SUBSTANTIVE FAIRNESS OF DISMISSAL FOR MISCONDUCT

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SUMMARY

In the employment context employers may view certain conduct/behaviour committed by an employee or a group of employees to be repugnant and unacceptable resulting in the disciplinary action that may lead to a dismissal sanction taken against such employee or employees.

Even though the employer has a right to discipline the employees for a contravention of a rule or a policy and even dismiss the employee/s involved, such a disciplinary action and dismissal must be based on a certain procedure where the principle of fairness must be adhered to.

The Labour Relations Act 66 of 1995 (“the Act”) and Schedule 8 of the Code of Good Practice deals with the aspects of dismissals related to conduct and capacity, however, each case is unique, it has to be approached on its own merits. Schedule 8(3) states that, “formal procedures in disciplinary measures do not have to be invoked every time a rule is broken or a standard is not met”. It is therefore necessary that there should be a disciplinary code which guides the workers and the employers, it must be clear and be understood by all the parties.

The disciplinary code of conduct serves as the foundation of good discipline because everybody knows the consequences of his/her contravention of those guidelines enumerated in the Code of Conduct.

The Code of Good Practice under Schedule 8(3), states that “while employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees”, so a very good relationship between the two parties is most important if there is to be stability and industrial peace in the workplace.
CHAPTER 1

INTRODUCTION

The concept of substantive fairness of dismissal for misconduct is an important requirement in current South African labour law. The Code of Good Practice provides some guidelines as to what is meant by the concept but the Labour Court and arbitrators develop the details of the concept.

Prior to the implementation of the Act in 1979 an all-inclusive legislation regulating unfair dismissal law was non-existent.\(^1\)

The employer can discipline the employee once a misconduct has allegedly been committed, but dismissal will only be justified when an employee is guilty of a serious misconduct or repeated acts of misconduct.\(^2\) The sanction of dismissal is the ultimate one in the employment relationship. Even though the sanction is the ultimate one, proper dismissal procedure must be followed before such dismissal could be justified. The dismissal emphasises the principle that it should be resorted to as a last resort.

There are five grounds which are recognised by the Act to justify the dismissal of an employee, namely misconduct, incapacity or poor work performance and operational demands, employee reaching retirement age and where employee refuses to join a trade union in terms of a closed shop agreement, is refused union membership or expelled from such a union.\(^3\) In this treatise the substantive fairness of a dismissal for misconduct will be addressed.

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\(^1\) Industrial Conciliation Amendment Act 99 of 1979.
\(^2\) Schedule 8 Item 3(3).
\(^3\) S 26(b) of the Labour Relations Act 66 of 1995 (hereinafter referred to as “the Act”).
CHAPTER 2

SUBSTANTIVE FAIRNESS OF A DISMISSAL FOR MISCONDUCT

2.1 INTRODUCTION

In this treatise the substantive fairness of a dismissal for misconduct will primarily be discussed. The procedural fairness of a dismissal is also touched upon since it is felt that substantive fairness of a dismissal must be supported by a procedural fairness approach without which the substantive fairness of such a dismissal will not be fair.

2.2 WHAT IS A DISMISSAL?

According to the Labour Relations Act, 1995 (hereinafter “the Act”) dismissal means *inter alia* that an employer has terminated a contract of employment with or without notice.\(^4\) In most cases it takes place after the contract of employment has been terminated at the instance of the employer who communicated with the employee informing him of such a dismissal. The communication can be carried out by words or even the conduct when the employer decides to stop paying the wages of the employee.

Under the common law there are two forms of dismissal, a dismissal with notice or without notice. The Act has widened the notion of dismissal to cover other forms of dismissal but the research will concentrate on dismissal for misconduct only, and in particular the substantive fairness of such dismissals.

For a dismissal to be relevant, there must be two parties, the employer and the employee as well as a proper contract of employment. It is clear that not all terminations of the contracts of employment will amount to a dismissal, it could for instance happen that the employee has resigned, or that a contract of employment is terminated by agreement.

\(^4\) S 186(a).
2.3 MISCONDUCT

Misconduct could be described as any act or omission on the part of the employee not in conformity with the set guidelines, standards, rules and policies of the workplace. The misconduct need not be deliberate; even negligence can suffice.

2.4 DEFICIENCIES OF THE COMMON LAW OF EMPLOYMENT

Under the common law the employment relationship is viewed as a contractual relationship between the employer and the employee and such a contractual relationship can be terminated by either party by simply giving the other party a notice or payment of salary in lieu of such a notice, irrespective of the reason for the dismissal. The approach is that procedural fairness before the termination of employment is not required. The employer has power to regulate the conduct of the employees and they are expected to obey all reasonable and lawful commands and to act in good faith including performing such duties with due diligence and skill. In recent times the Labour Court and arbitrators have accepted the notion that the employer has every right to prescribe rules regulating conduct at the workplace, this is done in a more satisfactory manner through the inclusion of such structures as employee’s unions and all the role players who are party to the collective agreement.

The common law had the following deficiencies which are not in line with section 23 of the Constitution\(^5\) of the Republic of South Africa. According to Grogan:\(^6\)

\(^{-}\) The common law contract of employment is individualistic in nature, paying no regard to the collective relationship between employees and employers which became an increasing importance with the growth of the trade union movement.

