CASES / VONNISSE

DOES THE INCORRECT CLASSIFICATION OF MISCONDUCT CHARGES CONSTITUTE SUBSTANTIVE UNFAIRNESS?

EOH Abantu v CCMA (2019) 40 ILJ 2477 (LAC)

1 Introduction

Dismissals are commonplace in employment and arise for various reasons. One such reason is the unacceptable or undesirable conduct of an employee, which is recognised as a dismissal for misconduct. Notwithstanding the employers' right to effect dismissals, employees are considerably protected by the law (s 185 of the Labour Relations Act (LRA)). An employee has the right to challenge his/her dismissal by referring an unfair dismissal dispute to the CCMA (s 191 of the LRA). This is not surprising considering the fact that fairness is the cornerstone of the employment relationship (as evident from s 23(1) of the Constitution, which states that "everyone has the right to fair labour practices"; see also Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 182). While it is indisputable that employers should act fairly towards its employees, a significant principle that has been highlighted in the determination of fairness is that it must accommodate and balance the conflicting interests and rights of both employers and employees (*National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 38 and 40).

In determining unfair dismissal disputes, adjudicators have the task of striking this balance (*Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) par 171–172). However, the determination of fairness is not always a simple task. This is the challenge that presented itself in *EOH Abantu v CCMA* ((2019) 40 ILJ 2477 (LAC)). Here, an employee had been charged with misconduct, and it was unquestionable that he had committed an act of misconduct. However, the employer classified the misconduct as one involving dishonesty, whereas he committed and was found guilty of gross negligence. The substantive fairness of the dismissal was challenged on this basis.

The case essentially came down to whether the incorrect framing of the allegations was unduly prejudicial towards the employee, such that the only fair decision was to exonerate him, despite his commission of misconduct.

However, the LAC did not absolve him. Instead, it found that the dismissal was substantively fair. This case note seeks to evaluate whether the LAC adequately balanced the interests of both parties and reached a conclusion that still protects the fundamental right against unfair dismissal.

2 Legislative setting

Section 188 of the LRA gives substance to the right against unfair dismissal. It prescribes that a dismissal is unfair if the employer cannot prove that the dismissal was effected for a fair reason and in accordance with a fair procedure (s 188(1)(*a*)–(*b*) of the LRA). Section 188 recognises only three reasons for a fair dismissal. One such reason is misconduct committed by an employee (Grogan *Dismissal* (2017) 212).

An employer who wants to dismiss an employee for misconduct must observe the requirements of both substantive and procedural fairness. These requirements are set out in Schedule 8: Code of Good Practice Dismissal. In terms of substantive fairness, there must be a contravention of an established workplace rule or standard. Furthermore, the gravity of the offence must justify the sanction of dismissal (item 3 of the Code of Good Practice). The requirements for procedural fairness are set out in item 4 of the Code of Good Practice. Of relevance, the employee must be notified of the allegations using a form and language that can be reasonably understood. He/she must be allowed an opportunity to state a case in response to the allegations. In this regard, the employee must be given a reasonable time to prepare a response and has the right to be assisted by a trade union representative or fellow employee.

Apart from the requirements that must be followed by an employer, the Code of Good Practice also provides guidance to commissioners and other decision-makers whose task it is to determine whether an employee has been unfairly dismissed. These guidelines must be observed, as the LRA requires that any person assessing the fairness of a dismissal must consider the Code of Good Practice (s 188(2) of the LRA).

There are a number of factors that must be considered in determining substantive fairness (item 7 of the Code of Good Practice). Firstly, it must be considered whether the employee contravened a rule or standard regulating conduct in the workplace. Secondly, where a rule or standard was contravened, the commissioner has to consider whether the rule or standard was valid or reasonable; whether the employee was aware of the rule or standard; whether the rule or standard was consistently applied; and whether the dismissal of the employee for contravening the rule or standard was an appropriate sanction.

The test for substantive fairness can be broken down into two clearly identifiable stages. The first, relates to the determination of whether the employee is guilty of unacceptable conduct (misconduct). Where he/she is guilty, the second leg of the enquiry is establishing whether dismissal is a fair sanction for the commission of the misconduct (Myburgh and Bosch *Review in the Labour Courts* (2016) 271).

