtkorb op cit note 38 at 440. Author makes reference to Collins (Collins, 1993, p.38).

<sup>41</sup> Brodtkorb op cit note 38 at 440.

<sup>42</sup> Brodtkorb op cit note 38 at 442.

<sup>43</sup> Ibid. Author quoting Collins (Collins, 2004).

<sup>44</sup> *Mr AJ Haddon v Van Den Bergh Foods Ltd* 1999 WL 1048318, accessed from [www.westlawinternational.com](http://www.westlawinternational.com) (date of access 28 June 2012).

<sup>45</sup> *Foley v Post Office* [2000] I.C.R. 1283, accessed from [www.westlawinternational.com](http://www.westlawinternational.com) (date of access 28 June 2012).

in an effort to obtain a clearer understanding of the employer's point of view. Furthermore an arbitrator cannot plausibly argue that he is able to understand the particular employer's business operations better than the employer himself, thus a measure of deference is necessary. Arbitrators may be skilled in legal reasoning and the interpretation of law but with regard to certain aspects of trade or specialised business, an arbitrator has no real choice but to rely on the special knowledge of the employer.

It seems that for a tribunal 'to substitute its own judgment', as referred to in *AJ Haddon*,<sup>46</sup> the court may have usurped the authority of an employer to impose the sanction he deems fit and has extended its authority beyond the simple question of whether the dismissal was fair. In this particular instance, an excessively deferential approach to the opinion of the arbitrator, which does not attempt to balance the interests of the employer and employee, illustrates the dangers of arbitrators misinterpreting their functions and authority in the determination of an appropriate sanction.

The court in *AJ Haddon* went on to criticize the 'band of reasonableness' approach advocated in the *British Leyland*.<sup>47</sup> The Employment Appeal Tribunal held that 'dismissal is an ultimate sanction. There is, in reality, no range or band to be considered, only whether the employer acted reasonably in invoking that sanction'. Furthermore the court in *AJ Haddon* held that, '[t]he mantra "the band or range of reasonable responses" is not helpful because it had led tribunals into applying what amounts to a perversity test'.<sup>48</sup>

In *Foley v Post Office*<sup>49</sup> the court rejected and overruled the findings in *AJ Haddon* and found that it was made clear in the *Iceland Frozen Foods Ltd v Jones*<sup>50</sup> that the provisions of section 98(4) of the Employment Rights Act 1996 'did not require such a high degree of unreasonableness to be shown or that nothing short of a perverse decision to dismiss can be

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<sup>46</sup> Ibid.

<sup>47</sup> Supra note 36.

<sup>48</sup> Brodtkorb op cit note 38 at 442. Author explains that '[u]nder administrative law, the standard for a court interfering with the decisions of a local authority is set out in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] K.B. 223, and the standard is that the court must not intervene unless the decision of the local authority is "so unreasonable that no reasonable authority could ever have come to it"'. See *Wednesbury* at p230. The perversity test the tribunal speaks of is similar to the *Wednesbury* test in terms of English administrative law.

<sup>49</sup> Supra note 45.

<sup>50</sup> *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, accessed from [www.westlawinternational.com](http://www.westlawinternational.com) (date of access 28 June 2012).

held to be fair'.<sup>51</sup> The court stated that the tribunals had been advised to follow the formulation of the 'band of reasonable responses':

'The range of responses approach is not rendered perverse or unhelpful by the fact that there are extremes. In between those extremes there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or unreasonable response.'

This judgement is in accordance with *British Leyland*<sup>52</sup> which advocates that an arbitrator's idea of reasonableness and the employer's idea of reasonableness may be different but as different as they may be, each may be deemed reasonable and fair in its own right.

The court in *Foley*<sup>53</sup> went on further to state that in determining the fairness of the sanction:

'[T]he process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory reference to "reasonably or unreasonably" and not by reference to the subjective views of arbitrators and what they would in fact have done as an employer in the same circumstances.'

By substituting their own judgments for that of the employer, it has been contended that 'whenever a tribunal finds a dismissal to be unfair, they are in effect substituting their own judgment for that of the employer'<sup>54</sup> and thus a tribunal may misinterpret the prohibition and 'show excessive deference to the interests of the employer in evaluating an employer's decision to dismiss'.<sup>55</sup>

What can be concluded from the above cases is that the English law concept of fairness, in terms of sanction, equates the employer's and tribunal's viewpoint of what is reasonable to what is appropriate and fair. Furthermore the 'band of reasonableness',<sup>56</sup> while allowing the employer to maintain his managerial prerogative and the freedom to impose workplace rules and standards, will in effect, very seldom render the employer's decision to dismiss unfair on the grounds of 'unreasonableness'.

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<sup>51</sup> Brodtkorb op cit note 38 at 442. Author contends that the 'statement in *Swift* requires a decision to dismiss to be unreasonable in order to be unfair, but the inclusion of the word "so" in the *Wednesbury* test implies that the decision...must not only fall within a category of unreasonable decisions, but must belong to the subset of very unreasonable decisions.'

<sup>52</sup> Supra note 36.

<sup>53</sup> Supra note 45.

<sup>54</sup> Brodtkorb op cit note 38 at 441.

<sup>55</sup> Ibid.

<sup>56</sup> Supra note 36.



In failing to balance the competing interests of both the employer and the employee, the reasonable employer test amounts to an excessively deferential approach to the employer's 'say so', with tribunals rubber stamping an employer's decision on the basis that it is not patently unreasonable. By disregarding the employee's perspective it firstly undermines the balancing of competing interests associated with the concept of fairness and it secondly fails to provide an adequate constraint on the employer's managerial prerogative to impose a sanction under the wide scope of 'reasonableness'.

## CHAPTER 3:

### THE SOUTH AFRICAN ‘DEFERENTIAL APPROACH’ TO SANCTION

The previous chapter has highlighted the problems that can be associated with the English ‘reasonable employer’ test. This chapter endeavours to evaluate the effect of adopting a similar approach to that of the reasonable employer test within South Africa (namely the ‘deferential approach’), as well as, the principles that have emerged by adopting such an approach.

In South Africa, the position regarding the determination by an arbitrator of the fairness of a dismissal is governed by the Code of Good Practice. The Code notes that it is generally inappropriate for an employer to dismiss an employee for a first offence, except where the offence is ‘serious and of such gravity’<sup>57</sup> and that it renders the ‘employment relationship intolerable’.<sup>58</sup> Hence dismissal must be an action of last resort and the ‘penalty must fit the crime’.<sup>59</sup>

The court in *Computicket v Marcus No and Others*,<sup>60</sup> one of the earlier judgements on the matter, held that the ‘question of sanction for misconduct is one on which reasonable people can readily differ’.<sup>61</sup> It was held that:

‘One person may consider that the dismissal is the appropriate sanction for an offence, another that something less would be appropriate. There are obviously instances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money or untrustworthy conduct on the part of the third respondent. There are obviously circumstances in which dismissal would not be warranted. I take for instance an employee who is five minutes late for work in circumstances in which the misconduct has no prejudicial consequences for the employee.’<sup>62</sup>

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<sup>57</sup> Item 3(4) of the Code.

<sup>58</sup> *Ibid.*

<sup>59</sup> Grogan op cit note 16 at 283.

<sup>60</sup> *Computicket v Marcus No and Others* (1999) 20 ILJ 342 (LC).

<sup>61</sup> At 347.

<sup>62</sup> *Ibid.*

In conclusion the court found that ‘between these two poles there is a range of possible circumstances in which one person might take a view different from another without either of them properly being castigated as unreasonable’.<sup>63</sup>

Using *British Leyland*<sup>64</sup> as authority, *Nampak Corrugated Wadeville v Khoza*<sup>65</sup> in dealing with the appropriateness of sanction found that:

‘The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.’<sup>66</sup>

Furthermore the court in relying on *British Leyland* found that ‘in judging the reasonableness of the sanction imposed the courts must remember that there is a “band of reasonableness” within which one employer may reasonably take one view: another employer reasonably take a different view’.<sup>67</sup>

An acknowledgment that the discretion to dismiss lies with the employer, does not in fact mean that the decision that results from exercising such a discretion is beyond impeachment but signifies that such a decision must stand insofar as it satisfies the Constitutional imperative of fairness. This acknowledgment represents an objective inquiry into the reasoning of the person exercising that discretion in order to determine the fairness thereof.

In *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>68</sup> the court held that ‘commissioners must exercise greater caution when they consider the fairness of the sanction imposed by the employer...They should not interfere

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<sup>63</sup>Supra note 60 at 347.

<sup>64</sup> Supra note 36. See also T Cohen ‘The Reasonable Employer Test - Creeping in Though the Back Door?’ (2003) 15 *SAMLJ* 192, 204. Cohen suggests that a distorted interpretation of the approach rendered a dismissal fair unless ‘the case is one where the employer has acted in a way in which no reasonable employer would have acted’. The distorted approach (perverse test) has been rejected as ‘applying to stringent a limit on the tribunals power to interfere with an employer’s decision to dismiss’. Thus Cohen suggests that when the ‘band of reasonableness’ was endorsed in *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC), ‘one can only assume that the Labour Appeal Court was supporting a wider, less “perverse” interpretation’ of the test.

<sup>65</sup> *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC).

<sup>66</sup> Para 33.

<sup>67</sup> Para 33 & 34.

<sup>68</sup> *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1999) 20 ILJ 1701 (LAC).

with the sanction merely because they do not like it. There must be a measure of *deference* [emphasis added] to the sanction imposed by the employer *subject* [emphasis added] to the requirement that the sanction imposed by the employer must be fair.<sup>69</sup>

What can be gathered from the above cases is that the concept of a ‘range of reasonable responses’ has filtered through from the English reasonable employer test. As in English case law, there is no further expansion on the range of reasonableness except to the degree that the decision may set aside if it is ‘unreasonable’. In addition, great respect and reverence is given to the decision of the employer; even the arbitrator is cautioned against undermining the employer’s managerial prerogative to impose a particular sanction. The court in *Nampak*<sup>70</sup> and *County Fair Foods*<sup>71</sup> reiterate that there ought to be deference accorded to the employer subject to the constraints of fairness. Yet the courts fail to expand on how these constraints of fairness apply, leaving the employer and arbitrator to his or her own devices.

The court in *County Fair Foods* went on to state that:

‘Where an employer upon investigation, has acted fairly in imposing the sanction, the commissioner should not disturb it. There mere fact that the commissioner may have imposed a somewhat different sanction or a somewhat more sever sanction than the employer would have, is no justification for interference by the commissioner. The minds of equally reasonable people differ.’<sup>72</sup>

A cautionary statement issued by the court was that:

‘If commissioners could substitute their judgement and discretion for the judgement and discretion fairly exercised by the employers, then, the function of management would have been abdicated – employees would take every case to the CCMA’. This result in turn would not be fair to employers.’<sup>73</sup>

In Ngcobo J’s view, ‘interference with the sanction imposed by the employer is only justified where the sanction is unfair... This would be the case where the ‘sanction is so excessive as to shock one’s sense of fairness’.<sup>74</sup>

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<sup>69</sup> Para 28. The court quoted with approval *Nampak v Khoza* (Supra note 63).

<sup>70</sup> Supra note 65.

<sup>71</sup> Supra note 68.

<sup>72</sup> Para 29.

<sup>73</sup> Para 30 & 31.

<sup>74</sup> Ibid.

A divergent approach from the preceding case law was seen in *Toyota SA Motors (Pty) Ltd v Radebe and Others*<sup>75</sup> in which the court considered the origin of the reasonable employer test. The court stated that ‘the origins are in English statute law<sup>76</sup> and it must be appreciated that the Act is quite differently worded, providing for the arbitrator to decide if the dismissal was fair<sup>77</sup> (reference being made to English statute). The court also found that the enquiry which then arises and which is specifically referred to in statute, is whether the employer acted reasonably and ‘whether it was within a range of reasonable responses for the employer to dismiss the employee in the circumstances’.<sup>78</sup>

The court in *Toyota SA Motors* stated that it did ‘not believe that the reasonable employer test forms part of our law’<sup>79</sup> and the application thereof was a ‘palpable mistake’<sup>80</sup> which allowed it to be overruled.<sup>81</sup> Although the *Toyota SA Motors* judgment was subsequently overruled by the Labour Court of Appeal in *De Beers Consolidated Mines Ltd v Commission for Conciliation Mediation and Arbitration and Others*,<sup>82</sup> it aptly identified the predicament of applying the ‘reasonable employer’ test which is based on English statute to South African law which is based on a completely different piece of legislation.