\(-\) The common law does not cater for the inherent inequality in bargaining power between the employer as the owner of the means of production and the employees, who are entirely dependent on supply and demand for their welfare and job security.

\(-\) The common law pays no regard to the enduring nature of the employment relationship, giving the employee no inherent right to press for better conditions of employment as time goes by.

\(^5\) Act 108 of 1996.

- The common law emphasis on freedom of contract encourages exploitation of labour.
- The common law does not promote participative management, in which workers have a meaningful say in at least those management decisions which directly affect their working conditions and legitimate interests.
- The common law does not provide effective protection to the job security of employees. Section 23 of the Constitution affords all employees the right to ‘fair labour practices’ and the right to join and form trade unions and to strike.”

At common law, the cancellation of the contract for any breach can be justified on any ground existing at the time of the termination, even if the termination was motivated by other factors, not the real one, it will be relevant since a ground can be relied on even if the employer was unaware of it. The Act approaches the matter differently, the employer’s grounds of dismissal are the focus of the inquiry and makes other reasons and grounds irrelevant. Under the common law there is no duty to hear the employee before dismissing him or her.

2.5 CONSTITUTION

Section 23(1) of the Constitution states that “everyone has the right to fair labour practices”. It is therefore clear that everyone has the right to fair labour practices and the right not to be unfairly dismissed.

Grogan lists three broad standards for a fair dismissal for misconduct:

“(a) The reason for the dismissal must not be classifiable as automatically unfair.
(b) There must be a valid reason for the termination of the contract (it must be substantively fair).
(c) It must be effected in a procedurally fair manner.”

Dismissal as a sanction is the most severe penalty. Therefore it should be resorted to as a last measure and should be imposed in respect of serious misconduct which may not require progressive discipline.

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7 See Beeton v Peninsula Transport Co Ltd 1934 CPD 53.
8 Supra.
9 Supra at 136.
2.6 THE INTERNATIONAL LABOUR ORGANISATION

The International Labour Organisation ("ILO") is a very important source of international labour standards. Its conventions and recommendations have played a significant role in the development of the international labour code. It has dealt with such matters such as unfair dismissal in instruments such as the Termination of Employment Recommendation, 1963 (No 119). This recommendation has been very influential on legislation and legal policy in many countries and it has been superseded by the Convention Concerning Termination of Employment at the initiation of the Employer 1982 and Recommendation 166 (Recommendation Concerning Termination of Employment at the initiative of the Employer 1982). Even our Industrial Court on its early stages was clearly influenced by the above conventions and recommendations. In several decisions the court referred to these instruments and relied on them as authority for its conclusions. In at least three decisions the court regarded itself as bound by the said instruments.

In Midde Vrystaatse Suiwel Koöperasie v FBWU,¹⁰ NAAWU v Pretoria Precision Castings (Pty) Ltd¹¹ and Olivier v AECI Plofstowwe & Chemikalieë, Bethal² Brasley also seem to be of the same opinion having based their views on the premise that the said conventions and recommendations are part of international customary law which can form part of our law in terms of the Constitution.¹⁴

2.7 SUBSTANTIVE FAIRNESS

Article 4 of the Convention states that the employment of a worker shall not be terminated “unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.

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¹⁰ 11/2/1877.
¹¹ (1985) 6 ILJ 369 (IC).
¹³ Brasley, Cameron, Cheadle and Olivier The New Labour Law (1987) at 234.
¹⁴ S 231(4) of Act 200 of 1993.
In addition, article 8 of the Convention specifically states that the following will not constitute a valid reason for the termination of employment:

- Union membership or participation in union activities.
- A worker acting or having acted in the capacity of a worker’s representative or seeking office as such a representative.
- The filing of a complaint by a worker against an employer in which it is alleged that statutory provisions have been violated by the employer.
- The race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin of a worker.
- Absence from work during maternity leave.

Article 5 of the recommendation lists two further unacceptable grounds for termination, namely the age of an employee and absence from work due to compulsory military service or other civil obligations.

2.8 SUBSTANTIVE FAIRNESS – HOW IS IT ESTABLISHED?

The substantive fairness of a dismissal for misconduct committed by the employee centres around the two questions that must be asked:

(a) Whether such an employee did contravene the rule and is guilty of the offence charged with?

(b) The most important question is whether the seriousness of the offence justifies the penalty of dismissal. The employer must prove the contravention by the employee on a balance of probabilities. There must be an inference in his statement that the employee contravened the rule which must be more likely than not, whether the rule contravened was a valid or reasonable rule, the
employee was aware, or could reasonably be expected to have been aware of, whether the rule has been consistently applied by the employer.\textsuperscript{15}

\section*{2.9 \hspace{1em} WAS THE RULE REGULATING CONDUCT CONTRAVENED?}

It is important that the contravened rule should exist or be in place and that the employee is guilty of such a rule and whether it was a relevant rule.\textsuperscript{16}

\subsection*{2.9.1 \hspace{1em} THE EXISTENCE OF A RULE REGULATING CONDUCT}

In practice, the source of the rule is the written disciplinary code which is understood by all concerned. It has been accepted by both the arbitrators and the old Industrial Court that the employer has the right to make rules regulating conduct at the workplace. The power of the employer to regulate the conduct of an employee is to be found in the implied common law duties of the employees. In terms of the common law the employee has a duty to obey reasonable and lawful commands from his employer as well as the duty to perform his functions with due diligence and skill. However, these duties have been tampered with by the Labour Court when dealing with dismissal cases.\textsuperscript{17}

The rule regulating the conduct at the workplace can be described as a general information and a guide to how the workers must conduct themselves in relation to their work. The employer has a right to prescribe rules regulating conduct at the workplace. Such a rule or guide must be specific enough to enable employees to ascertain what conduct is required of them.

