

The impact of dishonesty on employment: *Edcon*, prior and beyond

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OPSOMMING

Die impak van oneerlikheid op die diensverhouding: Voor en na *Edcon*

Hierdie bydrae handel met die ontslag van werknemers weens oneerlike gedrag in die lig van toepaslike wetgewing en hofbeslissings. Die klem val op die voortgesette toepaslikheid van die toets wat in *Edcon v Pillemer* neergelê is, naamlik dat die werkgever uitdruklik getuienis moet lei ten opsigte van die ondraaglikheid van die voortgesette diensverhouding. Die presedente wat in vroeëre beslissings geskep is, word noukeurig ondersoek. 'n Belangrike beginsel is dat eerlikheid as die kern van die diensverhouding beskou is. Oneerlike gedrag het tot die vernietiging van die vertrouensverhouding gelei wat die diensverhouding ondraaglik gemaak het. Dus is versoenbaarheid as implisiet tot die diensverhouding beskou. Die wenslikheid van die benaderingsverskuiwing wat deur *Edcon* teweeggebring is, word krities geëvalueer in die lig van die beslissings in daaropvolgende sake. Dié beslissings toon 'n terugkeer na die beginsels waarop die hofe voor *Edcon* staatgemaak het. Dit word as 'n positiewe verwickeling beskou en argumente word geopper wat die voortgesette belang van die oorspronklike beginsels ondersteun.

1 INTRODUCTION

When considering the constitutionally entrenched right to fair labour practices,¹ which is given statutory effect in terms of section 188 of the Labour Relations Act,² it is evident that employees are afforded ample protection against unfair dismissal.³

Nonetheless, it is trite that employers have the right to dismiss employees on the basis of three grounds, one such ground being the conduct of an employee. Notwithstanding this, the *Code of good practice: Dismissal* highlights that it is generally inappropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty, assault and gross

¹ S 23(1) of the Constitution of the Republic of South Africa, 1996.

² Labour Relations Act 66 of 1995, hereafter "LRA".

³ It is noteworthy that the LRA and the adjunct Schedule 8 provide protection against unfair dismissal to all employees. S 185 of the LRA states that *every* employee has the right not to be unfairly dismissed. This amounts to greater protection than that provided in countries such as the UK, where the right to unfair dismissal is subject to the qualifying period of employment. See s 108 of the Employment Rights Act 16 of 1996. This qualifying period has been amended from 1 to 2 years by Order 2012 no 989 "The unfair dismissal and statement of reasons for dismissal" cl 3.

insubordination.⁴ It is important to emphasise that the well-known factors that must be considered when pronouncing on the fairness of a dismissal include the appropriateness of the sanction of dismissal for the contravention of the rule or standard.⁵

Earlier decisions⁶ endorsed the notion that dishonest conduct implies a breakdown in the trust relationship. However, in *Edcon v Pillemer*⁷ there was a considerable shift from this approach. The Supreme Court of Appeal and the Labour Appeal Court endorsed the commissioner's decision that employers are required to provide explicit evidence to this effect. However, it appears from recent decisions that the tide may once again be turning.

This contribution provides a critical assessment of the development of the law before and after *Edcon*, with a view to providing insight into the current state of affairs and recommendations on the way forward.

2 THE COURTS' APPROACH PRIOR TO *EDCON*

2.1 General

Tackling the notion of the dishonest employee is an age-old problem that precedes our current labour law dispensation. As early as the 1940s, the court in *Gerry Bouwer Motors (Pty) Ltd v Preller*⁸ adopted the approach that dishonest conduct warrants dismissal. The Labour Court continued to endorse this approach after the adoption of the Constitution and the enactment of the LRA. It held that:

“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.”⁹

Dishonesty is generally regarded as behaviour that is untrustworthy, deceitful or insincere and intended to mislead another person. As indicated by Mischke,¹⁰ trust becomes an issue in dishonesty-related misconduct, such as theft, unauthorised possession, fraud or misrepresentation. In cases such as these, the employee's truthfulness and honesty is placed in question, and, clearly, an employer would indeed be hard-pressed to place trust in an employee who is guilty of theft or fraud.

4 Sch 8 cl 3(4).

5 Sch 8 cl 7(b)(iv).

6 Such as *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

7 *Edcon Ltd v Pillemer* [2010] 1 BLLR 1 (SCA).