In South African law, the arbitrator is not tasked with determining whether the dismissal was ‘fair’ but rather whether it was ‘unfair’. In addition there is no mention of the ‘reasonableness’ of the employer’s decision to dismiss but rather the appropriateness.<sup>83</sup> In terms of the application of a ‘deferential approach’, the courts in finding that the employer acted reasonably ultimately allows for possibly unfair decisions of the employer to fall within the extensive bounds of the ‘band of reasonableness’.

In *De Beers Consolidated Mines Ltd v Commission for Conciliation Mediation and Arbitration and Others*<sup>84</sup> Willis JA pointed out that *County Fair Foods*<sup>85</sup> ‘correctly defers to

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<sup>75</sup> *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC).

<sup>76</sup> Section 98 (4) of the Employment Rights Act 1996.

<sup>77</sup> Para 48. Within the South African context, an arbitrator is tasked with determining whether the dismissal for misconduct was ‘unfair’ as oppose to ‘fair’. See Item 7 of the Code.

<sup>78</sup> Para 48. Nicholson JA referring to Anderman *The Law of Unfair Dismissal* (2ed) at 153.

<sup>79</sup> Para 50.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC).

<sup>83</sup> Item 7 (b) (iv) of the Code.

<sup>84</sup> *Supra* note 82.

<sup>85</sup> *Supra* note 68.

employers in cases where there is considerable doubt or divergence of reasonable opinion as to appropriate sanction’.<sup>86</sup> The court held that:

‘The onus is on the employer to prove the facts upon which he relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings...the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which he relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair ...The arbitrator is not at large to substitute what he or she considers to be a fair sanction in the circumstances...’<sup>87</sup>

The court further contended that:

‘There must, in other words, be a degree of deference towards an employer’s decision. To say this is not to resurrect the “reasonable employer” test. It means that the arbitrator must take into account the prevailing norms and values of society of our society, paying particular regard to the norms and values of the industrial relations community...’<sup>88</sup>

In these decisions the notion of fairness in dismissals was significantly undermined by courts adopting an excessively deferential approach towards the position of the employer and at times completely failing to take into account the interests of the employee. In light of the fact that the LRA seeks to give effect to the Constitutional imperative of fair labour practices for *everyone*; it is to be concluded that the legislature’s vision of fairness will in fact incorporate the balancing of interests of all the parties and invariably include the interests of the employee. Whilst the South African ‘deferential approach’ does not equate to the excessively deferential approach apparent in the United Kingdom and does not seek to ‘resurrect’ the ‘reasonable employer’ test in its purest form;<sup>89</sup> it fails to adequately address the interests of the employee.

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<sup>86</sup> Para 37.

<sup>87</sup> Para 50.

<sup>88</sup> Para 50 & 51.

<sup>89</sup> Cohen op cit note 64 at 205 & 206. Author suggests that ‘[b]y using the criteria of fairness and reasonableness it appears that the Labour Courts and the CCMA, in assessing the fairness of an employer’s decision to dismiss, are relying (sometimes inadvertently) on a South African version of the “reasonable employer” test’.

## CHAPTER 4:

### THE CALL FOR REFORM IN SIDUMO

#### *4.1. The deferential approach in Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others (2006) 27 ILJ 2076 (SCA)*

The court commences its judgment by pointing out that:

‘[A] CCMA commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. That discretion belongs in the first instance to the employer. The commissioner enjoys no discretion in relation to sanction, but bears the duty of determining whether the employer's sanction is fair.’<sup>90</sup>

The court expanding on the role of the commissioner held that:

‘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 in 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 different sanction does not justify concluding that the sanction was unfair. Commissioners must bear in mind that fairness is a relative concept, and that employers should be permitted leeway in determining a fair sanction.’<sup>91</sup>

It was held that, ‘[t]here must be a measure of deference to the employers sanction, because under the LRA, it is primarily the function of the employer to decide on the proper sanction.’<sup>92</sup> The court stated that in determining the fairness of sanction, ‘the commissioner

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<sup>90</sup> Para 40.

<sup>91</sup> Para 46.

<sup>92</sup> Para 48.

need not be convinced that the dismissal is the only fair sanction...the statute only requires that the employer establish that it is a fair sanction'.<sup>93</sup>

The court not only employed legal precedent but also the LRA to defend a deferential approach towards the employer's point of view. What is notable is that, in examining the employer's reasons for the decision to dismiss, the court did not consider the reasonableness of the employer's decision, as done so by the courts applying a 'deferential approach' in the past; but rather considered the fairness of the decision in general terms.

#### *4.2. Rejection of the deferential approach in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)*

The Constitutional Court commenced its judgement by referring directly to section 23(1) of the Constitution which provides that 'everyone has the right to fair labour practices'.<sup>94</sup> The court went on to state that '[o]ne of the primary purposes of the LRA is to give effect to the fundamental rights conferred by section 23 of the Constitution'.<sup>95</sup>

It was found by Navsa AJ, writing for the majority, that 'the Supreme Court of Appeal placed undue reliance on item 7 (b) (iv) of the Code which requires the Commissioner to consider whether the dismissal was "an" appropriate sanction'.<sup>96</sup> The court went on to state that 'the code derives from NEDLAC and is a guide. In any event it cannot take precedence over the Constitution and provisions of the LRA'.<sup>97</sup> It added that:

'There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All indications are to the contrary.'<sup>98</sup>

The court stated that '[a] plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator...Any

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<sup>93</sup> Para 48.

<sup>94</sup> Para 55.

<sup>95</sup> Para 56.

<sup>96</sup> Para 60.

<sup>97</sup> Para 60. NEDLAC: The National Economic Development and Labour Council established by Section 2 of the National Economic, Development and Labour Council Act 35 of 1994.

<sup>98</sup> Para 61.



suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the precepts of the LRA cannot be sustained'.<sup>99</sup>

The rationale behind the rejection of 'deferential approach' is rooted in the purposive interpretation of the LRA. In terms of Constitutional imperatives, the courts are tasked with developing the law to the extent that the legislation does not give effect to a right in the Bill of Rights.<sup>100</sup> Thus the approach to the 'appropriateness of sanction' must be developed to give effect to the right to fair labour practices;<sup>101</sup> which would require that the interests of both the employer and employee to be taken into account.

The role of the commissioner can be summarised from the judgment as follows:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list. To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. *A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer.* What is required is that he or she must consider all relevant circumstances.'<sup>102</sup> (Emphasis added.)

It has been contended that with regard to practice, the judgment may give an impression to some that the employer's prerogative to decide whether to dismiss or retain an offending employee has been completely undermined.<sup>103</sup> Grogan contends that '*Sidumo* may be read as

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<sup>99</sup> Para 61.

<sup>100</sup> Section 8 of the Constitution.

<sup>101</sup> Section 23 of the Constitution.

<sup>102</sup> Para 78 & 79.

<sup>103</sup> J Grogan 'In the Shadow of Sidumo' (2008) *ELJ* Dec.

giving commissioners *carte blanche* when it comes to deciding whether to substitute their views on what constitutes a proper sanction in a particular case'.<sup>104</sup>

However the potential abuse that Grogan suggests is only a possibility where arbitrators misinterpret the scope of their authority or fail to balance the various factors specifically laid down in the *Sidumo* judgment. The reasonable commissioner test, in itself, does not undermine an employer's managerial prerogative however an arbitrator in balancing the countervailing factors laid down in *Sidumo*, according to his own sense of fairness, may misconstrue and exceed his scope of authority.

A further point to note is that the *Sidumo* judgment has also limited the powers of the courts to review the decision of an arbitrator in the determination of sanction; the award will only be set aside if the decision reached by the commissioner is one that a reasonable decision maker could not reach.<sup>105</sup> Thus the potential for abuse coupled with the courts limited powers of review could undermine the notion of fairness that was envisaged by the Constitutional Court in *Sidumo*.<sup>106</sup>

Navsa AJ found that the inquiry into the fairness of the dismissal involves the balancing of competing interests.<sup>107</sup> The court considered *Nampak*<sup>108</sup> and *County Fair Food*<sup>109</sup> and found that these judgements unfortunately 'resorted to the reasonable employer test used in England'. It was held that the test has its origins in statute, the provisions of which are very different to the provisions of the LRA.<sup>110</sup> Furthermore it was held by the court that:

'The approach followed by the Supreme Court of Appeal has been extensively criticized in England on the basis that it does not allow for a proper balancing of the interests of the employer and employee.'<sup>111</sup>

The court in *Sidumo* held that '[t]he Constitution seeks to redress the power imbalance between the employees and employers...neither the Constitution nor the LRA affords any

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<sup>104</sup> Ibid.

<sup>105</sup> Para 110. The awards of arbitrators are final and binding subject only to the limited review powers of the Labour and Labour Appeal Courts. See also Section 145 and 158 (1) (g) of the LRA.

<sup>106</sup> Supra note 29.

<sup>107</sup> Para 66.

<sup>108</sup> Supra note 63.

<sup>109</sup> Supra note 66.

<sup>110</sup> Para 68.

<sup>111</sup> Para 69.

preferential status to the employers view on the fairness of dismissal'.<sup>112</sup> As a result the court found that the approach of the Supreme Court of Appeal 'tilts the balance against employees'.<sup>113</sup>

The judgment succinctly summarises the reason why the 'deferential approach' is to be rejected as well as puts forward the foundation of developing a new test. Whilst finding that fairness dictates a balancing between the interest of the employer and employee and that a deferential approach fails to do so; the court makes a potentially risky statement by stating that 'the commissioner's sense of fairness is what must prevail and not the employer's view'.<sup>114</sup> It is this very phrase that seems to be the essence of the reformed approach to sanction. It may be assumed by some that the employer's point of view is completely disregarded in the enquiry into the appropriateness of sanction; it is this assumption that creates a potential concern. Nevertheless on a proper reading of the *Sidumo*<sup>115</sup> judgment these concerns can be allayed in light of the qualifying factors the court goes on to discuss regarding how the commissioner is to fulfil his functions.

The issue before Ngcobo J, writing for the minority, was whether there are any constraints on the exercise of the commissioner's power to determine fairness.<sup>116</sup> In answering the above question, he states that the LRA requires commissioners to take into account the Code of Good Practice: Dismissal issued under the LRA. In terms of the Code, 'the question of whether or not the dismissal is for fair reason must be determined by the facts of the case and the appropriateness of dismissal as a penalty'.<sup>117</sup>

He suggests that it is clear that 'the LRA and Code impose certain constraints on the powers of the commissioners'.<sup>118</sup> Furthermore Item 7 of the Code 'requires a commissioner to, in considering whether a dismissal is fair, to consider the reasonableness of the employer's rule or standard and the appropriateness of dismissal as a sanction for the contravention of the rule or standard'.<sup>119</sup>

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<sup>112</sup> Para 74.

<sup>113</sup> Ibid.

<sup>114</sup> Para 75.

<sup>115</sup> Supra note 8.

<sup>116</sup> Para 170 & 172.

<sup>117</sup> Para 174.

<sup>118</sup> Para 175.

<sup>119</sup> Para 176.

He concludes that ‘it is no doubt the prerogative of the employer to determine in the first instance that it will dismiss employees who are guilty of particular infractions of its disciplinary code and then in a particular case decide whether to impose that sanction’.<sup>120</sup>

What is worrying is that in the majority judgment, Navsa J unequivocally points out that the Code of Good Practice is no more than a guideline to which the weight of law cannot attach, however it is this Code that Ngcobo J relies upon to restrain the commissioner’s power to act outside his authority.

Ngcobo J then goes on to discuss the employers discretion and how it is to be utilised.

‘When an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions...[t]he employer must apply his or her mind to the facts and determine the appropriate response...[i]t is in this sense that the employer may be said to have discretion.’<sup>121</sup>

However it is further suggested by Ngcobo J that:

‘[R]ecognising that the employer has such discretion does not mean that the commissioner must defer to the employer...[w]hat this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is.’<sup>122</sup>

Furthermore it was held that ‘the commissioner’s task is not to ask what the appropriate sanction is, but whether the employer’s decision to dismiss is fair’.<sup>123</sup>

Lastly Ngcobo J suggests that the commissioner must pass a ‘value judgement’.<sup>124</sup> Thus:

‘However objective the determination of fairness of a dismissal might be it is based on a value judgment. Indeed the exercise of a value judgement is something which reasonable people may readily differ. It could not have been the intention of the lawmaker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determine by the background and

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<sup>120</sup> Ibid.