3 Facts of case

At the time of dismissal, the employee (Danny), was employed through a labour broker (EOH Abantu) to render services as a Microsoft server team leader at Wesbank, a client of the employer (*EOH Abantu v CCMA supra* par 2). Wesbank purchased "multiple activation keys" from Microsoft for Windows Office 2010. These keys could only be used by employees for official purposes. The use of these keys by third parties was strictly prohibited (par 4). In order to install Microsoft Office software on his girlfriend's mother's computer, Danny sent her via email a volume licence key that he downloaded from the server (par 5). This email was picked up by the internal forensic investigators (par 7). When questioned about whether he had sent the key, he initially denied it, but later confirmed that he had sent it (par 7).

He was charged with misconduct and called to a disciplinary hearing (par 8). The specific charges levelled against him were:

Charge 1 – contravention of the disciplinary code, namely theft, fraud, dishonesty or the unauthorised removal of any material from the Bank, or from any person or premises where such material is kept in that he dishonestly distributed the Wesbank Microsoft office licence keys.

Charge 2 – contravention of the disciplinary code, namely being in breach of the Bank's confidentiality agreements and/or by divulging such confidential information, in that he divulged information he obtained through his position as team leader, to unauthorised external personnel.

Charge 3 – contravention of the disciplinary code, namely disregarding or breaching the bank's code of ethics, in that he dishonestly distributed the Wesbank Microsoft licence keys to external parties.

Following a disciplinary hearing, he was dismissed for gross negligence. Although he was found to have committed the offences with which he was charged, he was found not to have acted intentionally (par 9).

The CCMA found his dismissal to be substantively unfair as he was found guilty and dismissed for gross negligence, yet this is not the offence with which he was charged (par 9). The argument advanced by the CCMA was that the employer was bound by its charges (par 9).

4 Judgment of the Labour Court

The Labour Court (LC) dismissed the review application. It reasoned that as the employee was charged with dishonesty, that is the case that the employer had to prove. As the employer failed to show that there was any intent on the part of the employee, it failed to prove the misconduct. Therefore, it was unfair to dismiss him (*EOH Abantu v CCMA supra* par 11).

5 Arguments advanced before the Labour Appeal Court

The employee's argument was essentially that it was unfair of the employer to dismiss him, as they failed to prove the charges against him, which required proof of intent. In terms of the law a chairperson cannot find an employee to be negligent when the charge against the employee is not one of negligence (*EOH Abantu v CCMA supra* par 9).

The employer argued that the CCMA's decision was unreasonable as the employee was well aware of the incident for which he was charged. It further argued that dishonesty was only one element of the charge. The charge was essentially about the unauthorised appropriation of the licence keys which was the property of the bank (*EOH Abantu v CCMA supra* par 13).

6 Judgment of the Labour Appeal Court

The LAC concluded that the CCMA in finding that the dismissal was substantively unfair committed a material error of law and that its decision was unreasonable (par 18). The court surmised as follows:

First, a key element of fairness is that an employee must be made aware of the charges against him/her. Therefore, the charges must be specific enough in order for the employee to respond to them. However, this does not mean that courts and arbitrators must adopt an approach that is too formalistic or technical (par 15). What is key is that the information given to the employee must enable him/her to ascertain the misconduct that he/she is alleged to have committed.

Secondly, "the categorisation of the alleged misconduct is of less importance" (par 15). The LAC gave the all familiar example of employees who are charged with theft, yet it is the offence of unauthorised possession that is proven at the disciplinary hearing or arbitration. What is of key importance said the court is that the employer must be able to show that a workplace standard was contravened, that the employee knew about the standard and that the employee suffered no significant prejudice due to the incorrect categorisation of the misconduct. If these elements are present, a competent verdict and sanction can be imposed even if the charge is not properly classified (par 16). This is premised on the fact that employers are not skilled legal practitioners and it can be commonly expected of them to incorrectly define the misconduct.

