

An Employer's Burden of Proof : The Breakdown of Trust

During a disciplinary **and** Arbitration hearing there are a number of factors that an employer needs to prove.

At the disciplinary hearing it is necessary for the employer to show proof, on a balance of probability, that the employee committed the act of misconduct for which he or she has been charged. This is essential prior to finding the employee guilty and deciding upon a suitable punishment. By the same token the employer also needs to prove that the desired punishment is justified ie "the punishment must fit the crime".

If during a disciplinary hearing an employee is found guilty of a serious transgression of the employer's rules, the employer must be able to justify its reasons if it is decided to dismiss the employee. Certain factors, apart from aggravating and mitigating circumstances, need to be taken into account if such a decision is to be taken. These include -

- Whether it is proved that the employee breached the rule;
- Was the employee aware of the rule;
- Is the rule reasonable;
- Could the employee have been expected to know of the rule;
- Could the employee have complied with the rule;
- The effect of the employee's misconduct on the trust relationship between the employer and employee.

The above factors will invariably have a bearing on the finding of guilt and the punishment to be applied. However, a very important facet to be considered is how an employee's actions will affect the future of the employment relationship. This poses the question of whether or not the employer can again trust the employee to perform his duties in the best interests of the employer's business. Simply put, this means that the employer, prior to dismissing the employee, will have to consider whether the employer/employee trust relationship has broken down irreparably.

It must be remembered that an employment relationship is essentially one where the employer and employee enter into a contractual arrangement, which could ideally be described as a "master/servant" relationship. In such a relationship the existence of the trust factor is of vital importance and cannot be ignored.

If the dismissal is referred to Arbitration as a dispute, the employee is required in terms of Section 192 of the Labour Relations Act to prove the existence of

the dismissal. Once the employee has succeeded in proving the dismissal, the employer is **then** required to prove that the dismissal was done in accordance with fair procedure, which includes the above factors. Here the importance of the employer proving the irreparable breakdown of trust becomes vital.

The importance of this issue was argued in the matter of **Edcon Ltd v B Pillemer NO & Others (2007) 16 LC**. In this case an employee was charged with misconduct, whereas she was dismissed after having pleaded guilty. The employee declared an unfair dismissal dispute, and referred it to the CCMA. The CCMA Commissioner found that the employee's dismissal was substantively unfair and directed that the employee be re-instated. The employer disagreed with this finding and took the matter on review to the Labour Court.

On review Judge Pillay agreed with the Arbitrator's findings, dismissed the matter with costs and had the following to say –

"The Arbitrator took into account all the circumstances, including her initial dishonesty, and came to the conclusion that the employment relationship had not broken down. There is no reason why I should disagree with that conclusion of the Arbitrator. Her reasoning is manifestly justifiable on the basis of the information before her. She considered the reasons for the dishonesty and rescued the third respondent from dismissal".

Later in the same judgment, Judge Pillay also remarked: *"The CCMA is not a rubber stamp, as I have said elsewhere before, for decisions of the employer. Justice is not justice unless it is tempered with mercy"*. This is indeed a rather interesting statement.

The employer took the matter on appeal, and the again the matter was dismissed with costs. The Appeal Judge found that a sanction of dismissal in the circumstances of this case had not been appropriate as there had been no evidence led by the employer to show that the trust relationship had been destroyed; and neither had the employer attached sufficient importance to mitigating factors in favour of the employee.

The decisions of the two Courts clearly show that there is an onus upon employers to ensure that there are sufficient reasons for dismissing an employee, one of which is proving that the employment relationship has broken down completely.

In view of the above, members are encouraged to approach their Regional Director for assistance when contemplating disciplinary steps which could result in a dismissal in order to ensure that the process is correctly dealt with.

REGIONAL DIRECTOR
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