<sup>121</sup> Para 177.

<sup>122</sup> Para 178.

<sup>123</sup> Ibid.

<sup>124</sup> Para 179.

perspective of the commissioner. Yet fairness requires that regard must be had to the interests of both the workers and those of the employer.<sup>125</sup>

The minority judgment also touches upon which factors the commissioner must take into consideration:

‘What is required is of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it... [i]t is not for the commissioner to set aside the disciplinary system merely because he prefers different standards...The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of business ... The commissioner must seek to understand the rule adopted by the employer and its importance in running the business and then weigh these factors in the overall determination of fairness.’<sup>126</sup>

The judgment has listed various factors that may possibly ensure that the power of the commissioner to determine the appropriateness of sanction, based on his own sense of fairness, will be constrained. By the court allocating such expansive authority to the commissioner, there is potential that a commissioner may exceed the bounds of his authority by imputing his sense of fairness without a proper balancing of the employer’s and employee’s rights. Whilst the court has laid down specific guidelines to ensure commissioners perform their functions properly, the Labour and Labour Appeal Court’s limited power to review and set aside the commissioner’s award creates a potential for abuse of power by commissioners. As will be seen in the following chapter, the inconsistency and potential abuse that can arise when a commissioner uses his ‘own sense of fairness’ undermines the efficacy of the reasonable commissioner’s approach to sanction.

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<sup>125</sup> Para 179 - 180.

<sup>126</sup> Para 182.

## CHAPTER 5:

### CASE LAW AFTER SIDUMO

This chapter seeks to examine how the courts have interpreted the reformed approach towards sanction i.e. the ‘reasonable commissioner’ test, as well as to consider factors that will assist and contribute to the development of a new approach to sanction in the future.

One of the cases decided after *Sidumo*<sup>127</sup> is *Palaborwa Mining Co Ltd v Cheetham & Others*<sup>128</sup> in which Patel JA made the following observation:

‘The Sidumo case enjoins a court to remind itself that the task of determining the fairness of a dismissal falls primarily within 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.’<sup>129</sup>

It is important to investigate ‘who’ has the burden of enduring this uncertainty; it seems that the position of the employer has been somewhat compromised in that he or she has no real semblance of consistency to rely on. It is hoped that the lack of certainty and the presence of inconsistency which plagued the ‘reasonable employer’ approach and the ‘deferential approach’ will not render the ‘reasonable commissioner’ test flawed as well.

The issue of the commissioner’s ‘sense of fairness’ raises a question as to whether undue deference towards the employer has been replaced by undue deference towards the commissioner. In theory the ‘reasonable commissioner’ approach seems to balance the rights of both the employer and the employee but the possibility of abuse in practice may undermine the efficacy of the approach.

In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*<sup>130</sup> the Labour Appeal Court made the following observations about the *Sidumo* Judgement:

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<sup>127</sup> Supra note 8.

<sup>128</sup> *Palaborwa Mining Co Ltd v Cheetham and Others* (2008) 29 ILJ 306 (LAC).

<sup>129</sup> Para 13.

<sup>130</sup> *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC).

“When a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in the particular case he or she must not apply the reasonable employer test, must not in any way defer to the employer and must decide the issue on the basis of his or her own sense of fairness.’<sup>131</sup>

In considering *Sidumo*,<sup>132</sup> Zondo JP summarises the factors the commissioner must take into account when performing his functions:

- ‘(a) ‘take into account the totality of circumstances’ (para 78);
- (b) ‘consider the importance of the rule that had been breached’ (para 78);
- (c) ‘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’ (para 78);
- (d) consider ‘the harm caused by the employee’s conduct’ (para 78);
- (e) consider ‘whether additional training and instruction may result in the employee not repeating the misconduct’;
- (f) consider ‘the effect of dismissal on the employee’ (para 78);
- (g) consider the employee’s service record.’<sup>133</sup>

It was held that after the above factors are considered, the commissioner must decide ‘whether dismissal was in all circumstances fair...[t]hat the commissioner is required to use his own sense of fairness does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide...’<sup>134</sup>

*Fidelity Cash Management*<sup>135</sup> does no more than summarise the position of the Constitutional Court in *Sidumo*. The fact that the commissioner must consider the reason for the employer imposing the sanction and the harm caused by the employee’s conduct both point to the consideration of managerial prerogative and the legitimate right of employers to conduct their businesses as they please, within the bounds of the law of course. The other listed factors that consider progressive discipline or the effect of the dismissal on the employee illustrate the fundamental right of employees to fair labour practices in tandem with the employer’s right to managerial prerogative. The consideration of competing interests will inevitably result in a

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<sup>131</sup> Para 92.

<sup>132</sup> Supra note 8.

<sup>133</sup> Para 94.

<sup>134</sup> Para 95.

<sup>135</sup> Supra note 130.

fair outcome however the fact that the balancing of these competing interests is done solely through the prism of the commissioner's sense of fairness may have anything but fair consequences for the employer and employee.

In *Shoprite Checkers (Pty) Ltd v Sebotha NO and Others*<sup>136</sup>, the court in comparing the demise of the 'reasonable employer' test to the abolishment of the death penalty and corporal punishment, found that in light of the *Sidumo* judgment:

'There are various prophets of doom about what would be happening to discipline in the workplace. Some employers were able to dismiss employees on the basis of the reasonable employer's test...Commissioners are not there to rubber stamp decisions taken by employers. Commissioners are enjoined to decide whether an employee's dismissal is fair or unfair. The reasonable employer's test is no longer part of our law.'<sup>137</sup>

Furthermore the court cautions the employer, the employee as well as the commissioner about the potential abuse of the reformed approach to sanction in *Sidumo*.<sup>138</sup> Francis J states that:

'The message as I understand it arising from *Sidumo* is that the employer cannot impose discipline as it used to do in the past. It does not give the employees the licence to commit misconduct at their whim in the hope that it would use *Sidumo* as a defence. It requires the employer to revisit its approach, the issue of sanction at the workplace, and apply the principles which have been given. Employers cannot approach the issue of sanction as if *Sidumo* does not exist. There must be a balance. Commissioners are not the agents of employers but are like umpires who must decide the issue of fairness.'<sup>139</sup>

In *Theewaterskloof Municipality v SALGBC (Western Cape Division) and Others*<sup>140</sup> the Labour Court, after considering *Fidelity*<sup>141</sup> and *Sidumo*<sup>142</sup> stated that:

'[T]he core enquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it.

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<sup>136</sup> *Shoprite Checkers (Pty) Ltd No and Others* [2009] 8 BLLR 805 (LC).

<sup>137</sup> Para 21.

<sup>138</sup> Supra note 8.

<sup>139</sup> Para 22.

<sup>140</sup> *Theewaterskloof Municipality v SALGBC (Western Cape Division) and Others* (2010) 31 ILJ 2475 (LC).

<sup>141</sup> Supra note 130.

<sup>142</sup> Supra note 8.



That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.<sup>143</sup>

The court then considered the minority judgment in *Sidumo*<sup>144</sup> and found that ‘the “value element” does not mean that commissioners may simply import their own values as the basis for deciding a dismissal dispute’.<sup>145</sup> The court acknowledged a difficulty that may arise in that a commissioner must at the same time employ his own sense of fairness in reaching a conclusion. The court noted that:

‘Reaching a value judgement in relation to competing factors will in many cases be fairly straightforward but in others it may be helpful to conduct a comparison process with reference to a common question, being how the factor relates to the relevant features of the employers operational requirements. A proper assessment of those requirements underlies the determination of what is fair and at the same time provides an objective framework for the value to be placed on factor and another.’<sup>146</sup>

Such a realistic approach of the court in considering any inherent deficiencies is to be commended. Not only does the court identify a possible loophole for abuse but also prescribes a possible remedy. In the courts opinion, a sound and objective consideration would be the employers ‘operational requirements’, which could temper the potential abuse that may arise in a commissioner utilising his or her own sense of fairness. Perhaps this objective criterion of the employer’s operational requirements may form part of a revised approach to sanction. In identifying that a value judgment and the commissioners sense of fairness may in fact distort the objectivity of the test and in essence distort the determination of fairness as well, the ‘common question’<sup>147</sup> the court refers to could ensure that operational requirements introduce an objective element.

The court in *Westonaria Local Municipality v SALGBC and Others*,<sup>148</sup> in dealing with the issue of sanction, noted that the central question to be asked was whether the dismissal was

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<sup>143</sup> Para 16.

<sup>144</sup> Supra note 8.

<sup>145</sup> Para 19.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> *Westonaria Local Municipality v SALGBC and Others* [2010] 3 BLLR 342 (LC).

fair and held that ‘[t]he person to answer this question is the arbitrator and no one else.’<sup>149</sup> The court proceeded to refer to *Engen Petroleum Ltd v CCMA and Others*<sup>150</sup> which held that:

‘The Act requires the CCMA commissioner to decide whether a dismissal is unfair. In effect, the statute puts the following question to the CCMA commissioner: “Is this dismissal fair?” In my view, the ordinary, natural and grammatical meaning of the word “fair”, when anybody is asked whether dismissal is fair in a particular case, is that such person should answer that question on the basis of his own opinion of what is fair or unfair.’<sup>151</sup>

In considering not only *Engen*<sup>152</sup> but *Sidumo*<sup>153</sup> as well, the court in *Westonaria* concluded that an enquiry which deals with the appropriateness of sanction is one to be left to the ‘discretion of the arbitrator’.<sup>154</sup>

In *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others*<sup>155</sup> the Labour Court of Appeal applied the ‘reasonable commissioner’ test by incorporating a consideration of the factors, many of which have now been listed in the CCMA Guidelines. The court clearly set out the role of the commissioner and how this role is to be carried out. The court stated as follows:

‘Firstly, the duty to determine whether a dismissal is fair or not rests with the commissioner...Secondly, the decision whether or not the sanction imposed by an employer is fair in a particular case is a value judgment which the commissioner is required to make on the basis of his/her own sense of fairness. Thirdly, each case must be decided on its own merits and with due regard to the totality of the circumstances - an objective approach (*Sidumo* at para 64 and 68)...Other factors may include the seriousness of the misconduct and the gravity thereof with relation to the continued employment relationship as well as the

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<sup>149</sup> Para 18.

<sup>150</sup> *Engen Petroleum Ltd v CCMA and Others* [2007] 8 BLLR 707 (LAC).

<sup>151</sup> Para 146.

<sup>152</sup> See *Sidumo* Constitutional Court judgment at para 75. The court held that, ‘[t]he commissioner determines whether the dismissal is fair. There are, therefore, no competing ‘discretions’. Employer and commissioner 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.’

<sup>153</sup> *Supra* note 8.

<sup>154</sup> Para 19.

<sup>155</sup> *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC).

employee's previous disciplinary record and personal circumstances, the nature of the employee's job and the circumstances of the infringement. The list is not exhaustive.’<sup>156</sup>

In the recent decision of *Wasteman Group v South African Municipal Workers' Union*,<sup>157</sup> Davis JA in interpreting *Sidumo*<sup>158</sup> and the powers of the commissioner found that, [t]he commissioner is required to come to an independent decision as to whether the employer’s decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner’.<sup>159</sup>

Davis JA explained the above to mean that the commissioner had to decide on his own whether the action undertaken by the employer was fair in the circumstances; this enquiry would not take into account what the commissioner would have ‘personally decided’<sup>160</sup> but whether the employer’s decision can be viewed as ‘fair’.<sup>161</sup> He further points out that in conducting an enquiry into the fairness of the sanction imposed, ‘deference cannot enter into the decision making power’.<sup>162</sup>

Thus each case must be considered in light of its unique facts; the manner in which the balancing of competing interests is conducted cannot be mechanically applied in every case. The commissioner would have to consider the facts and consider which factors in that specific instance may or may not outweigh each other.

The court in *South African Breweries Ltd v Commission for Conciliation Mediation and Arbitration and Others*<sup>163</sup> elaborated on the approach adopted by the court in *Wasteman*.<sup>164</sup> However *South African Breweries* goes further to clarify the role of the commissioner in comparing it to the role of a reviewing court. The court explained as follows:

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<sup>156</sup> Para 33 & 34.

<sup>157</sup> *Wasteman Group v South African Municipal Workers' Union* (CA6/2011) [2012] ZALAC (8 March 2012).

<sup>158</sup> In particular para 78-79 of the *Sidumo* Constitutional Court judgment.

<sup>159</sup> Page 7.