8 1940 TPD 130. The court continued: “I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him” (133).

9 *Standard Bank of SA Ltd v CCMA* (1998) 19 ILJ 903 (LC) para 39.

10 Mischke “The breakdown of trust: Operational perspectives on the appropriate sanction” (2010) 19 CLL 71.

2.2 Precedents

In a number of cases, the courts emphasised the necessity of a relationship of mutual trust and confidence in the employment relationship and upheld dismissals for dishonesty, even when relatively small amounts were involved.¹¹ In *Anglo American Farms t/a Boschendal Restaurant*,¹² an employee was dismissed for stealing a tin of Fanta. In *Rustenberg Platinum Mines Ltd v National Union of Mineworkers*,¹³ an employee who worked as a cleaner in the kitchen was dismissed for stealing cooked meatballs, while an assistant baker in *Shoprite Checkers (Pty) Ltd v CCMA*¹⁴ was dismissed for eating three helpings of pap and a piece of bread. There have also been dismissals for the theft of rubber tape to the value of approximately R30,¹⁵ as well as a cosmetic tester.¹⁶ Despite the relatively low value of the items in question, the common trend in the decisions of the Labour Court and the Labour Appeal Court in these cases is that a high premium is placed on honesty and that violation thereof will not be condoned. Similarly, dismissal was found to be fair in a number of cases concerning misrepresentation or fraud.¹⁷

2.3 Established principles

The most important principles stemming from the era preceding *Edcon* are:

2.3.1 Honesty is sacrosanct to the employment relationship

The courts have held that one of the fundamentals of the employment relationship is that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty goes to the heart of the relationship and is destructive of it.¹⁸ In *Anglo American Farms*, the court held that in order for a relationship between employer and employee to be healthy, the employer must of necessity be confident that he can trust the employee not to

11 Van Niekerk and Smit *Law@work* (2015) 277–278.

12 (1992) 13 *ILJ* 573 (LAC).

13 (2001) 22 *ILJ* 658 (LAC).

14 (2008) 29 *ILJ* 2581 (LAC).

15 *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 BLLR 995 (LC).

16 *Kalik v Truworths (Gateway)* [2008] 1 BLLR 45 (LC).

17 In *Standard Bank of SA Ltd v CCMA* (1998) 19 *ILJ* 903 (LC) the branch administrator reflected in the staff attendance register that she was present throughout the previous day, despite the fact that she was on leave. She further put in a claim for two hours' overtime on that day. In *Hoch v Mustek Electronics (Pty) Ltd* [1999] 12 BLLR 1287 (LC), the employee misrepresented her qualifications. In *De Beers Consolidated Mines Ltd v CCMA* [2000] 9 BLLR 995 (LAC) two truck drivers were found guilty of fraud in that they claimed overtime pay for nine hours when, in fact, they had not worked during that time. In *Toyota South Africa Motors (Pty) Ltd v Radebe* [2000] 3 BLLR 243 (LAC) the employee was found guilty of fraudulent and dishonest behaviour as, after being involved in an accident, he drove the vehicle to a parking area and abandoned it. On the same day, he reported to the police that the car had been hi-jacked. In *Nel v Transnet Bargaining Council* [2010] 1 BLLR 61 (LC) the employee was dismissed after taking a trip to a golf estate paid for in full by the managing director of a Transnet customer. In *Mutual Construction Company Tvl (Pty) Ltd v Ntombela* [2010] 5 BLLR 513 (LAC) an administrative clerk whose duties included the recording of hours worked by all employees (including himself) for the purpose of calculating payment due to employees, recorded that he had worked a certain number of hours on certain days, whereas he had not worked those hours.

18 Fn 9 above para 38.

steal.¹⁹ The courts have appreciated the importance of the harm and prejudice caused to the employer's business operations where misconduct involved gross dishonesty and fraud.²⁰

2.3.2 Marginal role of mitigating factors

It is evident that while the courts have taken mitigating factors into consideration in cases of dishonest conduct, it does not necessarily obviate the decision to dismiss. In *Hoch v Mustek Electronics*²¹ the court found that the employer was justified to consider the employee's dishonesty as serious enough to have irreparably damaged the unique trust relationship. This was despite the fact that she was an honest and trustworthy employee of seven years' standing and that the qualifications she misrepresented were irrelevant to her position as a debtors' clerk. Although the employee in *Mutual Construction Company Tvl (Pty) Ltd v Ntombela*²² only had two-and-a-half years of service with the employer, the court found that even if he had a much longer service that would not (and should not) have saved him in the circumstances of this case.