Thirdly, in considering whether an employee has been prejudiced, one of the questions to be asked is whether the employee has been denied knowledge of the charge which he is required to respond to (par 17). Another question is whether the employee would have conducted his defence differently had he known that he could have been found guilty of an offence other than that documented in the charge sheet.

Considering the evidence, the LAC found that Danny was fully aware of the incident that gave rise to the charges against him. It was trite that Danny acted negligently. He was the team leader and was required to observe a

high standard of care in protecting the intellectual property under his control, but he failed to do this (par 20). His actions had the potential of causing reputational harm to the employer (par 20). Although Danny contended that his defence on a charge of negligence would have been different, including different submissions in mitigation of sanction, the LAC found that he was unable to identify what that different evidence would have been (par 21).

Considering the nature of the offence; the fact that he held a senior position of team leader; as well as his short service with the employer, the LAC found it justifiable for the employer to have lost trust in him and to have sanctioned him with dismissal (par 23).

7 Consideration of established legal principles

Two pertinent issues arise from the decision of the LAC. The first is the requirements of a charge sheet, which is key to understanding the relationship between the misconduct detailed in the charge sheet and the misconduct for which an employee is found guilty. The second is the role of arbitration in determining the fairness of a dismissal for misconduct.
In order to evaluate the decision of the LAC, which is done later, an assessment of the established judicial principles in relation to the above-mentioned issues is first required.

7 1 Requirements of a charge sheet

It is trite that in order to prepare a response or answer to allegations of misconduct, the employee must have reasonable certainty about what the charge is (*POPCRU v Minister of Correctional Services* 1999 20 ILJ 2416 (LC) par 33). In this regard, it was stated that "the information on the charge-sheet must be sufficient to make the accused's right to prepare a real and not an illusory right" (par 37).

However, decision-makers must appreciate that the procedural fairness requirements set out in the Code of Good Practice signifies a shift away from the "criminal justice" model that was applied by the Industrial Court (*Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 27 ILJ 1644 (LC) 1651; see also *Woolworths v CCMA* 2011 10 BLLR 963 (LAC) par 32). The previous model "likened a workplace disciplinary enquiry to a criminal trial" (*Avril Elizabeth Home for the Mentally Handicapped v CCMA supra* 1651). Under the new model, the LRA recognises that managers are not experienced legal officers (1652). As correctly confirmed, a disciplinary enquiry no longer envisages procedures associated with a criminal trial, such as technical and complex "charge-sheets" (1652). An important aspect that arises from *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (*supra*) is that commissioners should not assess disciplinary hearings as if they are criminal trials (Grogan *Dismissal* 321).

Applying the above-mentioned principles to the disciplinary charge or allegation, the following has been affirmed. Charges do not have to be drafted with the precision of an arraignment in a criminal trial. It is sufficient if the charge is worded in a manner that provides adequate information to the

employee to enable him/her to identify the incident for which charges of misconduct are instituted, so that the employee can prepare a defence. The incorrect categorisation of the misconduct by the employer does not automatically result in a fatal irregularity. However, there must be a relationship between the charges levelled against the employee and the misconduct for which the employee is found guilty. (*National Commissioner of SAPS v Myers* 2012 JOL 28980 (LAC) par 97–98; see also Grogan *Dismissal* 336; see also *Zeelie v Price Forbes (Northern Province)* (1) 2001 22 ILJ 2053 (LC) par 37; see also Coetzer "Substance Over Form – The Importance of Disciplinary Charges in Determining the Fairness of a Dismissal for Misconduct" 2013 24 *Industrial Law Journal* 57 72).

A charge sheet usually consists of two components. The one is a description of the incident that is considered to constitute misconduct. The other, is the categorisation of that incident as a specific act of misconduct. In *EOH Abantu v CCMA* (*supra*) the incident that gave rise to the charges was the employee's distribution of the bank's office licence keys to an external party, which was prohibited. The employer categorised the misconduct that arose from that incident as dishonesty (in two of the three charges), but the employee was found guilty and dismissed for being grossly negligent.