<sup>160</sup> Page 8.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *South African Breweries Ltd v CCMA and Others* (C665/2011) [2012] ZALCCT 17 (24 MAY 2012).

<sup>164</sup> Para 26, Steenkamp J held that ‘[i]n my view, the commissioner’s view can best be summarised thus: The employer decides to dismiss. The commissioner conducts an arbitration *de novo*. In the light of the totality of circumstances, established by the evidence at arbitration, the commissioner must then decide whether the decision to dismiss was fair. In doing so, it is the commissioner’s own sense of fairness that must prevail. There can be no deference to the employer.’

‘The commissioner must decide whether the decision to dismiss was fair; this court may only decide whether the arbitrator’s decision was so unreasonable that no other arbitrator could have reached the same decision. Even if the court’s own sense of fairness may dictate a different outcome, it cannot interfere with the decision of the arbitrator. The converse applies to the arbitrator when deciding whether the employer’s decision to dismiss was fair.’<sup>165</sup>

There are a number of cases that expound further principles that may be useful in interpreting and applying the ‘reasonable commissioner’ test. The balancing of competing interests is an essential element of the ‘reasonable commissioner’ approach, with that said, the commissioner responsible for conducting such a balancing act bears a heavy responsibility and his own sense of fairness or value judgment may undermine the objectivity of such an approach. Thus while all these legitimate factors from both the perspective of the employer and employee has been extrapolated, there needs to be an objective element that will combat potential abuse that may arise from a ‘deferential approach’ towards the decision of the commissioner. The operational requirements of the employer seem to be a sound ground for introducing objectivity and may contribute to a revised approach (herein referred to as the ‘balanced approach’ towards the appropriateness of sanction).

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<sup>165</sup> Para 27.

## CHAPTER 6:

### FACTORS TO BE CONSIDERED IN THE DETERMINATION OF AN APPROPRIATE SANCTION

The factors to be considered by an arbitrator in determining an appropriate sanction, are now consolidated in the CCMA Guidelines but were initially crystallised in case law. In order to grasp the substance of factors listed in the Guidelines, it is critical to understand them against the backdrop of the cases that gave meaning to them. According to Item 7 of the Guidelines:

‘Determining whether dismissal was an appropriate sanction involves three inquiries: an enquiry into the gravity of the contravention of the rule; an enquiry into consistency of the application of the rule and sanction; and an enquiry into factors that may have justified a different sanction.’<sup>166</sup>

#### *6.1. Gravity of the contravention*

According to the Guidelines:

‘There are two enquiries involved in assessing the gravity of the contravention. The first concerns any sanction prescribed by the employer for the misconduct. The second enquiry relates to any aggravating factors that may make the contravention more serious or mitigating factors that may make it less serious.’<sup>167</sup>

With regard to the gravity of the contravention itself, Grogan suggests that ‘the more serious the offence, the more likely the employer will consider dismissal appropriate’.<sup>168</sup> He submits that minor contraventions may also be viewed in a ‘serious light’<sup>169</sup> and warrant dismissal depending on the circumstances. Furthermore he submits that it may ‘not always be necessary to dismiss an employee for offences listed in the Code’.<sup>170</sup> He states that the ‘courts have made it clear that an employer should at least allow the employee to plead mitigation and the employer should at least consider the possibility of a lesser sanction’.<sup>171</sup>

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<sup>166</sup> Paragraph 94 of the Guidelines.

<sup>167</sup> Paragraph 95 of the Guidelines.

<sup>168</sup> Grogan op cit note 16 at 284.

<sup>169</sup> Ibid.

<sup>170</sup> Grogan op cit note 16 at 285.

<sup>171</sup> Ibid.

### 6.1.1. Workplace Rules and Sanction prescribed by the employer

The Code of Good Practice states that:

‘All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer’s business.’<sup>172</sup>

The court in *Consani Engineering (Pty) Ltd v CCMA and Others*<sup>173</sup> consolidates the reasoning of earlier judgements on this point. The court in *Consani* firstly acknowledged the reasoning in the *Computicket v Marcus NO and others*<sup>174</sup> namely that ‘[t]he employer sets the standard and has the right to determine the sanction with which non-compliance with the standard will be visited’.

It went on to state that ‘[t]he decision-maker should embark upon the reasoning process of assessing a sanction by recognising that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of its business’.<sup>175</sup>

According to Du Toit, ‘disciplinary rules are intended to create certainty and consistency in the application of discipline’.<sup>176</sup> Furthermore ‘[t]he required standards of conduct must be clear and communicated to employees in a way that they can understand’.<sup>177</sup> Lastly the employer should consider its disciplinary code as a ‘guideline’<sup>178</sup> and ‘may still have regard to the Code of Good Practice’.<sup>179</sup> On this point Du Toit relies on *Changula v Bell Equipment*<sup>180</sup> where the Labour Appeal Court held that the (employer’s) code contains ‘discretionary and not obligatory provisions’.<sup>181</sup>

Support for the above contentions by Du Toit can be extracted directly from *Consani*.<sup>182</sup>

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<sup>172</sup> Item 3 (1) of the Code.

<sup>173</sup> *Consani Engineering (Pty) Ltd v CCMA and Others* [2004] 10 BLLR 995 (LC) at Para 17.

<sup>174</sup> *Supra* note 60 at 347A - 347B.

<sup>175</sup> Para 17.

<sup>176</sup> D Du Toit *Labour Relations Law: A comprehensive guide* 5 ed (2006) 397 at 397.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC).

<sup>181</sup> At 109B.

<sup>182</sup> *Supra* note 173.

‘While it is correct that the disciplinary code permitted some discretion requiring each case to be considered on its merits, such did not amount to an absolute bar to the subsequent and legitimate adoption of a zero-tolerance policy, which the evidence reflects was properly communicated to the workforce [my emphasis]. Indeed, once the policy had been communicated, the imposition of the dismissal penalty, in the light of that communication, accorded with a proper consideration of the merits of the specific case.’<sup>183</sup>

According to the Constitutional Court in *Sidumo*,<sup>184</sup> ‘the commissioner when evaluating the decision of the employer must apply his mind to the facts and determine an appropriate response in light of the disciplinary code’<sup>185</sup> furthermore ‘the commissioner must seek to understand the reasons for the particular rule being adopted and the importance in the running of the employers business...’<sup>186</sup>

The rationale behind the employer advocating reasons for workplace rules and the value of such reasons is well illustrated in *Samancor*<sup>187</sup> The applicant employer operated a smeltery; two of his employees namely a floor operator and a crane operator, were charged with failure to perform certain functions in breach of the employer's strict safety rules.<sup>188</sup> The court, when considering the appropriate sanction to be imposed for such misconduct, held that:

‘It is evident from the evidence that there are considerable risks associated with the appellant's operations at the smeltery. It carries a high risk of potential danger to the safety of its employees which in turn may hold serious consequences for the appellant as the employer. The issue of safety and the rules pertaining thereto are accordingly of considerable importance to both the appellant and its employees...Accordingly, in the context of the present matter, the importance of the safety rules concerned, the reasons for their existence, and the seriousness and potentially life threatening consequences of a breach of such rules are important considerations that must be accorded due weight.’<sup>189</sup>

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<sup>183</sup> Para 18.

<sup>184</sup> Supra note 8.

<sup>185</sup> Para 117.

<sup>186</sup> Para 182.

<sup>187</sup> Supra note 155.

<sup>188</sup> Para 1&2.

<sup>189</sup> Para 35.

Therefore it is apparent that the Guidelines advocate a process whereby the employer's reasons for adopting certain disciplinary policies must be given serious consideration in light of the employer's operational requirements and individual business needs. No two businesses are the same and the legislature has acknowledged this by allowing an employer to run his business efficiently and to set his own workplace rules and standards provided that they are reasonable. The arbitrator's right to intervene in the sanction imposed by the employer only becomes effective when the employer fails to utilise his power and authority in a fair manner. Until such a time, the employer is, according to the plain reading of the Guidelines, entitled to run his business as he pleases.

### *6.1.2. Circumstances of the Contravention: Aggravating and Mitigating Factors*

According to the Guidelines:

'Aggravating factors may include wilfulness, lack of remorse, not admitting to a blatant contravention of a rule, dishonesty in the disciplinary hearing, nature of the job and damage and loss incurred to the employer caused by the contravention. Aggravating circumstances may have the effect of justifying a more severe sanction than one prescribed in the code or normally imposed by employers...or may offset personal circumstances which may otherwise have justified a different sanction.'<sup>190</sup>

These factors will be considered below:

#### *6.1.2.1. Nature of the job*

In *Anglo American farms t/a Boschendal Restaurant v Komjwayo*,<sup>191</sup> the court found that due to the premeditation of the theft and that it was implemented over a period of time, a 'thieving propensity' was evidenced<sup>192</sup> and could not be acceptable given the nature of the employee's job. The respondent was employed as a waiter and '[h]is duties

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<sup>190</sup> Paragraph 98 of the Guidelines.

<sup>191</sup> *Anglo American Farms t/a Boschendaal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC). See also *Central News Agency (Pty) Ltd v CCAWUSA and Another* (1991) 12 ILJ 340 (LAC); *Hoechst (Pty) Ltd v CWIU and Another* (1993) 14 ILJ 1449 (LAC); *Pitcher and Another assisted by the Western Cape Omnibus and Salaried Staff Union v The Golden Arrow Bus Service (Pty) Ltd* (1995) 16 ILJ 1201 (IC).

<sup>192</sup> At P592.



necessarily entailed handling the appellant's stock-in-trade'.<sup>193</sup> In the nature of things, this task could not practically be carried out without the employee being placed in a position of trust.<sup>194</sup> In these circumstances the court held that 'the effect of the respondent's misconduct on the relationship between the parties was such that its continuation would have been intolerable for the appellant'.<sup>195</sup> The court consequently found that the dismissal to be fair in the circumstances.

In this case it is evident that the nature of the job and the position of trust are weighty factors in determining: firstly if the employment relationship can continue in light of the employer's business operations and secondly whether the risk of repetition of such misconduct by the employee is probable. The first factor considers the objective needs of the business and the second looks more closely and subjectively at the employee and his inclination to contravene a rule. The court concluded that:

'The theft, or attempted theft, was premeditated... It shows a 'thieving propensity' on respondent's part. It rendered his further employment intolerable, from applicant's point of view. Respondent persisted throughout in falsely maintaining that he was innocent, and gave a false explanation. At no time has he shown any remorse for his conduct. He knew in advance exactly what the potential consequences of his conduct... These are all, in my view, aggravating factors which enhance the fairness of the dismissal.'<sup>196</sup>

In considering the above passage, the court seemed to take a holistic approach to the offence, looking at contributing factors such as remorse and premeditation. Therefore it is up to the arbitrator when considering the employers sanction to evaluate *any* factor that may shed new light on the situation. These factors may be different and new in each employer's individual business setup. It is consequently for the arbitrator to apply his or her mind and sincerely search for them.

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<sup>193</sup> At P590.

<sup>194</sup> Ibid.

<sup>195</sup> At 592. See also *Standard bank of SA Ltd v CCMA and others* (1998) 19 ILJ 903 (LC); *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ (LAC); *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) 21 ILJ 1051 (LAC) and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC).

<sup>196</sup> Ibid.

### 6.1.2.2. Remorse

In *De Beers Consolidated Mines Ltd*,<sup>197</sup> the court dealt specifically with the issue of remorse. It was held that:

‘It would, in my view, be difficult for an employer to re-employ an employee who has shown no remorse...Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken.’<sup>198</sup>

Furthermore the court stated that:

‘Where, as in this case, an employee ‘over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.’<sup>199</sup>

In addition to identifying remorse, or lack thereof, as a relevant factor the court went on to explain the significance of such consideration. In this instance the court considered remorse in light of the possibility of restoring the damaged relationship of trust. This judgement illustrates that arbitrators should consider all relevant factors that may arise in a particular situation. Furthermore the reasons the employer advances for dismissing an employee must incorporate these considerations.

A lack of remorse for misconduct not only presupposes that the employee may repeat the offence but it may also deter an employer from imposing sanctions that seek to correct the employee's behaviour. Where it is apparent that the employee is not in fact receptive to correction, it would be unreasonable to expect the employer to commit to repairing the relationship of trust. In *Timothy v Nampak Corrugated Containers (Pty) Ltd*<sup>200</sup> the court held that where there is an ‘egregious act of dishonesty’<sup>201</sup> or conversely ‘a complete lack of

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<sup>197</sup> Supra note 82.