The Labour Appeal Court in *Toyota South Africa Motors (Pty) Ltd v Radebe*²³ found that although a long period of service will usually be a mitigating factor where an employee is guilty of misconduct, the point must be made that there are certain instances of misconduct which are of such a serious nature that no length of service can save a guilty employee from dismissal. As such, the court found that the employee's length of service in the circumstances was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty.

These sentiments were echoed by Molahlehi J in *Kalik v Truworths (Gateway)*,²⁴ as he held that no amount of mitigation can ever restore an employment relationship that has broken down as a result of an act of dishonesty. The underlying reason for this approach is that an employer cannot be expected to keep dishonest workers in his or her employ. Another reason is to send an unequivocal message to other employees that dishonesty will not be tolerated. The court stated that a worker with an unblemished record cannot continue to be trusted after an incident relating to an act of dishonesty. The operational risk to the business of an employer that arises from the dishonest conduct cancels whatever good record the worker may have had before the transgression. In other words, there would

19 Fn 12 above 590.

20 *Mutual Construction Company Tvl (Pty) Ltd v Ntombela* [2010] 5 BLLR 513 (LAC) para 38.

21 [1999] 12 BLLR 1287 (LC) para 40.

22 [2010] 5 BLLR 513 (LAC) para 37.

23 [2000] 3 BLLR 243 (LAC) para 15.

24 Fn 16 above para 27. A similar approach was followed in *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* [2008] 3 BLLR 241 (LC) and in *De Beers Consolidated Mines Ltd v CCMA* [2000] 9 BLLR 995 (LAC). In *Hulett* para 42 it was held that the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, such as long service and a clean record of discipline, are likely to have minimal impact on the sanction to be imposed, while in *De Beers* para 22 it was held that long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability, but does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it.

be no purpose in conducting an inquiry into mitigating circumstances where a worker is guilty of misconduct relating to dishonesty.

It is interesting to note that in *Palaborwa Mining Co Ltd v Cheetham*²⁵ the dismissal of a 58 year old employee for intoxication was found to be fair. This was despite the fact that he was a first-time offender. Although the Labour Court found the decision to be substantively unfair as adequate consideration had not been given to the employee's personal circumstances, the Labour Appeal Court upheld the fairness of the dismissal.

An analysis of the above cases supports the remarks made by Grant,²⁶ that where the employee has been found guilty of some act of dishonesty (usually theft, attempted theft or fraud), the attitude of the labour courts has been to adopt a strict approach, namely, that dismissal is almost always the appropriate sanction. Far greater weight has been attached to the gravity of the misconduct than the personal circumstances of the employee.

2 3 3 Implied intolerability

In *De Beers Consolidated Mines*,²⁷ the court 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. The court remarked that while a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended.

The courts have accepted that an employer has the prerogative to set standards of conduct for its employees and to decide on the proper sanction if that standard is 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.²⁸ The following *dictum* by the Labour Appeal Court in *Toyota South Africa Motors (Pty) Ltd*²⁹ is of particular importance:

"Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasised, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour. The employer and employee are parties to an enterprise that produces goods or services which generate profits. If one party is dishonest to such a degree that the enterprise or a part of it is jeopardised then I am sure that there has been such a fundamental breach."

In *Consani Engineering (Pty) Ltd v CCMA*,³⁰ the commissioner found the testimony of the employee's manager to be inconsistent with the notion that there

²⁵ *Palaborwa Mining Co Ltd v Cheetham* (2008) 29 ILJ 306 (LAC).

²⁶ "Some comments on the appropriateness of dismissal as a sanction in misconduct relating to shrinkage" 2009 *Obiter* 758.

²⁷ (2000) 9 BLLR 995 (LAC) para 17.

²⁸ Fn 21 above paras 41 42.

²⁹ Fn 23 above para 43.