The power of the employer to prescribe such rules regarding discipline derives from the nature of the employment relationship, and it can be ascribed to economic factors since he has the ownership or the control of the property and the superior bargaining power. The power of the employer to issue Codes of Conduct is to be found in the

\textsuperscript{15} Schedule 8 Item 7(b)(ii).
\textsuperscript{16} Schedule 8 Item 7(a).
\textsuperscript{17} In terms of the Code of Good Conduct Practice “all employers should adopt disciplinary rules that establish the standard of conduct required of their employees”. Schedule 8(3)(1).
implied common law duties of employees which prescribe that an employee must comply with rather vaguely formulated obligations, *eg* that the employee must obey all reasonable and lawful instructions and to act in good faith and perform his duties with due diligence and skill.

The view under common law that the employment relationship was not a permanent relationship and could be terminated by notice also gave power to the employer. The courts have adopted a rather less technical approach when interpreting such a Code of Conduct. In *CWIU & Another (Pty) Ltd v Hoechst (Pty) Ltd*18 the court when dealing with the Code came to the conclusion that a Code was an open-ended discretionary institution rather than a rigid hierarchical Code of Conduct. It was not an immutable set of commandments that have to be slavishly applied. This clearly indicates that a measure of flexibility should be applied when interpreting the Code of Conduct. It was also confirmed in *NEHAWU v Director General of Agriculture*19 where the court rejected the inflexible approach of labouriously and minutely examining the employee’s disciplinary code and pouncing with relish on any minute deviation.

In *Chamber of Mines and NUM*20 the arbitrator found the dismissal of a nursing sister to be unfair in circumstances where she was found sleeping on duty in the intensive care unit of a hospital. The basis of a decision was the fact that the hospital’s disciplinary code, drafted with no doubt with less serious circumstances in mind, provided that sleeping on duty in the first instance warranted a written warning, the inflexible approach was applied in the case. It is agreed that flexibility may not always favour the employee, there will always be a possibility that a more severe penalty may be imposed than that provided by the Code.

It is clear therefore that the Code of Conduct is not the only guide of rules governing the conduct of the employees, some rules will be embodied in the written contract of employment and other agreements between the employer and the employee, notices

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18 (1993) 14 *ILJ* 471 (IC).
19 (1993) 14 *ILJ* 1488 (IC).
on notice boards, documents such as manuals, company’s policy or other briefings as was found in the case of *NUM v Western Holdings Gold Mine*.²¹

The common practice can also develop to such an extent that it becomes the company’s policy which is accepted by everyone and in appropriate circumstances they can even be orally promulgated as was held in the *SACCAWU v City Lodge Hotels (Pty) Ltd*.²²

The employer may amend rules and introduce new ones but has a responsibility to bring the new amendments to the attention of the employees. There is no need for the involvement of union members when such disciplinary rules are formulated. However, in the case of *MAWU v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd*,²³ the court stated that the employer is under a duty to negotiate disciplinary rules should the union demand to do so. Where no agreement can be reached between the parties, the employer may impose its own rules, however, the requirements of reasonableness and fairness must be adhered to. Within the context of reasonableness and fairness the employer must be entitled to set the standards of conduct for the company and to see to it that such standards are properly enforced.

In a situation where the employer unilaterally imposed rules that are contested or in conflict with the rules imposed by the union, the employer’s rules will normally take precedent. In both cases of *Mabizela v Siemens Ltd*²⁴ and *Errol van Neel v Jungle Oats Co*²⁵ the misconduct alleged by the employer was a consequence of decisions taken by the union in furtherance of collective action. In *Mabizela*²⁶ the court stated that:

“the fact that the employees in the winding section collectively decided to disobey their employer does not confer an immunity against dismissal for a valid reason”.

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²¹ (1993) 2 LCD 243 (IC).
²² (1993) 2 LCD 320 (IC).
²⁴ NH 13/2/12.
²⁵ NHK 11/2/170.
²⁶ Supra 9.
There are some other sources from which rules regulating conduct could be found, such as rules imposed by the statutes, *eg* Occupational Health and Safety Act.\textsuperscript{27} Under the common law a contractual principle is found, where the employee is obliged to obey all reasonable and lawful instructions from his employer and to further the interests of the employer. The conflict of the employee’s interests and those of his employer could lead to the employee’s dismissal from his work. In *SACTWU v R Stumpfe t/a De Lederhandler, George*,\textsuperscript{28} the employee worked for his employer at home manufacturing and repairing leather goods for his own account. He was found to have been fairly dismissed as a result of such conflict of interests. The court stated that “even if the employer and employee had not specifically agreed that the employee could not do the work complained of in his spare time, the employee had a common law duty to further the business interests of the employer and to avoid a conflict between his interests and those of the employer, he could not compete with his employer”. The conduct of the employee was viewed as a serious breach of contract and that dismissal was justified.