<sup>198</sup> At 1059.

<sup>199</sup> Ibid.

<sup>200</sup> *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] 8 BLLR830 (LAC).

<sup>201</sup> At P835.

acknowledgement of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction'.<sup>202</sup>

Furthermore where the employee has committed misconduct which involves gross dishonesty, the lack of remorse would seem to compound the risk to the employer's business and limit the possibility of restoration of the damaged relationship of trust. In *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & Others*<sup>203</sup> the court stated that:

'The misconduct which the third respondent committed involved gross dishonesty and fraud which was bound to cause harm and prejudice to the appellant's business operation. It was also significant that the third respondent elected not to own up to his misdemeanour. In other words, he showed a complete lack of remorse or contrition for what he did.'<sup>204</sup>

#### 6.1.2.3. Seriousness of the Offence

*Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others*<sup>205</sup> in dealing with the issue of the seriousness of the offence, held that 'the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed'.<sup>206</sup> The court stated that:

'In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'<sup>207</sup>

There are various forms of misconduct that may warrant dismissal as a sanction, *Hulett* merely demonstrates that dishonesty is one of those. Due to the fact that all mitigating and aggravating factors are considered in an attempt to evaluate the relationship of trust between the parties, any factor which *prima facie* undermines that relationship will be deemed

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<sup>202</sup> Ibid.

<sup>203</sup> *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC).

<sup>204</sup> Para 37.

<sup>205</sup> *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others* (2008) 29 ILJ 1180 (LC).

<sup>206</sup> Para 42.

<sup>207</sup> Para 42.

sufficient to justify dismissal. In light of recent case law, proof that the relationship of trust has been irreparably damaged must be produced by those making the allegation.<sup>208</sup>

The court in *Hulett*<sup>209</sup> also held that it would be ‘unfair for the court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse’.<sup>210</sup> Although it is often the employee who is on the receiving end of any unfairness, it is interesting to see what the court deems would be unfair on the employer and its business needs and interests.

#### 6.1.2.4. *Loss Suffered*

With regard to loss incurred by the employer due to the contravention, the court in *Anglo American farms t/a Boschendal Restaurant*<sup>211</sup> held that:

‘There is no doubt that the value of an article which is stolen may, and often does, play a significant role when the question of an appropriate penalty is considered. However this role is not always, or necessarily, such that low value is always a conclusive indication that only a lenient penalty is called for’.<sup>212</sup>

The court found itself in agreement with the submissions made on behalf of counsel for the employer; and stated that:

‘The value of what was stolen was of comparatively little importance in this matter, and that the true question to be considered was whether or not what respondent did had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties, so that the continuation of that relationship could be regarded as intolerable.’<sup>213</sup>

Once again all factors are considered in light of the relationship of trust. Therefore the principle that is enunciated is that, irrespective of whether an employee steals one million or one rand, once the relationship of trust and confidence has been destroyed, the employer is under no obligation to continue to employ that person. Once the employer alleges and *proves*

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<sup>208</sup> Issue of proof will be discussed briefly in chapter 10.

<sup>209</sup> Supra note 205.

<sup>210</sup> Para 45.

<sup>211</sup> Supra note 191.

<sup>212</sup> P590.

<sup>213</sup> Ibid.

the breakdown in trust, the decision to dismiss rests with the employer; however, whether the decision will be deemed to be appropriate and fair in the circumstances will ultimately be determined by the commissioner.

In developing a 'balanced approach' to sanction, an objective element to incorporate in the approach would be the consideration of the operational requirements of the employer; however there is also a need to consider certain subjective elements, such as the aggravating and mitigating factors discussed in this chapter. What can be concluded is that, although the commissioner is required to consider issues such as remorse and dishonesty, these considerations really involve the effect of the employee's misconduct on the 'relationship of trust'. Although the relationship of trust will be discussed in further detail,<sup>214</sup> at this point it is worth mentioning that whilst the employer's operational requirements may form the objective leg of the 'balanced approach'; consideration of the relationship of trust could form the qualifying and subjective leg of such an approach.

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<sup>214</sup> See chapter 10.

## CHAPTER 7:

### CONSISTENT APPLICATION OF THE RULE

The aim of this chapter is to examine the fundamental principles regarding the consistent imposition of sanction. It is of necessity that the commissioner, in applying his own sense of fairness, is well acquainted with the legal principles, the rationale behind them and how he or she is to interpret the requirements of fairness.

In terms of Code of Good Practice:

‘The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.’<sup>215</sup>

According to the Guidelines, ‘if an employee leads evidence that another employee similarly placed was not dismissed for a contravention of the same rule, the employer must justify the difference of treatment’.<sup>216</sup> Furthermore the Guidelines state that ‘[u]nless the employer can provide a legitimate basis for differentiating between two similarly placed employees, a disparity in treatment is unfair’.<sup>217</sup> Therefore inconsistency in applying certain sanctions is not completely prohibited. Should an employer treat employees differently, his conduct will not be rendered unfair on that fact alone. Only if the employer fails to show a valid reason for such discrepancy will his conduct be challenged.

The court in *Cape Town City Council v Masitho and Others*<sup>218</sup> in considering *SACCAWU and Others v Irvin and Johnson*<sup>219</sup> pointed out that:

‘In *SACCAWU and Others v Irvin and Johnson* [1999] 8 BLLR 741 (LAC) at 751B this court reiterated that consistency is an element of disciplinary fairness, and that it 'is really the perception of bias inherent in selective discipline which makes it unfair', but went on to

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<sup>215</sup> Item 3 (6) of the Code.

<sup>216</sup> Paragraph 101 of the Guidelines.

<sup>217</sup> Ibid.

<sup>218</sup> *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC).

<sup>219</sup> *SACCAWU and Others v Irvin and Johnson* [1999] 8 BLLR 741 (LAC) at para 29.

observe that the flexibility which is inherent in the exercise of discretion will inevitably create the potential for some inconsistency.’<sup>220</sup>

The discretion that the court speaks of is the general discretion awarded to employers to identify the types of misconduct that will justify dismissal and the discretion to apply that sanction in individual cases of employee misconduct. Even if the employer has valid reasons to treat employees differently and the result is in fact fair, there may be a misplaced assumption that where there is inconsistency there is also injustice.

According to *Cape Town City Council*:<sup>221</sup>

Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with the same.’<sup>222</sup>

In *Gcwensha v CCMA & others*<sup>223</sup> the court explained the concept of consistency in light of an employer’s decision to impose disciplinary action. Nicholson JA stated that:

‘In *SA Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC), this Court set out the principles of consistent employment discipline. Disciplinary consistency is the hallmark of progressive labour relations and the “parity principle” merely requires that every employee must be measured by the same standards. Discipline must also not be capricious nor should there be any perception of bias when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the discipline record of the two employees compared. No extraneous matters should be regarded and a comparison has to be made between all the relevant features that are normally considered when one employee is disciplined.’<sup>224</sup>

In a recently handed down judgment, the court in *Westonaria*<sup>225</sup> in dealing with the appropriateness of sanction and consistency, held that:

‘The employer has the responsibility of setting the standard of conduct he or she requires employees to comply with and to apply such standard consistently. Failure to apply the

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<sup>220</sup> Para 14.

<sup>221</sup> Supra note 218.

<sup>222</sup> Para 14.

<sup>223</sup> *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC).

<sup>224</sup> Para 36.

<sup>225</sup> Supra note 148.

standard consistently could lead to the conclusion that non-compliance with the standard by the employee cannot be regarded as serious enough to warrant a dismissal.<sup>226</sup>

The Guidelines clearly stipulate that: '[i]t is not inconsistent to treat employees charged with the same misconduct differently if there is a fair and objective basis'<sup>227</sup> for example an employee's previous disciplinary record.<sup>228</sup> In *SA Transport and Allied Workers Union and Others v Ikhwezi Bus Service*<sup>229</sup> the court held that 'an employer is entitled in general terms to impose different penalties on different employees for the same act of misconduct, provided there is a fair and objective basis for doing so'.<sup>230</sup>

In light of *SA Transport*, when an existing disciplinary record is the differentiating factor, prior disciplinary action short of dismissal (in particular, warnings) can be relevant in the following way. If the disciplinary record of one employee reveals prior disciplinary action short of dismissal, this can be taken into account when the employer decides on an appropriate sanction. The court makes a definitive statement by holding that 'in general terms, the nature and extent of prior sanctions can legitimately form the basis of a differentiation in penalty, even when the nature of the misconduct differs'.<sup>231</sup>

The court in *SA Transport* held that:

'An exception applies when the employer considers an appropriate sanction for misconduct that is collective in nature. In this instance, prior disciplinary sanctions for individual misconduct cannot be used to justify a differentiation in penalty. The employer has no choice but to impose the same sanction in respect of all employees engaged in the collective misconduct.'<sup>232</sup>

In *Num and Another v Amcoal Colliery t/a Arnot Colliery and Another*,<sup>233</sup> the court held that:

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<sup>226</sup> Para 27.

<sup>227</sup> Paragraph 102 of the Guidelines.

<sup>228</sup> Ibid.

<sup>229</sup> *SA Transport and Allied Workers Union and Others v Ikhwezi Bus Service* (Pty) Ltd (2009) 30 ILJ 205 (LC).

<sup>230</sup> Para 25.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> *Num and Another v Amcoal Colliery t/a Arnot Colliery and Another* [2000] 8 BLLR 869 (LAC).



‘The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence...a disciplinary record may justify differentiating between employees guilty of the same offence.’<sup>234</sup>

Zondo JP went on to state that the fact that the employer was entitled to take into account the employee’s previous warnings is not in conflict with his judgment in *SACTWU & others v Novel Spinners (Pty) Ltd.*<sup>235</sup> Zondo JP states:

‘In that case it was argued that an employer is not entitled to take into account previous warnings which were in respect of individual misconduct when considering what sanction to impose in respect of collective action. In this case, the employee’s case, was that, by virtue of the fact that the conduct for which the previous warnings had been issued was not related to the conduct in respect of which the employer had to decide an appropriate sanction, the employer was not entitled to take such previous warnings into account. These are two different points. In my view the former has merit, the latter none.’<sup>236</sup>

What can be extracted from the above judgements is that firstly, inconsistency is an innate feature of the discretion awarded to employers in imposing sanction and secondly, employers will be justified in departing from consistently applying a particular sanction if there is a fair basis to do so. An example of a fair and objective basis for applying a different sanction is the employee’s personal circumstances and more specifically his or her individual disciplinary record. Employers will not be compelled to impose the same sanction if they have legitimate grounds not to do so but they must keep in mind that a failure to consistently impose dismissal as a sanction for a particular misconduct, where they have done so in the past, may lead employees to believe that such misconduct is no longer considered serious enough to warrant dismissal.

The disciplinary record is useful, regardless of whether the current and past misconduct are unrelated. What can be concluded is that is the disciplinary record of individual employees cannot be used where an employee is liable for participation in group misconduct. It becomes

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<sup>234</sup> Para 19.

<sup>235</sup> *SACTWU and others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC).

<sup>236</sup> Para 24 & 25.

apparent once again, that if an employer is able to justify his actions, even if they are inconsistent, this remains his prerogative and the courts will not be able to intervene without legitimate countervailing reasons.

The last point regarding consistency in the Guidelines states that '[a]n employer may justify a change in its approach to disciplining employees for particular misconduct by showing that employees were made aware of the change in the approach'.<sup>237</sup> This principle was enunciated by the court in *Cape Town City Council*,<sup>238</sup> which held that:

'While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency...the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future.'<sup>239</sup>

According to Van Niekerk this approach suggests that 'excessively lenient treatment of one employee should not serve to advantage another employee.'<sup>240</sup> In summation all an employer needs to prove in order to justify any inconsistency in the imposition of sanction, is the presence of a fair and objective reason or evidence that employees were made aware that previous disciplinary sanctions will not be applied similarly in the future.

In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,<sup>241</sup> the court also touched upon the circumstances in which an employer will be justified in deviating from the 'parity principle':<sup>242</sup>

'A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator...The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant...Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency

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<sup>237</sup> Paragraph 103 of the Guidelines.

<sup>238</sup> Supra note 218.

<sup>239</sup> Para 14.

<sup>240</sup> A Van Niekerk *Law at Work* 1 ed (2008) 245.

<sup>241</sup> *Southern Sun Hotel Interest v CCMA and Others* [2009] 11 BLLR 1128 (LC).