³⁰ [2004] 10 BLLR 995 (LC) para 11: "The evidence of respondent's manager, Mr Stockigt, in this case was that the applicant had shown reliability during his years of service to respondent. He stated that the applicant was a good worker and that the company would have preferred not to dismiss him."

had been a complete breakdown of trust in the relationship. However, the Labour Court found this conclusion to be unjustifiable, holding that an observation that a worker was a good worker does not of necessity lead to an inference that after an incident of theft he can continue to be trusted. The judge aligned himself to the standpoint of Grogan.³¹

“An employer has two reasons for wanting to rid itself of a dishonest employee. One is that the employee can no longer be trusted. The other, less frequently acknowledged but no less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deterrence theory of punishment. The question to be asked is whether a repetition of the misconduct, either by the same employee or by others, will adversely affect the employer’s business, the safety of the workforce and/or the employer’s trading reputation.”

The Labour Appeal Court in *Shoprite Checkers (Pty) Ltd* considered the jurisprudence laid down in previous cases, which endorsed the principle that dishonest conduct destroys the employment relationship.³²

A careful assessment of these earlier decisions illustrates that it provided unequivocal justification to employers to impose a sanction of dismissal in cases involving dishonesty. This was irrespective of whether or not explicit evidence was led regarding the breakdown of the employment relationship, as the impact of dishonest conduct on the relationship was considered to be implicit.

3 ASSESSMENT OF *EDCON*

3.1 Facts

In this case, an employee concealed an accident that occurred with a company vehicle which was being driven by her son. She failed to follow company procedure, which required her to report the accident to the employer and to the relevant insurance company; to complete and sign the relevant motor accident claim form and not to carry out any repairs without the approval of the insurance company. Instead, her husband repaired the vehicle at his panel-beating workshop.³³

A few months later, upon inspection by a Toyota dealer, the collision damage which had not been repaired properly was discovered. Upon the employee being appraised of this fact, she approached her manager with a request to authorise payment for the required repairs, but did not disclose to him that the car had been in a collision. Upon the company becoming aware of the collision and confronting her, she was dishonest and provided a series of versions.

The chairperson of the disciplinary hearing dismissed her for behaving without integrity and honesty, values regarded highly by Edcon. He considered her unblemished record and character as insufficient to mitigate her conduct. The sanction of dismissal was upheld on appeal, as the chairperson found that the employee’s misconduct negatively impacted on the trust relationship. The fact

31 Grogan *Dismissal* (2002) 99.

32 (2008) 29 *ILJ* 2581 (LAC) paras 16–21. Reference was made to *Standard Bank SA Ltd v CCMA*; *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb*; *Leonard Dingler (Pty) Ltd v Ngwenya*; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v National Union of Mine-workers*; and *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration*.

33 Fn 7 above para 3.

that she had lied throughout the investigation with the aim to hide the true facts of what really happened to the company car, played an important role in his decision. He concluded that it was trite law that an act of dishonesty undermines the trust relationship and therefore may justify dismissal.

However, the commissioner disagreed with her dismissal, finding that no direct evidence had been led to show that the trust relationship had been destroyed and found that the employee's long and unblemished track record militated against a decision to dismiss her. She also considered written correspondence from two managers, which illustrated that dismissal was not a desired result. She ultimately found that the misconduct was not so gross that by reason thereof, the long-standing trust relationship had been destroyed. Both the review application and the subsequent appeal failed.³⁴

The Supreme Court of Appeal took note of evidence led by the investigating officer to the effect that the employer was intolerant towards dishonesty and that employees were generally dismissed if they committed dishonest acts, as honesty was one of the employer's core values. However, the court held that his evidence did not, and could not, deal with the impact of the employee's conduct on the trust relationship. It was held that this was the domain of those managers to whom she reported, who did not testify.

3 2 Influence of *Sidumo*

In considering the *Edcon* case, the Supreme Court of Appeal revisited the jurisprudence that developed around the review of arbitration awards in *Sidumo v Rustenburg Platinum Mines Ltd.*³⁵ The Supreme Court of Appeal, having regard to the Constitutional Court's finding in *Sidumo*, regarded the test for review to be whether the award is one that a reasonable decision-maker could arrive at considering the material placed before him.³⁶ This interpretation was in line with the findings of the Constitutional Court, as they rejected the deference to the employer approach, finding that the commissioner's sense of fairness must prevail in deciding whether dismissal is fair or not, and the standard for review is whether a reasonable decision-maker would have come to that conclusion.