In terms of the requirements of a charge sheet, there must be some flexibility. Although the misconduct for which an employee is charged and for which he/she is dismissed should ideally be the same, there must be room for variation. The dismissal of an employee for misconduct that differs from that specified in the charge sheet should not automatically render the dismissal unfair. Of key importance, the employee must have done what the charge/s depicts he/she has done. The chairperson of the disciplinary hearing must be satisfied that the actions of the employee constitute misconduct, even if it is misconduct other than the misconduct for which it was categorised in the charge sheet.

One cannot overlook the fact that not all employers are skilled in the field of labour law. As such, employers will not always know how a specific incident of misconduct should be categorised. However, one cannot lose sight of the purpose of instituting disciplinary proceedings. Employees who conduct themselves in an unacceptable manner must be held accountable. It is commonplace that an employer cannot be expected to put up with an employee who has no regard for its rules and regulations. Unfortunately, employers may falter in reducing the employee's unacceptable conduct to writing, especially with regard to the legal correctness of the categorisation of the charge. As disciplinary hearings are not court proceedings, decision-makers need to grant some leeway to employers, especially if employees are not unduly prejudiced as a result of the employers confounds.

7 2 Role of arbitration in determining fairness of dismissal

An employee dissatisfied with his/her dismissal following the internal disciplinary process has the right to refer an unfair dismissal dispute to the CCMA (s 191 of the LRA). The fairness of such a dismissal is determined

during arbitration, at which the appointed commissioner must conduct the proceedings in a manner that he/she considers appropriate. Of key importance, the dispute must be determined fairly and quickly, and the substantial merits of the dispute must be dealt with, with the minimum of legal formalities (s 138(1) of the LRA). Fundamentally, an arbitration constitutes a new hearing (CCMA: Guidelines on Misconduct Arbitration as published in *GG* 38573 under GNR 224 of 2015-03-17). It is the commissioner's duty to determine whether the dismissal is fair based on the evidence admitted at the arbitration. Significantly, the commissioner must not merely review the evidence that was considered by the employer when it decided to dismiss the employee (CCMA: Guidelines on Misconduct Arbitration par 17; see also *National Commissioner of SAPS v Myers supra* par 42 and 69).

In *Toyota SA Motors v CCMA* (2016 37 ILJ 313 (CC)) Zondo J emphasised two important points about the role of the commissioner. The one is that the Code of Good Practice requires a commissioner in determining whether a dismissal for misconduct is fair to consider whether or not a rule or standard had been contravened (par 120). The other is that the commissioner must decide whether the employee was guilty of the misconduct for which he/she was dismissed (par 124). This is essentially the misconduct with which an employee was charged (cases such as *Toyota SA Motors v CCMA supra* par 5 and 57; *SAMWU v Ngaka Modiri Molema District Municipality* 2016 37 ILJ 2430 (LC) par 13 makes it clear that courts equate the misconduct with which an employee is charged with the misconduct for which an employee is dismissed).

Flowing from the above, the question to be answered is whether a commissioner is restricted to finding that a rule or standard was contravened only if the specific allegations of misconduct for which the employee was charged and dismissed at the disciplinary hearing is found to have been committed? It is interesting to note that the Code of Good Practice does not require a commissioner in assessing whether a dismissal is fair, to determine whether the employee contravened the rule or standard for which he/she was charged and/or found guilty at the disciplinary hearing. The provision is worded in broader terms.

However, in *Phuthi v CCMA* (2016 37 ILJ 2417 (LC)) the LC found that the commissioner was confined to determining whether the misconduct specified in the charge sheet had been committed. The misconduct was stated as "clocking in and out in that on 22 July 2014 you allegedly clocked for work but did not proceed to your workplace" (par 6). The arbitrator found the dismissal to be fair but referred to the employee's misconduct as fraud. This was because the employee clocked in, failed to carry out his duties and was subsequently paid even though he did not perform his duties (par 25). The arbitrator went on to find that dismissal was a fair sanction (par 25). While the LC found that on the employee's own admission he was guilty of the misconduct for which he was charged, it held that the commissioner misdirected himself by implying misconduct as serious as fraud in a charge of a less serious nature, effectively meaning that "the charge is quite different from what meets the eye" (par 37). The court stated that once an

employee is charged with misconduct, the employee should be able to look at the charges and to understand what the case that he or she is facing is in order to prepare a defence (par 37). Accordingly, the court explained that the fairness of an employee's dismissal must be determined on the basis of the reasons given by the employer at the time of dismissal (par 34).