### 2.9.2 THE CONTRAVENTION OF THE RULE

It is important in disciplinary proceedings to establish not only the existence of a rule but whether there has been a contravention of such a rule formulated by the employer. In some instances it is very difficult for most people involved in a disciplinary inquiry to decide the factual question whether the rule was contravened due to the fact that such people do not have the required skills of cross-examination and assessment of the evidence. The fear of retribution sometimes dissuade a person from giving material evidence. It therefore becomes necessary to determine what rules of evidence are applicable in a disciplinary inquiry or whether normal rules will be applicable. It is important in cases of this nature to find out who bears the onus of proof and the standard of proof required. It is also necessary that people involved in such inquiries should at least have the basic knowledge of how to deal effectively with cases of alleged misconduct.

\textsuperscript{27} 85 of 1993.
\textsuperscript{28} (1992) 13 ILJ 388 (IC).
2.10 THE VALIDITY OF THE RULE

A valid rule is not contrary to any law of public policy, an invalid rule is arbitrary and capricious. As we have noted in the above comment that the employer has every right to formulate the rules regulating the conduct of the employees, the courts will always see to it that the rules formulated are reasonable and valid, if the rule is not reasonable it cannot be a valid one. Therefore whatever disciplinary steps taken under such a rule could be declared unfair. Where a rule is valid and relevant to the needs and circumstances of such a business place it is viewed as lawful and legitimate. In the case of *Atlantis Diesel Engines (Pty) Ltd v Roux NO*\(^a\) the court gave the following test:

“Was the rule reasonably related to (a) the orderly, efficient and safe operation of the company’s business, and (b) the performance that the company might properly expect of the employee?”

There are certain factors that must be taken into account when considering the validity of the rule, *eg* the nature of the employer’s business and the circumstances in which it operates.

The court in the case of *Swanepoel v AECI Ltd*\(^b\) justified the introduction of a strict disciplinary rule dealing with inter-racial assault because of the situation prevalent within the factory. The type of work performed by the worker and the circumstances in which the work is performed, *eg* some workers are employed in positions of trust where the company relies heavily in such a worker, *eg* people employed as bank tellers and police officials etc. Should such people commit a serious misdeed in his/her performance of duty, a sanction of dismissal may be a proper one.

In some oil companies smoking within the premises may be prohibited as a means of safety precaution and if a worker is found smoking, his dismissal could be justified.

\(^a\) (1988) 9 *ILJ* 45 (IC) 209.
\(^b\) (1984) 5 *ILJ* 41 (IC).
Where a rule was agreed on by collective agreement between the employer and the employees, there is a strong possibility that the courts would accept its validity as was shown in the case of *NEHAWU v Director General.*

The employer must be careful when resorting to disciplinary rules, if in the past the contravention of the rule was never enforced, that may give an impression that does not consider the rule to be valid and the court may be hesitant to justify such dismissal based on such rule. Furthermore, the employer could be accused of being selective and inconsistent which is not an accepted principle in the employment relationship.

### 2.10.1 KNOWLEDGE OF THE RULE

The employee must know the disciplinary rule or ought to have reasonable knowledge of the rule.

It is an accepted principle in a work situation that an employee could only be disciplined for contravening a rule he is aware of or could reasonably be expected to have knowledge of it. It is very important that all employers should strive and ensure that the Code of Conduct they set up is known to all employees. This can be done through many ways either by distributing pamphlets of disciplinary codes, use of lecture meetings with the workers, written briefs, notices fixed on company’s notice boards and the use of induction lectures on new employees. Whenever there is a need to introduce a new rule or to amend an existing rule it must be brought to the attention of all employees. Apart from the above-stated formal rules there could be rules that are not formally applied because the employee is reasonably expected to know that disciplinary action will be taken against him should he contravene such an informal rule, eg assaults and even intimidation, theft, working under influence of liquor, insolence and insubordination. In these instances reasonable sense dictates that such contraventions will lead to disciplinary action and dismissal.

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31 (1993) 14 *ILJ* 1488 (IC).
2.11 CONSISTENCY MUST BE ADHERED TO IN DISCIPLINARY ACTIONS

It is always important to apply the element of consistency in disciplinary actions if fairness is to be the objective of any disciplinary action, as it does not help to apply the disciplinary measures in a selective manner. As it has been stated above that failure to take action in the past may be an indication that the employer regarded the rule as invalid. In the case of NUM v Amcoal Collieries & Industrial Operations Ltd\(^\text{32}\) the Labour Appeal Court distinguished between “historical inconsistency” and “contemporaneous inconsistency”.

Historical inconsistency is when an employer has not dismissed an employee as a matter of practice or impose a disciplinary sanction for such a contravention of the rule, but suddenly decides to dismiss or impose a sanction for contravention of the same rule, that will not be a lawful thing to do because many employees may be under the impression that the rule was no more valid. Where employees commit the same disciplinary offence contemporaneously and are not all disciplined, or they receive different disciplinary penalties, amounts to unfairness which is based on the proposition that similar cases should be treated in the same way. If the employer does not do that, the inference may be drawn that the employer acts in an arbitrary and discriminatory way. Inconsistency sometimes can never be regarded as unfair.