On the issue of the appropriateness of the sanction, Navsa AJ held that:

"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."³⁷

Ncgobo J who supported the decision of Navsa AJ stated:

"What this means is that the commissioner does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is

34 The Labour Court and Labour Appeal Court both agreed with the conclusion reached by the commissioner that Edcon had failed to illustrate that the trust relationship was destroyed due to the employee's dishonest conduct.

35 2008 2 BCLR 158 (CC).

36 Fn 7 above para 15.

37 Fn 35 above para 79.

fair. In answering this question, which will not always be easy, the commissioner must pass a value judgment.”³⁸

Grant argues that this judgment alerts employers and decision-makers to the dangers of adopting a strict, narrow approach to imposing the sanction of dismissal.³⁹ While this conclusion is supported and it is noted that *Sidumo* has changed the test of review from that of the reasonable employer to that of the reasonable commissioner, one cannot overlook the fact that *Sidumo* did not primarily deal with dishonesty. As indicated by Grant, it is not clear whether or not the court would have confirmed the employer’s decision to dismiss if the employee concerned had been found guilty of dishonesty.⁴⁰ However, there are indications in the judgment that the outcome may have been quite different in such an instance. The judgment states that the commissioner decided not to impose a sanction of dismissal for three reasons.⁴¹ One of them was that Sidumo had not been dishonest. The commissioner stated that he did not consider the offence committed by Sidumo to “go into the heart of the relationship [with the employer], which is trust”. The court, in turn, could not fault the commissioner for considering the absence of dishonesty to be a relevant factor in relation to the misconduct, stating that the absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal.⁴²

A significant aspect covered in the judgment is that fairness requires that regard be had to the interests of both the workers and the employer and that this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction. It was held that where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because he or she prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.⁴³

As confirmed by Le Roux,⁴⁴ it is clear from the judgment that the arbitrator, when considering the fairness of the sanction, must take into account a range of factors, including the reasoning adopted by the employer when deciding on the sanction.

3 3 Analysis

It is apparent that the decision-makers in *Edcon* failed to consider the jurisprudence of earlier cases regarding implied intolerability. It was common cause that the employee was guilty of misconduct of a dishonest nature, and if one considers the facts of the case, it was undoubtedly of a serious or gross nature. The dishonesty is definitely comparable to, if not graver than, the dishonest acts of misconduct considered by the courts in earlier cases. In *Hoch*, the court upheld the employee’s dismissal for misrepresenting qualifications that was not relevant or needed for the position that she occupied, while in *Nel* the employee’s dismissal for going on a trip paid for by a customer was endorsed. The *Standard Bank*

38 Fn 35 above para 178.

39 Grant 2009 *Obiter* 760.

40 *Ibid.*

41 Fn 35 above para 113.

42 Fn 35 above para 116.

43 Paras 180–181.

44 “Proving the fairness of the dismissal” 2010 *CLL* 19 59.

case similarly involved the employee's concealment of an accident that he had with a company car, while in *Rustenburg Platinum Mines Ltd (Rustenburg Platinum Section)* a cleaner's dismissal for taking meatballs was upheld, even though she had 15 years of service.

Although no evidence was led regarding the breakdown of the employment relationship, consideration and reliance on earlier jurisprudence would surely have led to an endorsement of implied intolerability. Similarly, the court failed to give any consideration to the legal principles established with regard to the role played by mitigating factors.

It is concerning to note that no importance was attached to the evidence led regarding the employer's intolerance towards dishonesty and an appreciation of the fact that it was one of their core values. Furthermore, no regard was had to the standards set by the company and the impact of the employee's breach of those standards. It is difficult to understand the commissioner's conclusion that the misconduct was not so gross, given the fact that the employee perpetuated her dishonesty even after the damage to the vehicle was exposed. She even requested her manager to provide funds to repair the vehicle, damages for which she knew she was responsible.

It is perplexing to comprehend how an employer, under these circumstances, could be expected to keep someone in their employ merely because no direct evidence was led to illustrate the breakdown in the trust relationship; yet it is undeniable that there was gross dishonesty and it was commonplace that the breakdown in the trust relationship was inherent.