The LC adopted a similar approach in *SAMWU v Ngaka Modiri Molema District Municipality* (*supra*). Here, the employee was charged with "unacceptable behaviour" in that she conducted an unauthorised search for documents in the finance registry office and entered the office under false pretences. The arbitrator found her guilty of the incident but categorised her misconduct as insolence (par 5). While the LC accepted that an arbitration is a hearing *de novo*, it stated that it does not alter the fact that a dismissal happened because an employer believes that an employee committed a particular act of misconduct. For that reason, a commissioner must determine whether the misconduct for which the employee was dismissed warrants the sanction of dismissal (par 13).

However, in *National Commissioner of SAPS v Myers* (*supra*) a different stance was followed. Here, the LAC dismissed the argument that the commissioner by entertaining the alternative charge of which the employee was acquitted at the disciplinary hearing was formulating his own charge sheet and acting beyond his powers (par 67–68). The LAC held that there was nothing irregular about the commissioner having regard to the alternative charge, as a commissioner is enjoined to conduct an arbitration in a manner that he/she deems appropriate (par 68). Furthermore, arbitration takes the form of a hearing *de novo*, which means that the findings of the disciplinary hearing are irrelevant and not binding on the commissioner (par 69). This implies that the commissioner's powers go further than merely assessing whether the misconduct for which the employee was charged and dismissed at the disciplinary hearing was committed or not.

It is trite that there is a close relationship between the misconduct charges levelled against the employee at the disciplinary hearing and the acts of misconduct that the employer must prove at the arbitration hearing. This is because the employee lodges the unfair dismissal dispute based on what transpired at the disciplinary hearing. In other words, the employee is alleging that the decision to dismiss him/her for specific allegations of misconduct, or the procedure followed, or both, was unfair. The basis or foundation upon which the disciplinary hearing was premised has an important role to play. However, this does not mean that the arbitration is limited to an assessment of whether the employee committed the misconduct as categorised in the charge sheet.

What is of greater importance is the incident that gave rise to the charge of misconduct and not the categorisation of that misconduct. For example, if the transgression is the employee's removal of a computer from the employer's premises on 10 December 2019 without permission, it is of less importance whether the transgression is categorised as dishonest conduct or theft or unauthorised removal of property. The emphasis should be on whether the employee committed the transgression. Did he remove the computer without permission? If the employee did, it follows that he/she is

guilty of misconduct, as it amounts to a contravention of a rule or standard. The next question will be whether the respective contravention warrants dismissal. Here, the impact and gravity of the contravention will come into question. Whether the contravention involved acts of dishonesty are factors that will be taken into account in determining the seriousness thereof. Even though an employer may not have categorised the charge as dishonest conduct, the arbitrator is competent to find that dishonesty was present.

The decisions of the LC in *Phuthi v CCMA* (*supra*) and *SAMWU v Ngaka Modiri Molema District Municipality* (*supra*) incorrectly placed substantial emphasis on the characterisation of the transgression. It was of less importance whether the commissioner categorised the misconduct as fraud and insolence, respectively. What was key, was whether the employees' committed the acts of misconduct detailed in the charge sheet. It is indisputable that both charge sheets clearly set out the transgression for which the employees were charged, so there was no uncertainty about the incident that gave rise to the charges. The fact that an employer may not have classified an act of misconduct as fraud or may have incorrectly classified an act of misconduct as fraud should not detract from the actual transgression.

In *Phuthi v CCMA* (*supra*) it was irrefutable that the employee clocked in but did not perform any work for the day. There was also testimony led at the arbitration to explain that this transgression constituted fraud clocking as the employee got paid for the shift without rendering any service to the company. The witness also testified about the further negative implications of this transgression (par 21).