The employer who resorted to inconsistency must be able to justify it because of factors such as the employee’s record of service, may be an employee has a long clean record of service or the seriousness of the contravention. The employer may also justify the inconsistent enforcement of a rule on the basis that changed circumstances make it necessary to take a different view of the need to enforce the rule. Contemporaneous inconsistency entails that the employer dismisses only some of the employees who have breached the same rule of conduct at the same time, such inconsistency may make the dismissal unfair and inappropriate.

The Labour Appeal Court in the case of Early Bird Farms (Pty) Ltd v Mlambo\(^\text{33}\) held that “the respondent and Maziya were guilty of the same offence, the theft of chicken

\(^{32}\) (1992) 13 ILJ 1449 (LAC).
\(^{33}\) (1997) 5 BLLR 541 (LAC).
pieces. *Prima facie*, they should have received the same penalty. ‘I say *prima facie*,
because an employer may be justified in differentiating between employees, guilty of
the same offence, on the basis of differences in the personal circumstances of the
employees (such as their length of service and disciplinary record) or the merits
(such as the roles played in the commission of the misconduct”.

In *NUM v Council for Mineral Technology*34 the employer was held to have been
justified in distinguishing between the employees who were dismissed and other
employees, the former had played the most active role in the detention of members
of management during a sit in.

If the employer is unable to point out or identify all the culprits the guilty offenders,
those who have been identified, cannot rely on the parity principle simply because
the employer was unable to identify all the culprits. The Labour Appeal Court in
*SACCAWU v Irvin & Johnson*35 pointed out that there was in fact no principle
involved in the parity rule, but that consistency was simply an element of disciplinary
fairness. Conradie JA stated the approach that ought to be adopted as follows:

“Discipline must not be capricious. It is really the perception of bias inherent in
selective discipline that makes it unfair.

Where, however, one is faced with a large number of offending employees, the best
one can hope for is reasonable consistency. Some inconsistency is the price to be
paid, flexibility which requires the exercise of a discretion in each individual case. If
the chairperson conscientiously and honestly, but incorrectly, exercises his or her
discretion in a particular way, it would not mean that there was unfairness to the other
employees. It would mean no more than that his or her assessment of the gravity of
the disciplinary offence was wrong. It cannot be fair that other employees profit from
that kind of wrong decision. In the case of a plurality of dismissals, a wrong decision
can only be unfair if it is capricious, induced by improper motives or, worse, from a
discriminating management policy. Even then I dare say that it might not be so unfair
as to undo the outcome of other disciplinary inquiries.

If, for example, one member of a group of employees who committed a serious offence
against the employer is, for improper motives, not dismissed, it would not, in my view,
necessary mean that the other miscreants should escape. Fairness is a value
judgment. It might or might not in the circumstances be fair to reinstate the other
offenders. The point is that consistency is not a rule in itself.”

The court found that the fact that some employees were guilty of misconduct during industrial action were given warnings, whereas others were dismissed, did not render the dismissal unfair.

Conradie JA puts it quite clear that consistency must be adhered to where possible, but if events or circumstances are such that it could not be adhered to, it is permissible not to adhere to it and the dismissal will still be justified. This became clear in *Lubners Furnishers v SA Commercial Catering & Allied Worker’s Union*\(^{36}\) where Mr Hlunganisa an employee of Lubners Furnishers and a number of other employees illegally occupied the premises of Lubners Furnishers to lend force to their wage demands. Mr Hlunganisa was the only employee who was subsequently dismissed by Lubners Furnishers for his illegal occupation of the premises. The Labour Appeal Court found that this factor did not make the dismissal unfair. It found that Mr Hlunganisa was the only employee who had been identified by Mrs Blignaut, the assistant credit controller of the company who had remained on the premises when the employees illegally occupied the premises. He was also guilty of more serious transgressions than the other employees in that he had switched off the lights and unplugged telephones.

The consistency principle should be applied very carefully by the employers when distinguishing between workers who acted in collective misconduct and those who acted individually in misconduct. In the case of *SACTWU v Novel Spinners (Pty) Ltd*\(^{37}\) it was held that an employer may not take into account earlier warnings issued for individual absenteeism when deciding whether to dismiss employees for participation in a stay away. If the employees are found guilty after having committed the same offence then the parity principle applies. In an unreported case of *Metcash Trading (Pty) Ltd t/a Trador Cash & Carry Wholesalers v Sithole NO*,\(^{38}\) the Labour Court set aside a CCMA arbitration award because the Commissioner did not understand the parity principle after three employees were dismissed by separate presiding officers, whereas one employee had been acquitted by another presiding officer, and two other employees had their charges withdrawn. The court held that

\(^{38}\) Labour Court case No 51079/97 dated 1 September 1998 (unreported).
the Commissioner had failed to understand the Code of Good Conduct, so the
dismissal was unjustified. In the case of *Truworths Limited v Ramabulana NO* the
Labour Court held that the Commissioner had erred grossly by finding that the
respondent employee had been unfairly dismissed because her supervisor was not
disciplined for failing to detect the employee’s dishonest act. The court went on to
state that, “the supervisor had, at worst, been guilty of negligence, while the
employee had dishonestly attempted to defraud the employer”.