Even though the commissioner took account of correspondence written by two managers in support of the employee's continued employment, the seriousness of the misconduct could not have been overlooked in favour of this.⁴⁵ The court failed to give any consideration to the operational risks that keeping the employee in the company posed. Nor did they take into account the deterrent impact that the dismissal would have had, in line with the high value that the employer placed on honesty.

It is submitted that the circumstances of *Edcon* are aptly described in the following statement by Rycroft:⁴⁶

"For many employers there is an assumption that, having proved an act of serious misconduct, there is no additional need to prove that the employment relationship had become intolerable. The assumption – a sort of *res ipsa loquitur* – is that the intolerability of certain kinds of misconduct is so obvious that it does not need to be spelt out. To use the language of a recent case,⁴⁷ where the misconduct is 'manifest', not only does it not have to be proved evidentially but a less formal procedure may be justified. Or as another case put it, where facts are 'strongly demonstrative' the intolerability of the relationship may not need to be established as a separate issue."⁴⁸

45 See *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 BLLR 995 (LC) para 21. The Labour Court noted the view taken by the commissioner, especially in light of the evidence of the manager that the employee was a good worker and that he regretted having to dismiss him. However, the court found this conclusion to be unjustifiable, holding that an observation that a worker was a good worker does not necessarily lead to an inference that after an incident of theft, he can continue to be trusted.

46 Rycroft "The intolerable relationship" (2012) 33 *ILJ* 2271.

47 *Ngutshane v Arivakom (Pty) Ltd t/a Arivia.com* (2009) 30 *ILJ* 2135 (LC) para 30.

48 *Theewaterskloof Municipality v SALGBC (Western Cape Division)* (2010) 31 *ILJ* 2475 (LC) para 38.

It is undeniable that all emphasis was placed on the lack of evidence led about the breakdown in the trust relationship, thereby losing sight of the severity of the misconduct committed, notably the flagrant dishonesty. All eyes were on this one criterion and it dominated the decision reached. However, it is doubtful whether such an approach can withstand scrutiny, considering the fact that there were other factors that had a role to play. As was correctly stated by Rycroft, it is not just intolerability in the form of a breakdown of trust that determines the fairness of dismissal.⁴⁹

Even having regard to the review test set out in *Sidumo*, no reason can be found to sustain the court's decision in *Edcon*. The Supreme Court of Appeal correctly stated that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his or her reasons, taking account of the material before him or her.⁵⁰ As such, they found the commissioner's finding that no evidence was led to show the breakdown in the relationship to be beyond reproach. While it is undisputed that there was no direct evidence led to this effect, there were other relevant factors that required consideration by the commissioner. Furthermore, a reasonable decision-maker in assessing the impact of the employee's dishonest conduct on the trust relationship, would have relied on the established principle of implied intolerability. Instead, the commissioner demanded direct evidence to that effect, the absence of which rendered the dismissal unfair, which was unreasonable considering the circumstances of the case.

4 THE COURTS' APPROACH POST *EDCON*

4.1 General

An assessment of five cases succeeding *Edcon* and relating to dishonesty illustrates the tendency of commissioners to approach these cases with a considerable degree of leniency towards employees. Of the five cases reviewed, four were found to be substantively unfair at arbitration. Notwithstanding this observation, the Labour Appeal Court, and in some instances the Labour Court, have shown reluctance to such a forbearing approach.

4.2 Decisions

In *Miyambo v CCMA*,⁵¹ the Labour Appeal Court found the dismissal for the theft of scrap metal justified, holding that the employee undoubtedly breached the relationship of trust built up over many years of honest service and took account of the fact that the company had a consistent policy of zero tolerance for theft. The court also noted that a successful business enterprise operates on the basis of trust and that the accumulation of individual breaches of trust has significant economic repercussions. As such, the court overturned the commissioner's decision who, despite finding the employee guilty of theft, found the sanction to be unduly harsh and unfair.

49 Fn 46 above 2283.

50 Fn 7 above para 23.

51 [2010] 10 BLLR 1017 (LAC).