At arbitration the onus lies on the employer to prove that misconduct was committed. The employee is privy to all of the evidence led during the arbitration process and has the right to question all witnesses brought by the employer. Employees also have the right to call their own witnesses to disprove elements of the employer's case. The fact that the employee may not have been charged with fraud at the disciplinary hearing, does not diminish the fact that the employee was well aware of the transgression that led to his dismissal. That transgression did not change during arbitration. Furthermore, the employee was aware of the fact that the employer regarded this transgression to constitute fraud, as this evidence was led at the arbitration where the employee was present. The employee had the opportunity to counter the employer's linkage of this incident to fraud.

One cannot lose sight of the fact that arbitrations are hearings *de novo*. Importantly, the commissioner's role is not to review whether what transpired at the disciplinary hearing was reasonable or not. Although the arbitration stems from the outcome of the disciplinary hearing, it is a new process during which the employer must prove that the dismissal of the employee was fair. This must be done by firstly proving that the employee committed an act of misconduct. The misconduct to be proven by the employer must relate to the transgression for which the employee was charged at the disciplinary enquiry. However, if there were defects in the employer's charge sheet, this should not automatically lead to a conclusion that the dismissal was substantively unfair. The commissioner has a duty to hear the evidence

that is led by the employer during arbitration and to assess that evidence to establish whether the employer has on a balance of probabilities established that the transgression took place. If the evidence heard by the commissioner leads to him or her categorising the transgression as a specific disciplinary offence, such as fraud, theft or insubordination, why is this unreasonable. After all, the commissioner is tasked with making a finding on whether or not a rule or standard was contravened.

8 Evaluation of Labour Appeal Court judgment

The LAC endorsed the key principles that exist regarding the requirements of a charge sheet. It correctly emphasised that the categorisation of the misconduct should not overshadow the fundamental elements of the charge. A key element is that the information given to the employee must detail the transgression so that the employee understands the incident that led to him/her being charged with misconduct. Here, it was undeniable that notwithstanding the references to dishonesty in the charge sheet, it clearly detailed the incident that led to the charges of misconduct. The charge sheet complied with the requirements of providing sufficient information to the employee to enable him to identify the incident and to be able to prepare a proper defence. Although the employee was dismissed for gross negligence, this was founded on the incident described in the charge sheet. There was therefore an explicit relationship between the allegation with which the employee was charged and the misconduct for which the employee was found guilty. The charge documented in the charge sheet was not characteristically different from the charge for which he was found guilty and dismissed.

The LAC correctly concluded that the decision of the commissioner was unreasonable. It was the duty of the commissioner to listen to the evidence presented at arbitration and to decide whether the employee committed the transgression that he was accused of. If the commissioner found the employee guilty on the evidence presented, he/she should then have decided whether dismissal was appropriate for the contravention committed. To have automatically concluded substantive unfairness by virtue of the fact that the employee was dismissed for negligence, yet the charge sheet made reference to dishonesty, was prejudicial to the employer.

As rightfully explained by the LAC, an important fact to be established when dealing with the incorrect classification of misconduct is whether the employee has been unduly disadvantaged. No such enquiry was conducted by the commissioner. It was further trite that the employee committed the misconduct for which he was charged. Therefore, the commissioner's decision gives employees an unfair advantage by allowing them to escape the consequences of misconduct based on technicalities. This does not align with the objectives of labour law, which is fairness towards both parties.

Although the law protects employees against unfair dismissal, there was in this instance, no unfairness perpetrated by the employer against the employee. The LAC adequately balanced the interests of both parties and reached a fair conclusion.

9 Conclusion

The LAC judgment clarifies that disciplinary hearings must not be held to the same legal and technical standards as court proceedings. It is trite that disciplinary hearings are not bound by the same strict rules as criminal and civil cases. The adjudication of such cases must be premised on the principle of fairness. The automatic declaration of a dismissal as substantively unfair based on the incorrect classification of the misconduct in the charge sheet is unreasonable towards the employer. Commissioners have a duty to ascertain whether the employee has been prejudiced and to what extent. They also have a duty to hear the evidence presented by the employer to prove the commission of misconduct and based on that evidence to determine whether a contravention of a rule or standard took place. While commissioners and judges are instrumental in protecting an employee's right not be unfairly dismissed, this important task must be executed in a balanced manner.

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