To promote sound objectivity and consistency in the workplace, the Code requires
that records should be kept for each worker clearly specifying disciplinary
transgressions, the action taken by the employer and the reason for such action.

**2.12 APPROPRIATE SANCTION TO BE APPLIED**

The right of the employer to formulate rules regulating conduct also includes the right
to formulate and impose sanctions for the breach of such rules. The Code and the
Labour Courts are of the view that dismissal should be resorted to in cases of serious
infractions and should be resorted to lastly. The Code mentions quite a number of
factors that must be considered, *eg* previous disciplinary record and personal
circumstances, including the length of service.

It is always difficult to determine whether a sanction of dismissal is an appropriate
one more so in cases of first time offenders or whether another sanction *eg* a
warning or even demotion should not be imposed. In some Industrial Court decisions
and arbitration awards, suspension without pay is also seen as a form of disciplinary
sanction. The employer since he has a right to formulate rules regulating the conduct
of workers, he has also the right to formulate and impose penalties for the
contravention of such rules. The sanction prescribed by the formulated rules of
conduct will be regarded in most cases as the determination of the appropriateness
of such a sanction, *eg* if such a contravention warrants the imposition of a warning
according to the Code, if any other sanction is imposed it will be regarded as unfair

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40 Schedule 8 Item 5.
even though the presiding officer may be of the opinion that a more severe sanction eg that of dismissal is justified, unless the employees are informed that a different sanction will be imposed in future for such a contravention.

The employers must, however, be careful when imposing the severe sanction formulated in the employer’s rules, the courts and arbitrators may overturn such a sanction if it is regarded to be too excessive. There are many factors that must be considered in determining the appropriateness of a sanction, eg the seriousness of the conduct, the employer’s consistency, the length of service, the disciplinary record of the employee and the general attitude of the employee and his previous misdeeds. The nature of the business place as well as the work performed by the employee is very important to be taken note of. In the case of Finck v Ohlssons Cape Breweries\textsuperscript{41} the court accepted the nature of the employer’s business and justified the dismissal of an employee for consuming liquor on the premises, for the employee to consume liquor in such place was viewed very seriously, this view was also held in the case of Rosenberg v Mega Plastics (Pty) Ltd\textsuperscript{42} where an employee was on duty and dismissed for being intoxicated when driving a heavy truck, the dismissal was justified. The Code allows the use of informal advice and counselling in minor incidents of misconduct\textsuperscript{43} if the offences are repeatedly committed, warnings leading to final warnings are preferably. In the Code an example of sufficiently serious offences to justify dismissal is given as gross dishonesty eg thefts, fraud, etc, wilful damage to the property of the employer, wilful endangering of the safety of other workers in the business place, assault on the employer or another worker, or client or customer and conduct that is viewed as gross insubordination. When deciding on the nature of the offence committed it is important to look at the aggravating circumstances which will include the wilfulness and intention on the part of the employee, lack of remorse shown by the employee, previous valid warnings imposed on the employee and a long record of contravention of offences. It is important that the employer must bring to the notice of the employee all such misconduct.

\textsuperscript{41} (1985) 1 LCD 20.
\textsuperscript{42} (1984) 5 ILJ 29 (IC).
\textsuperscript{43} Schedule 8 Item 3(3).
It is important for presiding officers to look at the mitigating factors when presiding on such trials, *eg* the long service and even exemplary service and even in cases of short periods, an unblemished disciplinary conduct, showing of remorse by the employee after having committed such misconduct, but where the employee was forced by others to commit an offence this would be a mitigating factor because he acted under duress fearing for his safety as well as his family, and the employee’s personal circumstances. Although in *Rosenberg v Mega Plastics (Pty) Ltd*\(^{44}\) the court decided that personal circumstances of the employee were not relevant. In the later case of *National Union of Mineworkers v East Rand Proprietary Mines Ltd*\(^{45}\) dismissal was unfair because the employer had not given adequate consideration to the employee’s personal circumstances.

There is a limitation to mitigating factors unrelated to the misconduct that could be relied on by the employee *eg* having a clean record, remorse and long service. In *De Beers Consolidated Mines (Pty) Ltd v Commission for Conciliation, Mediation*\(^{46}\) the court went on to say that “these factors are not really ‘mitigating’ circumstances at all, in the sense in which a clean record may serve to reduce a penalty in a criminal trial. The only relevance of a clean record in the employment context, said the learned judge, is the extent to which it indicates that the employee is likely to repeat the offence. Where, as in *De Beers*, the employees concerned had shown no remorse and had by their conduct done nothing to show that they would not again commit their acts of dishonesty, there was no reason why the employer should have shown leniency. In Conradie’s view, the arbitrating Commissioner’s decision that a final written warning would have been a more appropriate penalty had to be set aside on this ground”.