<sup>242</sup> Para 10.

challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.<sup>243</sup>

In a recent decision, the Labour Court in *Nel v Transnet Bargaining Council and Others*,<sup>244</sup> also considering the employer's justification for not imposing a sanction consistently, held that:

‘The ratio of *Irvin & Johnson, supra*, indicates clearly that in considering whether or not the employer had applied the discipline inconsistently, one of the important factors to take into account is the gravity of the misconduct committed by the employee pleading inconsistency. The gravity of the offence, in the present instance, may even outweigh consideration of length of service of the affected employee. This will be so in particular when dealing with an employee who because of his seniority ought to know the impact that his or her conduct may have on the relationship between him and the employer and more importantly other stakeholders in the employer's business.’<sup>245</sup>

In light of the fact that the courts have developed factors that may render an employer's conduct fair, despite its inconsistent characteristics; employees must evaluate all the circumstances before challenging a dismissal purely on the ground of inconsistency. As the court in *Southern Sun*<sup>246</sup> adequately pointed out, ‘[i]t is evident from the above principles that there is no confusion in the jurisprudence as it relates to the consistency requirement, nor is there any conflict between decisions of the Labour Appeal Court’.<sup>247</sup>

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<sup>243</sup> Para 12.

<sup>244</sup> *Nel v Transnet Bargaining Council and Others* [2010] 1 BLLR 61 (LC).

<sup>245</sup> Para 31.

<sup>246</sup> *Supra* note 241.

<sup>247</sup> Para 12.

## CHAPTER 8:

### FACTORS THAT MAY JUSTIFY A DIFFERENT SANCTION

The CCMA Guidelines list a number of reasons for not using dismissal as a sanction for an offence. The Guidelines state that '[a]lthough the following factors are often referred to as mitigating factors, this is misleading. Dismissal is not a punishment'.<sup>248</sup> Dismissal is a 'rational response to risk management'.<sup>249</sup> Thus 'the factors that should be taken into account must be relevant to the risk of further instances of misconduct in the future, and the risk of harm to the enterprise as a result'.<sup>250</sup>

#### *8.1. The Employee's Circumstances*

##### *8.1.1. Length of service*

According to Grogan, 'it is widely accepted that the longer the period of service the employee has had with the employer, the more seriously the employer should consider mitigating factors'.<sup>251</sup>

In *De Beers*<sup>252</sup> the court held that, 'long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability'.<sup>253</sup> Thus:

'Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it... Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise.'<sup>254</sup>

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<sup>248</sup> Paragraph 104 of the Guidelines.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Grogan op cit note 16 at 288.

<sup>252</sup> Supra note 82.

<sup>253</sup> Para 22.

<sup>254</sup> Ibid.

It is the legal reasoning of the court in *De Beers*<sup>255</sup> which introduced the concept of ‘rational response to risk’<sup>256</sup> into the Guidelines. It is noteworthy that the court looked not only at the gravity of the misconduct, which on the face of the situation would justify dismissal, but also the effect it has on the business of the employer. It is to be inferred that if the employer can no longer trust the employee it is no longer a viable option to continue the employment relationship and risk further business infractions. The reasoning of the court reinforces that a balanced approach to the determination of an appropriate sanction should fundamentally include consideration of the employer’s business needs as well as the relationship of trust.

It was also held by the court in *De Beers* that long service is ‘not entirely irrelevant’.<sup>257</sup> The court found that:

‘It is relevant in determining whether an employee is likely to repeat his misdemeanour. An employee who has long and faithfully served his employer has shown that he has little propensity for offending.’<sup>258</sup> Depending on the circumstances, long service may be a weighty consideration. However the risk factor is paramount.<sup>259</sup> Grogan submits that in light of the *De Beers* judgment, long service merely creates a prima facie impression of reliability, which can be offset by other considerations.<sup>260</sup>

The court in *Theewaterskloof Municipality*<sup>261</sup> held that long service:

‘[D]oes not stand as a number of years in vacuo. Like any factor it must be evaluated in the circumstances of the case as a whole; it does not ipso facto trigger a reduction in the sanction or trump the other factors. In general, there are two aspects to long service. The one aspect is that an employee with lengthy service will have become imbued with a proper understanding of the rules, objects and values of his employer. That might be an appropriate circumstance to take into account at the stage of determining guilt. However, when it comes to sanction, the tablet must be turned over to display the mitigatory aspect of long service.’<sup>262</sup>

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<sup>255</sup> Supra note 82.

<sup>256</sup> Paragraph 104 of the Guidelines.

<sup>257</sup> Para 24.

<sup>258</sup> Para 24.

<sup>259</sup> Ibid.

<sup>260</sup> Grogan op cit 16 at 289.

<sup>261</sup> Supra note 141.

<sup>262</sup> Para 32.

Furthermore the court held that, '[w]hen it comes to sanction, long service can never as such leave an employee worse off than one who has been in service for a short time'.<sup>263</sup>

In light of the above judgments it is suggestive that, long service will not be viewed as a significantly weighty factor in the overall enquiry into the appropriateness of the sanction especially where the employee's misconduct reflects an element of dishonesty, which has had the effect of damaging the relationship of trust. In *Hulett*<sup>264</sup> the court held that:

'[T]he presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed.'<sup>265</sup>

In *Transnet Rail Engineering Ltd v Transnet Bargaining Council and Others*,<sup>266</sup> the court pointed out that long service may have the effect of reducing the sanction to be imposed for misconduct but went further than most courts in the past have ventured by stating that long service may also necessitate a harsher sanction in certain circumstances.<sup>267</sup> This dictum stands to be overturned by a higher court especially in light of the fact that the judgment does not list the type of circumstances that will result in long service increasing the severity of the sanction.

### 8.1.2. Disciplinary Record

Grogan suggests that 'an employee's disciplinary record may be taken into account when considering whether the employee should be dismissed for a particular offence. This follows from the requirement that discipline should be 'progressive' discipline.'<sup>268</sup>

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<sup>263</sup> Ibid. Court makes reference to item 3(5) of the Code of Good Practice: 'which plainly contemplates that long service should be taken into account as an element of mitigation: "When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself".'

<sup>264</sup> Supra note 205.

<sup>265</sup> Para 42.

<sup>266</sup> *Transnet Rail Engineering Ltd v Transnet Bargaining Council and Others* (JR 2191/09) [2011] ZALCHB 113 (1 December 2011).

<sup>267</sup> Para 37 & 38.

<sup>268</sup> Grogan op cit note 16 at 285.

In *Shoprite (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration and Others*<sup>269</sup> the court dealt with a case where an employee had been captured on the store video camera, on several occasions, eating in areas in which such conduct was prohibited. He was charged with misconduct and dismissed. The employee had 30 years of service and was a first offender.<sup>270</sup> The judge stated:

‘When all the relevant circumstances are taken into account, I am of the opinion that a reasonable decision-maker could not, in the circumstances of this case, have concluded that an employee who had a clean disciplinary record such as the fourth respondent and who had 30 years of service should, in addition to getting a “severe final warning” for this type of conduct, also forfeit about R33 000 for eating food that could well have cost less than R20.’<sup>271</sup>

In *MEC for Finance, KwaZulu-Natal & Another v Dorkin NO & Another*,<sup>272</sup> the employee’s misconduct related to granting of bursaries in excess of authorised amounts. Zondo JP held that:

‘ I have no hesitation in concluding that his is a decision that no reasonable person could reach on the facts of this case and his decision is not just unreasonable but it is, without any doubt, grossly unreasonable. The facts that the second respondent had 21 years of service and a clean record cannot mean that on the facts of this case, the sanction of dismissal would not be appropriate. There is a limit to which an employee’s long service period and clean record can save such employee from dismissal when he is guilty of misconduct.’<sup>273</sup>

In *Theewaterskloof Municipality*<sup>274</sup> the court looked at the issue of the employee’s disciplinary record throughout his 22 years of service. The court held that:

‘Although a value judgment must eventually be based on a holistic appraisal of all factors, this is a case in which a primary comparison can helpfully be drawn between the length of service and clean record on the one hand and the circumstances of the offence and lack of

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<sup>269</sup> *Shoprite (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration and Others* [2008] 12 BLLR 1211 (LAC).

<sup>270</sup> Para 5 & 6.

<sup>271</sup> Para 26.

<sup>272</sup> *MEC for Finance, KwaZulu-Natal & Another v Dorkin NO & Another* [2008] 6 BLLR 540 (LAC).

<sup>273</sup> Para 18.

<sup>274</sup> *Supra* note 141.

remorse amounting to defiance on the other. The lens through which the product of this comparison is to be observed is that of the municipality's operational requirements.<sup>275</sup>

With various aggravating and mitigating factors to consider along with the various legal principles dealing with each factor, it is understandable that arbitrators and employers are unsure of the weight to attach to each factor. Although it has been mentioned that long service is always mitigatory it has also be asserted that in some instances long service will not be able to mitigate the seriousness of the offence committed by the employee. Furthermore there has even been a suggestion that long service may work against the favour of an employee who has been found guilty of breaching the relationship of trust. Much depends on the circumstances of the case. In *Theewaterskloof Municipality*,<sup>276</sup> the court's acknowledgement of the difficulty that may arise in weighing up different factors is to be applauded. In addition to this acknowledgement, the judgment provides an objective yardstick to measure these factors against, namely, 'operational requirements'.<sup>277</sup>

In *Transnet*,<sup>278</sup> the fact that the employee had a clean disciplinary record did not assist him in terms of sanction. The fact that the employee had not owned up to his wrongdoing and had invented a false defence rendered his conduct dishonest and had broken the relationship of trust despite the employee's lack of prior offences. However it is interesting that in this instance, the employees clean disciplinary record was used as evidence that counted against his defence of kleptomania. Molahlehi J held that:

'In my judgment, had the arbitrator appreciated the issue before him, he ought to have found that it would be unfair to expect the applicant to retain an employee, who when initially asked to be searched, resisted, and once found in possession of the copper he sought to blame someone else. He later seeks to suggest that he was entitled to remove the copper because it was scrap. Further, when he realised that his excuse is unsustainable as an afterthought, he resorted to concoct a defence in the form of kleptomania. It to be noted that there is no evidence that the respondent has in the many years that he has been employed by the

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<sup>275</sup> Para 33.

<sup>276</sup> Supra note 141.

<sup>277</sup> Ibid.

<sup>278</sup> Supra note 266.



applicant ever been accused of theft. There is also no evidence that the respondent has ever been charged outside the workplace with theft.<sup>279</sup>

### *8.1.3. Personal Circumstances*

The Guide does not provide any guidance regarding the factor of personal circumstances except to say that they must be work related. Grogan states that ‘there has been little attempt to explain which personal circumstances may be relevant, and how much weight should be accorded to them if any’.<sup>280</sup> He contends that it is ‘doubtful whether employees will be able to persuade judges or arbitrators that a dismissal that is otherwise fair is unfair solely because they are sole breadwinners or advanced in years... Excessive leniency on the basis of personal considerations might also expose the employer to attack on the grounds of inconsistency’.<sup>281</sup>

### *8.2. Nature of the Job*

The Guide recognises the nature of a job as a relevant factor in terms of a situation ‘whereby any further infraction makes the risk of continued employment intolerable’.<sup>282</sup> The job description of the employee and the position of trust that he is placed in, was briefly discussed under the subheading ‘Aggravating Factors’.<sup>283</sup> The issue of tolerability and risk will be discussed further in chapter 10 of this research paper.

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<sup>279</sup> Para 36.

<sup>280</sup> Grogan op cit note 16 at 290.

<sup>281</sup> Ibid.

<sup>282</sup> Paragraph 107.

<sup>283</sup> See Chapter 6.1.2.

## **CHAPTER 9:**

### **THE CONSIDERATION OF PROGRESSIVE DISCIPLINE WHEN IMPOSING SANCTION FOR MISCONDUCT**

As seen in the preceding chapter, the examination of an employee's disciplinary record will indicate whether progressive discipline may or may not be utilised. Regarding the origin of the concept of progressive discipline, a research paper into progressive discipline in the Australian workplace, conducted by John Chelliah and Pitsis Tyrone, discusses this form of discipline in the Australian labour law jurisdiction.<sup>284</sup>

According to the paper, progressive discipline originated in the United States of America around the 1930's. It was a reaction to trade union demands that summary terminations by employers should be abolished and a progressive system of discipline be introduced. This was requested in the hope that this innovative system would prevent employees from losing their jobs without first knowing that there was real risk of dismissal.<sup>285</sup>

To elaborate, the inception of progressive discipline was a reaction to the problem of dismissal of employees without being given adequate warning that their behaviour warranted dismissal and secondly that should their conduct not be rectified, dismissal would be justified. The introduction of this approach did not seek to take away any discretion from the employer to set his own workplace rules or standards but merely to ensure that dismissal, should it be warranted, be imposed with caution and proper communication. This caution is in line with the doctrine of fairness, which dictates that parties are made fully aware of the consequences of their actions.