In *Timothy v Nampak Corrugated Containers (Pty) Ltd*,⁵² the commissioner found dismissal to be too harsh for the nature of the misconduct. The employee generated a telephone call alluding to be an attorney acting on behalf of the employer and representing various staff members. The Labour Court found that the award of the commissioner was unreasonable because he failed to properly evaluate and take into account the totality of evidence placed before him. The Labour Appeal Court agreed, holding that had a reasonable arbitrator approached the evidence objectively there was no doubt that he or she would have found the dismissal to be fair.

In *Absa Bank Ltd v Naidu*,⁵³ the employee switched a client's funds from one portfolio to another without the client's knowledge or consent. The CCMA found the dismissal to be unfair based on the following factors:

- (a) the degree of dishonesty was not sufficient to warrant dismissal;
- (b) inconsistency;
- (c) the employee was doing what she believed was in the best interest of the client;
- (d) the employee was remorseful; and
- (e) neither the client nor the company would have lost any money.

The court *a quo* noted that dishonesty has a corroding effect on the trust which the employer is entitled to expect from its employees, but upheld the decision of the commissioner based on the parity principle. However, the Labour Appeal Court concluded that this should not be seen as granting a licence to every other employee to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they would not be dismissed, remarking that it is well accepted in civilised society that two wrongs can never make a right.⁵⁴

The Labour Appeal Court questioned whether the remorse referred to by the commissioner was indeed genuine and commented that remorsefulness would not have placed an absolute bar against her dismissal, taking into account the seriousness of the misconduct in question. The court emphasised that a guilty plea *per se* or a mere verbal expression of remorse is not necessarily a demonstration of genuine contrition, stating that there are varying degrees of dishonesty, and that generally, a sanction of dismissal is justifiable where the dishonesty involved is of a gross nature.⁵⁵

The court quoted *Shoprte Checkers* as authority for its finding that the employee's trust relationship with the employer was indeed irreparably broken down and held that any plea of remorse, genuine or otherwise, was, in the circumstances of this case, most unlikely to restore the trust which was the cornerstone of her employment relationship with the employer.⁵⁶

The recent Labour Appeal Court judgment of *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer*⁵⁷ involved the dismissal of an employee for

52 [2010] 8 BLLR 830 (LAC).

53 [2015] 1 BLLR 1 (LAC).

54 Fn 53 above para 42.

55 Fn 53 above paras 44-46.

56 Fn 53 above para 56.

57 [2015] 4 BLLR 394 (LAC).

accepting a favour from a supplier's employee without prior approval of management and without declaring the favour. (During the course of a hunting trip which was on a pay-as-you-go basis, he shot a wildebeest and the supplier's employee, as a favour, transported it to the employee's home.) The commissioner found that it constituted dishonest conduct for which the sanction of dismissal was appropriate. The Labour Court, however, disagreed, finding that the commissioner had no regard to the effect of the dishonesty on the employment relationship and that he merely concluded that there is authority for dismissal being an appropriate sanction for dishonesty, but failed to determine whether it was appropriate in this instance. The court further held that there was no evidence that the trust relationship had been broken.⁵⁸ The Labour Appeal Court dissented, and concluded that the commissioner's finding was one that fell within a range of reasonable responses to the employee's misconduct.⁵⁹

In the later decision of *Pick 'n Pay Retailers*⁶⁰ an employee who was a cashier was found guilty of using her smart shopper card to earn points on customer purchasers. Although the commissioner confirmed that she was guilty, dismissal was found to be an inappropriate sanction. One of the reasons was that there was no evidence of a breakdown in the relationship. However, the Johannesburg Labour Court found the commissioner's decision to be unreasonable, stating that specific evidence is not a *sine qua non* before a conclusion can be reached that the employment relationship had irretrievably broken down. The court stated that misconduct involving dishonesty will usually be destructive of the employment relationship, absent circumstances in which the dishonesty does not impact on the employer's business.

5 ASSESSMENT, CONCLUSION AND RECOMMENDATION

The cases decided after *Edcon* illustrate that the jurisprudence established in cases prior to *Edcon* is still very much alive and relevant. There does not appear to be a definitive reliance in recent cases on the principles endorsed in *Edcon*. However, it is worth noting that *Edcon* was acknowledged by the Labour Appeal Court in *Anglo Platinum (Pty) Ltd*, specifically with regard to the requirement that evidence must be led to establish a breakdown in the employment relationship. The Labour Appeal Court held that *Edcon* turned on its own facts and was not the law when the commissioner's award was handed down. Notwithstanding the latter comment, it is submitted that had the Labour Appeal Court considered this criterion to be essential to the fairness of the dismissal, the court had the power to take this factor into account in deciding on the matter, as it is authorised to make any judgment or order that the circumstances may require.⁶¹ Instead, the court disagreed with the court *a quo*'s finding that the commissioner's decision on a sanction was unreasonable.