It became clear in the case of *Kammies v Golden Arrow Bus Service (Pty) Ltd*\(^{47}\) that the mere fact that a disciplinary code stipulates a maximum sanction of a final warning for a specific offence does not prevent the employer from dismissing an employee for a more serious offence. In this case the disciplinary code had

\(^{44}\) *Supra*.
\(^{45}\) (1987) 8 *ILJ* 315 (IC) at 321D.
\(^{46}\) (2000) 21 *ILJ* 1051 (LAC).
\(^{47}\) (1994) 15 *ILJ* 1113 (IC).
stipulated for a maximum penalty of a final warning for a first offence of negligent driving and the employee admitted to blameworthy involved in 43 accidents, nine expired warnings for negligent driving, ten final warnings for other offences, and five previous dismissals and subsequent reinstateements. This clearly shows that the employer could exercise his discretion accordingly.

In NUMSA obo Valent/Volkswagen of SA (Pty) Ltd\(^{48}\) where the arbitrator held that “the employer was not bound by the maximum penalty in its disciplinary code if the offence in question went beyond the degree of gravity contemplated by the code”.

In the case of County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration\(^{49}\) the above principle was confirmed by the Labour Appeal Court. The court held that “in evaluating whether dismissal was a reasonable sanction, it should be recognised that there was a range within which reasonable people might reasonably disagree on the penalty for a particular offence. Where the employer’s decision fell within that range, commissioners or judges should not interfere merely because they would have preferred a better penalty”. Kroon JA stated:

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

In the De Beer’s\(^{50}\) case where the employees had fraudulently claimed payment for overtime they had not performed. The award reinstating them subject to a final warning was set aside with Zondo AJP dissenting, holding that the case was distinguishable from the Toyota case because the employees’ dishonesty was not “gross”. In Toyota South Africa Motors (Pty) Ltd v Radebe\(^{51}\) the court unanimously agreed that “a final warning was patently inadequate for an employee who had falsely claimed that his company car had been hijacked in order to concealed the fact that he had damaged it in an accident”. In the Nampak Corrugated Wadeville v

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\(^{48}\) (1999) 5 BALR 631 (IMSSA).

\(^{49}\) (1999) 20 ILJ 1701 (LAC).

\(^{50}\) Supra.

Khoza\textsuperscript{52} the Labour Appeal Court reaffirmed the principle that the employer is entitled to set the standards of conduct for its employees and to see to the maintenance of such standards, and Nicholson JA held that commissioners must decide for themselves whether penalties imposed by employers are fair, and are free to impose lesser penalties if they deem fit, a view which was overturned in the later case of Toyota\textsuperscript{53}

Ngcobo AJP as he then was added the following in a concurring judgment in the County Fair Foods\textsuperscript{54} case:

“\textquote[\textsuperscript{54}]{If commissioners could substitute their judgment and discretion for the judgment 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 would not be fair to employers. In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. this would be the case, for example, where the sanction is so excessive as to shock one’s sense of fairness. In such a case, the commissioner has a duty to interfere.”}

The principle adopted by both judges Kroon and Zondo has in a way brought sanity and order in the work place, if the commissioners were allowed to impose lesser penalties if they deem fit there could be a flood of cases referred to the CCMA by the employees whenever they are punished for contravening the rule of conduct, the employers could be undermined by the employees and that could affect production and stability in the work place. The employer’s penalties must be recognised provided that they are fair and reasonable. Only if a penalty is not fair and reasonable commissioners should interfere with it.

\section*{2.13 CORRECTIVE APPROACH}

The Code under Schedule 8 Item 3(2) advocates a corrective or progressive approach to discipline involving behaviour modification through a system of progressive disciplinary actions with the aim of improving the disciplinary patterns of the affected employees, \textit{eg} where misconduct of a minor nature would be dealt with

\textsuperscript{52} (1999) 20 ILJ 578 (LAC) at 585.
\textsuperscript{53} Supra.
\textsuperscript{54} Supra.
through informal approach such as advice and counselling leading to giving warnings according to Schedule 8 Item 3(3) and up to final warning should the employee continue with the contravention of the rule, the warning must be in a written form and is signed by the employee, but in serious cases of misconduct the employee may be dismissed if the continued employment relationship becomes intolerable. However, in *National Union of Mineworkers v Free State Consolidated Gold Mines*\(^{55}\) the Appellate Division (as it then was) expressed doubt as to whether dismissal was justified only when misconduct had the effect of irreparably harming the employment relationship between the employer and employee; it held that the least that was required was that the misconduct should have been “serious”, but in the case of *Nkomo v Pick ’n Pay Retailers*\(^{56}\) the court ruled that dismissal was too drastic a penalty where the theft involved a single pie by the employee. It seems that it depends on the employer in the first place to decide whether he wants to dismiss or not in a case involving theft of a minor nature. The case that comes to mind is *Komane v Fedsure Life*\(^{57}\) in which it was held that “once it was proved that an employee was guilty of theft, no matter how small the value of the goods involved (in casu a packet of powdered milk) there was no reason to inquire into whether the misconduct was “gross” and whether the employment relationship had been rendered “intolerable”, in such cases a dismissal will be justified. So the concept of corrective approach is reasonable fair and it must be encouraged rather than to opt for the maximum penalty of dismissal even though the value involved is not significant, a warning in writing should be resorted to and even counselling of such an employee. There is quite a number of serious cases that will justify dismissal including offences such as gross insubordination and gross negligence. This was held by the Industrial Court in *CWIU v Total (Pty) Ltd*\(^{58}\) that a first offence of gross negligence was serious enough for dismissal.