With regard to what progressive discipline actually entails, it is stated that:

‘Progressive discipline is made up of a procedure that deals with the behaviour of an employee who does not meet the requirements of code of conduct set by the employer. This system is intended to assist an employee improve his or her work behaviour by giving him/her the necessary feedback and support to adjust to workplace requirements, rather than simply

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<sup>284</sup> J Chelliah & P Tyrone ‘Power Sharing in Progressive Discipline: New Rules of Engagement Arising from an Australian Perspective’ (2010) 6 *CMR* 91.

<sup>285</sup> Chelliah & Tyrone op cit note 284 at 94.

face unemployment at the whim of an employer. Employers are generally expected to give their employees an opportunity to remedy their shortcomings in performance or conduct prior to termination. Failure to do so would place employers at risk of litigation of the terminations being deemed unfair dismissals by independent labour arbitrators (Anonymous, 1999).<sup>286</sup>

Progressive discipline goes further than simply communicating the consequences of misconduct in the workplace; constant appraisal of the employee's performance or conduct is required and the employer is obliged to apply his or her mind to the issue, communicate and provide the employee with the necessary tools required to remedy the situation. What this seems to imply is that employers themselves should possess the necessary training to problem solve and communicate efficiently in order to give effect to this type of discipline.

The paper suggests that progressive denotes 'incremental' discipline, in that the sanctions imposed for the misconduct become 'progressively harsher if the employee fails to meet the expectations of the employer'.<sup>287</sup>

The fact that punishment becomes increasingly severe results in two things. The first is that employee is given ample time to acknowledge his wrongdoing and rectify it if possible. Secondly an employer is not obliged to continue to employ an employee who deliberately and repeatedly fails to meet its expectations.

In South African law, the employer has a right to discipline employees and to compile its own disciplinary code. If an internal disciplinary code does not exist then the Code of Good Practice will constitute the minimum guidelines<sup>288</sup> for discipline in the workplace.<sup>289</sup>

Item 3 (2) of the Code states that '[e]fforts should be made to correct the employee's behaviour through a system of progressive or graduated disciplinary measures'. It has been suggested that the concept of correct or progressive discipline 'denotes that an employer should attempt to desist from resorting to dismissal as a first option'.<sup>290</sup>

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<sup>286</sup> Chelliah and Tyrone op cit note 284 at 93.

<sup>287</sup> Ibid.

<sup>288</sup> Item 3 (1) of the Code.

<sup>289</sup> Le Roux & Strydom op cit note 14 at 114.

<sup>290</sup> Le Roux & Strydom op cit note 14 at 117.

In terms of the Code of Good Practice: Dismissals:<sup>291</sup>

‘Formal Procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short at dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.’<sup>292</sup>

The CCMA Guidelines point out that the Code, in line with the concept of progressive discipline, ‘distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively’.<sup>293</sup> The guidelines furthermore identify the types of misconduct that the Code has deemed serious misconduct (for example sexual harassment) and which ‘may justify dismissal as a result of a single contravention’.<sup>294</sup>

The relevance of ‘progressive discipline’ is highlighted in *Sidumo*<sup>295</sup> in which the Constitutional Court held that ‘the absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered’.<sup>296</sup> The court proceeded to state that, in light of these factors, ‘there was no indication that the principle of progressive discipline will not assist to adjust the employee’s *attitude and efficiency* [emphasis added]’.<sup>297</sup> It is thus to be inferred that the aim of progressive discipline is to correct a flaw, deficiency or error on the part of the employee’s outlook and performance in the workplace.

The court in *Theewaterskloof Municipality*<sup>298</sup> held that:

‘[P]rogressive discipline is premised on a corrective purpose and outcome. If no correction is likely to be obtained or if the employment relationship is in any event irretrievably broken down, the scope for graduated discipline will likewise fall away. The facts of a particular case will indicate whether or not it should be applied.’<sup>299</sup>

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<sup>291</sup> Item 3(3) of the Code.

<sup>292</sup> Item 3 (3) of the Code.

<sup>293</sup> Paragraph 97 of the Guidelines.

<sup>294</sup> Ibid.

<sup>295</sup> Supra note 8.

<sup>296</sup> Para 117.

<sup>297</sup> Ibid.

<sup>298</sup> Supra note 141.

<sup>299</sup> Para 36.

The application of progressive discipline will be determined on a case by case basis, with the court considering whether the damaged relationship of trust can be repaired. Thus the possibility that the relationship of trust can be mended is a precondition for the application of progressive discipline. The court in *Theeswaterkloof Municipality*<sup>300</sup> further held that:

‘Where an employee refuses to demonstrate any acceptance of wrongdoing, indicates no degree whatsoever of remorse, makes no move to correct what he has done and stands firm with an attitude of opposition towards the employer, then such an employee through his own conduct undercuts the applicability of corrective or progressive discipline.’<sup>301</sup>

The Labour Court, in considering the reasoning of the commissioner in *Cash Paymaster Services Northwest (Pty) Ltd v CCMA & Others*,<sup>302</sup> found that it was clear that the employee should have been made aware of all the consequences that pertained to his conduct. The court noted that:

‘As correctly submitted by Mr Grudlingh, in this instance the applicant was untruthful in handing in an assignment, which related to a training programme organized by the respondent. He should have been put on terms and advised of the consequences of his not fulfilling the training modules designed for his advancement. It is unfortunate that this was clouded with his not opening the [deport] timeously (sic). An appropriate sanction would be a written warning.’<sup>303</sup>

To impose a drastic sanction of dismissal, without the employee having ever known that dismissal was in fact a possibility, goes against the concept of progressive discipline. Where an employee, although found guilty of misconduct, has the potential to be rehabilitated, the introduction of progressive discipline within our law and the concept of fairness dictate that he or she be given a second chance. In addition, in light of the harsh consequences of dismissal, the fact that the relationship of trust has not been completely severed must be taken into account when an employer or arbitrator contemplates dismissal as a sanction.

The court in *Timothy*<sup>304</sup> embraced a stricter approach to the application of progressive discipline in the face of flagrant dishonesty. It was held that:

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<sup>300</sup> Supra note 141.

<sup>301</sup> Para 37.

<sup>302</sup> *Cash Paymaster Services Northwest (Pty) Ltd v CCMA and Others* 30 ILJ 1587 (LC).

<sup>303</sup> Para 11.

<sup>304</sup> Supra note 200.

‘The decision-maker who has to decide whether an arbitration or court must be cautious, before simply assuming that disciplinary sanctions must always and invariably be based on a progressive system. In other words, in a case such as the present, where there is an egregious act of dishonesty, and I use that word advisably because, as I have already indicated appellant’s conduct throughout this dispute constituted a perpetuation of the dishonesty, by way of a denial, conversely complete a lack of acknowledgement of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction.’<sup>305</sup>

The court goes on to state that:

‘Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer’s organisation, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. In these circumstances, where there is nothing more than an aggressive denial and a perpetuation of dishonesty, it is extremely difficult to justify a progressive sanction...’<sup>306</sup>

The court points out that not every case will allow for progressive discipline to be imposed, especially where there is a lack of remorse or dishonesty. The only reason why these factors are important is that, firstly it is a strong indication of whether the relationship of trust has been breached and secondly progressive discipline can only be applied if there is possibility that the employee can be rehabilitated, if not, the employer is not obliged to engage in graduated discipline.

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<sup>305</sup> At 835.

<sup>306</sup> Ibid.

## CHAPTER 10:

### TOLERABILITY AND THE RELATIONSHIP OF TRUST

This chapter seeks to elaborate on the impact of misconduct on the ‘relationship of trust’, not in isolation but in the acknowledgment that it relates to all the factors the commissioner is obliged to take into consideration when determining the fairness of sanction.

According to item 3 (4) of the Code of Good Practice, ‘gross dishonesty’ is listed as an example of serious misconduct which may warrant dismissal. The dismissal may be rendered appropriate if the ‘gravity of the offence is such as to render the continued employment relationship intolerable’.<sup>307</sup>

The CCMA Guidelines also refer to the issue of tolerability in considering the nature of the employee’s job, specifically with regard to whether ‘further infractions’<sup>308</sup> by the employee may be too great a risk for the employer to take in the circumstances.

Dishonesty may ‘manifest’<sup>309</sup> itself in various ways; it may take the form of theft, fraud or non-disclosure. That gross dishonesty is generally accepted as warranting dismissal does not obviate the need to establish the appropriateness of sanction in each case, general assumptions will not suffice. There are various factors that the courts take into account when dealing with instances of dishonesty in an employment relationship. It is thus necessary to re-examine how the courts have addressed the issue of dishonesty in the past.

In *Central News Agency (Pty) Ltd v Commercial Catering and Allied Workers Union and Another*,<sup>310</sup> the employee had stolen five films valued at R50, 00 in total from the employer. De Klerk J held that:

‘Appellant terminated its contractual relationship with second respondent as it was entitled to do because of the breach by second respondent of a basic tacit term of the contract of employment, i.e. that the employee would not steal from the employer and that the employee would not breach the position of trust in which he had been placed by being allowed into

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<sup>307</sup> Item 3 (4) of the Code.

<sup>308</sup> Paragraph 107 of the Guidelines.

<sup>309</sup> Van Niekerk op cit 240 at 239.

<sup>310</sup> *Central News Agency (Pty) Ltd v Commercial Catering and Allied Workers Union and Another* (1991) 12 ILJ 340 (LAC).

appellant's store room. In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee.<sup>311</sup>

What can be gathered from this judgment is that theft, and inherent dishonesty associated with theft, are entirely destructive of the relationship of trust. Consequently once the basis of the relationship has been severely damaged then dismissal *will* be justified.

In *Anglo American farms t/a Boschendal Restaurant*,<sup>312</sup> the employee was accused of the 'misappropriation' of a can of Fanta. The court in dealing with the substantive fairness of the matter held that:

'[T]he relationship between the employer and the employee is of such a nature that, for it to be healthy, the employer must, of necessity, be confident that he can trust the employee not to steal his stock. If that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer... [T]he correct test to apply in the circumstances of theft is whether or not the employee's actions had the effect of rendering the continuation of the relationship of the employer and employee intolerable.'<sup>313</sup>

It is therefore not the act of theft itself that renders the relationship intolerable but the effect it has in damaging the relationship of trust. Therefore all acts of misconduct that are likely to have the same effect on the relationship of trust will in the same way justify dismissal.

Almost a decade later, the approach of the current Labour Appeal Court seemed to be consistent with the above approach. In *Toyota SA Motors*<sup>314</sup> the court specifically considered gross dishonesty and mitigating factors. Zondo AJP held that:

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<sup>311</sup> At 844.

<sup>312</sup> Supra note 191.

<sup>313</sup> At 590 & 591.

<sup>314</sup> Supra note 75.



‘Although a long period of service will usually be a mitigating factor where an employee is guilty of misconduct; there are certain acts of misconduct which are of such serious nature that no length of service can save the guilty employee from dismissal. One such form of misconduct is gross dishonesty.’<sup>315</sup>

The judge went on to state that:

‘I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying that dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal inter alia, is an appropriate and fair sanction.’<sup>316</sup>

In *De Beers*,<sup>317</sup> Conradie JA dealt with the relationship of trust and stated that:

‘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 had not been broken down. Of course, a commissioner is not bound to agree with an employer’s assessment of damage done to the relationship of trust between it and the delinquent but in the case of serious fraud, only unusual circumstances would warrant a conclusion that it could be mended.’<sup>318</sup>

What becomes a decisive factor is the employers claim that the relationship of trust has indeed been irreparably harmed. There are instances in which an employee may commit a serious act of dishonesty yet the employer may still feel it is capable of trusting that employee. The employer’s appraisal of the situation must be taken into consideration. Therefore the presence of dishonesty in itself is not enough to suggest the relationship of trust has completely disintegrated.

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<sup>315</sup> Para 15.

<sup>316</sup> Para 16. While asserting that gross dishonesty will warrant dismissal, the court fails to make a distinction between dishonesty and gross dishonesty.