It is also evident from the cases under discussion that while the circumstances of cases differ, which must be taken into account, there is no absolute bar on making use of the established principle of implied intolerability, notwithstanding the fact that this was disregarded in *Edcon*.

⁵⁸ Fn 57 above para 10.

⁵⁹ Para 20.

⁶⁰ *Pick 'n Pay Retailers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (JR2078/13) [2015] ZALCJHB 373 (26 October 2015).

⁶¹ S 174(b) of the LRA.

If one considers the wording of the *Code of good practice: Dismissal*, there is no requirement that evidence must be led to illustrate expressly that a continued employment relationship has become intolerable.⁶² While the appropriateness of dismissal is a factor that must be taken into account when a decision-maker is determining the fairness thereof, there are a number of other factors that play a role and which require consideration. These include aspects such as company procedure; operational consequences and risks; deterrence; and the gravity of the misconduct. The need to consider the circumstances of the case in totality was distinctly endorsed in *Sidumo*.

What is apparent from a number of the decisions reviewed, is that commissioners display a degree of clemency towards employees. This is easily understood within the context that security of employment is a core value that requires protection. Nonetheless, it is equally important that decision-makers do not lose sight of the fact that fairness requires that the interests of both parties be considered. As indicated by Ngobo J, this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.⁶³ It further endorses the principle that a premium is placed on both employment justice and the efficient operation of business.⁶⁴

As correctly indicated by Rycroft,⁶⁵ the courts' function is to look at the conduct as a whole and to determine whether its effect, judged reasonably and sensibly, is such that the other party cannot be expected to put up with it.

It is unmistakably understood that whilst the decision to dismiss belongs to the employer, the determination of its fairness no longer does. However, decision-makers in determining fairness have a duty to consider the impact of the dishonest conduct on the employer's business, not only in terms of actual losses, but also the risk it poses to continue to employ a dishonest employee, and the perception that it creates amongst other employees that they can have free reign and suffer limited consequences. It poses a grave challenge to employers to maintain a disciplined workforce when dismissal for serious misconduct such as dishonesty is overturned.

As indicated in *Anglo American Farms*, if the employer's confidence to trust an employee is destroyed or substantially diminished, the continuation of the relationship can be expected to become intolerable. The result is that the employer will have to be looking over his shoulder continually to see whether his employee is being honest.⁶⁶ Surely, such a situation cannot be fair to any employer, being mindful of the fact that the employees in these cases have been the authors of their own misfortune. As indicated in *De Beers Consolidated Mines*,⁶⁷ while

62 Sch 8 cl 7: "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 . . . (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.

63 Fn 35 above para 180.

64 Sch 8 cl 1(3).

65 Fn 46 above 2287.

66 Fn 12 above 590–591.

67 Fn 27 above para 22.

dismissal is not an expression of moral outrage or an act of vengeance, it is, or should be, a sensible operational response to risk management in the particular enterprise.

Important principles have been established with regard to the fairness of dismissal for dishonest conduct, one such principle being implied intolerability. While the law is not static and there are continuous developments in this regard, these important standards should not be abandoned as they remain relevant. Propitiously, recent decisions illustrate that there is still a degree of recognition of these principles, and time will tell whether they continue to be reinforced. However, as things stand, the pendulum appears to be swinging back to the more traditional approach. This is a positive development, considering the strong arguments that have been made to support the fact that the courts should not revert to the approach taken in *Edcon*.

In conclusion, it is recommended that decision-makers, in determining the fairness of a dismissal, should not lose sight of the well-defined legislative provisions that govern dismissal law in South Africa. Furthermore, the influence of the well-established principles developed by the courts in a plethora of cases must not be overlooked. If these components are applied, together with a consideration of the totality of circumstances when deliberating on the appropriateness of dismissal as a sanction, a fair conclusion is likely to be reached. Ultimately, fairness to both parties is what is needed from our decision-makers.