<sup>317</sup> Supra note 82.

<sup>318</sup> Para 17.

The court in *De Beers*<sup>319</sup> found that:

‘The seriousness of dishonesty – i.e. whether it can be stigmatised as gross or not, depends not only on the act of dishonesty itself but the way in which it impacts on the employer’s business. The employees in casu were not dismissed in order to punish them. They were dismissed because the employer was not prepared to run the risk of employing them any longer once they had been shown to be dishonest. Long service, is of course, not entirely irrelevant in determining whether an employee is likely to repeat his misdemeanour... [b]ut the risk factor is paramount.’<sup>320</sup>

Therefore another element that must be considered is the effect of the offence on the employer’s business. The greater the damage, the more likely the act of dishonesty can be characterized as gross. This is an objective enquiry that requires the arbitrator or the employer to objectively assess any existing damage or the potential consequences of that misconduct being repeated in the future.

According to *Hulett*,<sup>321</sup> ‘there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship’.<sup>322</sup> A similar approach is evident in *Standard Bank of SA v CCMA and Others*<sup>323</sup> where it was held that:

‘It is one of the fundamentals of the employment relationship that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it.

The existence of the duty upon an employee to act with good faith towards his or her employer and to serve honestly and faithfully is one of long standing in the common law. It has been regularly and strongly approved by our courts in relation to the unfair labour practice jurisdiction under the previous Act 28 of 1956. It has been no less strongly re-affirmed in decisions dealing with the current Act.’<sup>324</sup>

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<sup>319</sup> Supra note 82.

<sup>320</sup> Para 24.

<sup>321</sup> Supra note 205.

<sup>322</sup> Para 42.

<sup>323</sup> *Standard Bank of SA v CCMA and Others* (1998) ILJ 903(LC).

<sup>324</sup> Para 38 & 39.

In *Hoch v Mustek Electronics (Pty) Ltd*<sup>325</sup> the court held that:

‘It is for the employer to set standards of conduct for its employees. As long as these standards are reasonable the court will not interfere (see the requirements of item 7 of schedule 8 to the Act). It is also the prerogative of the employer to decide on a proper sanction once these standards have been transgressed. This is especially so when there is a personal and unique relationship of trust which has been broken by the dishonest misconduct of the employee.’<sup>326</sup>

The court found it necessary to set dishonesty apart from other forms of misconduct. In addition the court pointed out that because the employment relationship is a personal one, it is for the employer to consider the consequence of the breach of such trust.

In *Mutual Construction Co Tvl (Pty) Ltd*<sup>327</sup> the court approached the employee’s misconduct by considering the ‘totality of the circumstances’.<sup>328</sup> The court, in taking into account the employee’s position of trust, found that ‘this role played by the third respondent constituted a crucial and fundamental operational requirement in the appellant’s business’.<sup>329</sup>

Furthermore the court found that the misconduct involved ‘gross dishonesty and fraud which was bound to cause harm and prejudice to the appellant’s business operation’.<sup>330</sup> In summation the court held that to continue to employ the employee ‘would have been severely detrimental to the appellant’s operational requirements and therefore inappropriate’;<sup>331</sup> and that the effect of the misconduct was that it rendered any continuation of the employment relationship ‘intolerable’.<sup>332</sup>

It is apparent that the ‘relationship of trust’ is viewed through the prism of the employer’s operational requirements. Thus if the employers operational requirements justify a dismissal

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<sup>325</sup> *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC).

<sup>326</sup> Para 41 & 42.

<sup>327</sup> Supra note 203.

<sup>328</sup> Para 36.

<sup>329</sup> Ibid.

<sup>330</sup> Para 37.

<sup>331</sup> Para 38.

<sup>332</sup> Para 38.

it would at the same time mean that the prospect of the continuation of the employment relationship has been compromised.

In *Miyambo v CCMA & Others*<sup>333</sup> the court found it necessary to ‘reflect on the role that trust plays in the employment relationship’.<sup>334</sup> The court found that the risk that an enterprise undertakes is dependent on its ability to trust its employees.<sup>335</sup> Thus ‘accumulation of individual breaches of trust has significant economic repercussions’.<sup>336</sup>

The decision of *Transnet*<sup>337</sup> is significant in that it illustrates the potential for commissioners to sometimes confuse the issues to be dealt with in determining the appropriateness of sanction. Whereas the commissioner ought to focus on the effect of dishonesty on the relationship of trust, the commissioner in this instance focused on the non-problematic relationship the employee had enjoyed with his supervisor in the past.<sup>338</sup>

‘In relation to the issue of the breakdown of trust, the arbitrator misconceived this issue. The facts before him had very little to do with the working relationship between the respondent and his supervisor. The issue before the arbitrator concerned the dishonest conduct of the respondent. Because of misconceiving the issue, the Commissioner failed to appreciate that dishonesty is the core to the trust relationship.’<sup>339</sup>

The significance of the impact of misconduct on the relationship of trust was highlighted in the discussion of aggravating and mitigating factors, it became relevant in considering the reasons why an employer should desist from imposing dismissal and it became central when dealing with when to apply progressive discipline. As has been argued in preceding chapters, the consideration of the relationship of trust could afford the employee protection from an employer who simply contends that it is the interest of his business to dismiss the employee.

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<sup>333</sup> *Miyambo v CCMA & Others* (2010) 31 ILJ 2031 (LAC).

<sup>334</sup> Para 13.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Supra note 266.

<sup>338</sup> Para 11, The arbitrator found that the relationship of trust had not broken down because the respondent’s supervisor testified at the hearing that the respondent was helpful and that he never had any problem with him in the past.

<sup>339</sup> Para 35.

In assessing the impact of misconduct on the relationship of trust, employers and commissioners must consider the personal circumstances of the employee, his length of service and the presence of remorse; if all of these considerations point to the fact that the relationship of trust has not irreparably broken down then dismissal may not be appropriate. On the other hand, if the employer contends that the relationship of trust has broken down and in light of his operational requirements, he cannot afford the risk of continuing to employ the offending employee; the employer must *prove* the breakdown in the relationship of trust in order for the dismissal to be upheld.

In *Edcon Ltd v Pillemer and Others*<sup>340</sup> the dismissal was alleged to have been based in the fact that the employee's dishonesty had destroyed the relationship of trust. At the CCMA, the commissioner found that 'for a decision to dismiss an employee such as Reddy with track record of 43 years unblemished employment the misconduct had to be gross and evidence was necessary to show that the relationship of trust had in fact been destroyed'.<sup>341</sup> The commissioner found that no direct evidence was led by Edcon to show that the relationship of trust had broken down.

The Supreme Court of Appeal court found that the determinant issue is whether the trust relationship between Edcon and Reddy had been shown in arbitration to have been destroyed. It was held that in determining the reasonableness of an award, courts have to make a value judgment as to whether the commissioner's conclusion is rationally connected to the reasons for this conclusion taking into account the material before the commissioner. That is the correct approach endorsed in the *Sidumo*<sup>342</sup> Constitutional Court judgement. Therefore the court held that Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship cannot be criticized. Her conclusion is rationally connected to the reasons she gave for it.<sup>343</sup>

Thus a 'balanced approach' would incorporate a two prong test; the first leg of the test dealing with the relationship of trust and the employee's subjective circumstances; the second leg of the test would consider the employee subjective circumstances in light of the

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<sup>340</sup> *Edcon Ltd v Pillemer and Others* (2008) 29 ILJ 2581 (LAC).

<sup>341</sup> Para 9.

<sup>342</sup> Supra note 8.

<sup>343</sup> Para 18 - 23.

employer's objective business needs. If the employer can prove the breakdown in trust on objective grounds, then case law reveals that the commissioner ought not to override the employer's decision to dismiss. Hence in applying a balanced approach that deals with the competing interests of the employer and the employee, the scope of the commissioner to exceed his authority is limited to the factual, legal and objective test that cannot be easily undermined by his 'own sense of fairness'. The inherent objective features of such a test will strengthen the enquiry into the appropriateness of sanction.

## CHAPTER 11:

### CONCLUSION

According to the Code of Good Practice: Dismissal, '[A]ny person determining whether a dismissal is unfair should consider whether the dismissal is an appropriate sanction'.<sup>344</sup>

There are two considerations that apply when contemplating the above enquiry: firstly, the Code of Good Practice does not attract the weight of law and secondly, the concept of 'appropriateness' is so varying that it may attract a myriad of interpretations.

In terms of the 'deferential approach' developed by South African courts,<sup>345</sup> employees could be 'fairly dismissed' insofar as a commissioner deemed the decision to fall within a 'range of reasonable options' available to the 'reasonable employer'. The employer's right to dismiss was consequently beyond impeachment as long as it did not amount to unreasonableness.

In light of the new constitutional dispensation, which echoes the fundamental right to fair labour practices, the 'deferential approach' which failed to take into account the employees perspective falls short of the Constitutional directive of fair labour practices for both the employer and the employee.<sup>346</sup> In *Sidumo*,<sup>347</sup> the 'deferential approach' was replaced by the 'reasonable commissioner' test which considers the matter exclusively through the viewpoint of a reasonable commissioner's sense of fairness. Whilst the demise of the 'deferential approach' is to be hailed, there seems to be inherent shortcomings evident in the 'reasonable commissioner' test as well.

The authority bestowed upon the commissioner to determine the fairness of the sanction according to his 'own sense of fairness' and 'value judgment', may lead to a deferential approach towards the commissioner's perspective on the matter. Whilst the courts have extrapolated factors to be considered and balanced by the commissioner in determining the fairness of a sanction; the fact that the ultimate decision is based solely on the commissioner's subjective sense of fairness may potentially undermine the entire enquiry.

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<sup>344</sup> Item 7 of the Code.

<sup>345</sup> See *Computicket v Marcus No and Others* (1999) 20 ILJ 342 (LC); *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC); *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1999) 20 ILJ 1701 (LAC); *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 21 ILJ 1051 (LAC).

<sup>346</sup> Section 23(1) of the Constitution.

<sup>347</sup> *Supra* note 8.

Many courts have acknowledged the inconsistency and uncertainty that may arise from such an approach but have dismissed it under the guise of ‘legislative intention’.

The legislature and the judiciary have listed the factors that must be considered by the commissioner in his capacity to determine the fairness of sanction; some of these factors have been codified in the recently handed down CCMA Guidelines. Many of these factors tie in with the ‘relationship of trust’ which our courts have repeatedly identified as being the pinnacle of the employment relationship. In addition the courts, against the backdrop of the *Sidumo*<sup>348</sup> judgment, have identified the employers ‘operational requirements’ as a necessary and objective factor to be taken into account when determining the fairness of sanction. Thus the operational requirements and the relationship of trust are crucial factors to be considered when adopting a ‘balanced approach’ to the competing interests of the employer and employee.

The balancing of the countervailing interests of the employer and employee can be conducted in light of two crucial issues: the employer’s objective operational requirements and the subjective circumstances of the contravention that may or may not have the effect of repairing the damaged relationship of trust.

The ‘balanced approach’ would not require the commissioner’s value judgment to be used without constraint but would confine the enquiry to whether the employer can operationally afford to retain an offending employee. If not, the employer would still have to prove, in addition, that the relationship of trust cannot be repaired. In considering whether the relationship of trust has been destroyed, the commissioner must consider the subjective circumstances such as aggravating and mitigating factors; it is in this regard that a commissioner may pronounce on the fairness of the dismissal, based exclusively on the facts and evidence before him.

In conclusion it is trite that the ‘reasonable employer’ test applied in the United Kingdom is excessively deferential to the employer’s perspective on the appropriateness of sanction. The ‘deferential approach’ adopted in South Africa, which advocated a ‘band of reasonableness’, was not as excessively deferential as the English approach nevertheless it failed to strike a balance between the interests of the employer and employee. Finally the ‘reasonable commissioner’ test, as developed by the Constitutional Court in *Sidumo*, advocates the

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<sup>348</sup> Supra note 8.



consideration of both the employee and the employer's conflicting interests, nonetheless it provides for potential abuse by commissioners interpreting their authority and role according to their 'own sense of fairness'; and could possibly lead to an excessively deferential approach towards the decisions of commissioners. Therefore regard must be had to this potential for abuse as well as the limited powers of the courts to review arbitration awards. In doing so, a balanced approach ought to limit the power of commissioners to determine the appropriateness of sanction according to their own perception of fairness and rather oblige commissioners to consider the concept of fairness in light of the interests of both the employer and the employee in the specific circumstances.