Dismissal would be substantively unfair under some of the following conditions:

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\(^{55}\) (1995) 13 *ILJ* 573 (LAC) at 5911.

\(^{56}\) (1989) 10 *ILJ* 937 (IC).

\(^{57}\) (1998) 2 *BLLR* 215 (CCMA).

\(^{58}\) (1995) 16 *ILJ* 1233 (IC). The Industrial Court judgment is reported at (1995) 16 *ILJ* 1233 (IC) and the unreported appeal judgment was delivered on 14 December 1994.
• The dismissed employee is unaware of the alleged rule he is alleged to have contravened, was never informed about it.

• Clear reason for the dismissal must be established, *eg* a rule must be contravened if not there can be no fair dismissal.

• The sanction imposed is inconsistent with the treatment of other employees who committed the same offence.

• Dismissal was ordered without the consideration of mitigating factors.

• The sanction is too severe for the offence which was committed.

• The dismissal constitutes victimisation of the employee and all dismissals that contravene law, service contract, wage determination or industrial council agreement.

• The employer is unable to justify the penalty of dismissal, the employer must establish on the balance of probability and on reasonable grounds, that the offence was committed and was serious.

• Failure to give a fair hearing to the employee before dismissing him.

• Failure to conduct proper investigation into the alleged misconduct of the employee.

### 2.14 ONUS IN MISCONDUCT DISMISSALS

If a dismissal is imposed, then it is the duty of the employer in terms of section 192(2) to prove that the dismissal was fair, this is a departure from the approach which was found under the 1956 LRA where no onus vested on either party, now the employer must prove that the dismissal was both substantively and procedurally fair. The employer must first investigate the allegation of misconduct properly and thereafter
hold a proper hearing. The employer need not be satisfied beyond reasonable doubt that the offence was committed by the employee like in the criminal courts but if he is satisfied on a balance of probability. In the case of *Moahlodi v East Rand Gold & Uranium Co Ltd*\(^{59}\) the court formulated the test as follows:

“An employer need not be satisfied beyond reasonable doubt that an employee has committed the offence. The test to be applied is whether the employer had reasonable grounds for believing that the employee had committed the offence. It is sufficient if, after making his own investigations, he arrives at a decision on a balance of probabilities, that the offence was committed by the employee provided that he affords the employee a fair opportunity of stating his story in refutation of the charge.”

In the case of *Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation & Arbitration*\(^{60}\) the award of the CCMA commissioner was set aside because the commissioner adopted the criminal standard of proof beyond “reasonable doubt”, rather than the balance of probability which is applied in the civil courts.

When deciding on a balance of probability, the ultimate question is whether the arguments of the party having to prove onus were probable than not, this does not mean that a party met by a denial could not succeed unless the arbitrator was certain that the other side was not telling the truth. It is sufficient if the version of the employer is more probable than that of the employee.

In *Electrical & Allied Workers Trade Union v The Production Casting Co (Pty) Ltd*\(^{61}\) the court proposed a different test, that:

“if the employer is of the *bona fide* view that as a result of the employee’s conduct which has come to his attention and which he has investigated to such an extent that would exclude any grounds that he (the employer) has acted arbitrarily, the relationship between him and the employee has become intolerable for commercial or public interest reasons, he will be entitled to dismiss the employee ... If an employer for instance mistrusts an employee for reasons which he must obviously justify (not according to any particular standard of proof), and he can show that such mistrust, as a result of certain conduct of the employee, is counter-productive to his commercial activities or the public interests (where appropriate) he would be entitled to terminate the relationship”.

\(^{59}\) (1988) 9 *ILJ* 597 (IC).

\(^{60}\) (1999) 20 *ILJ* 2679 (LC).

\(^{61}\) (1988) 9 *ILJ* 702 (IC) at 708G-J.
In the case of *Blackie & Co Ltd v Yeomans*\(^{62}\) the Labour Appeal Court stated that the onus was on the employer to establish the breach of the disciplinary rule and that must be proved on a balance of probabilities.

\(^{62}\) 1992 1 LCD 5 (LAC).
CHAPTER 3

SPECIFIC ACTS OF MISCONDUCT

3.1 INTRODUCTION

In this chapter offences justifying dismissal from work will be discussed. However, this does not suggest that if an employee commits any one of them, dismissal is automatically warranted. The seriousness of the offence concerned and its impact on the employment relationship must be assessed in the light of the particular circumstances of each case.

3.2. ABSENTEEISM FROM WORK AND TIME-RELATED OFFENCES

Under the common law an employee must place himself or herself at the disposal of the employer. Deliberate absence from work is viewed as a serious misconduct and in most cases dismissal is justified, however, not every incident of absence, whether isolated or whatever duration, warrants dismissal. However, where an employee is absent repeatedly, or where a single incident of absence detrimentally affects the employee’s business, dismissal will be justified.

The Labour Courts have enforced this obligation noting that the employer has a right to expect better service and discipline from the employee including not to be unnecessary absent from work in circumstances where the absence cannot be justified. The onus will rest on the employee to justify his absence from work. Being late on duty frequently can create problems for the employer if the employee’s position at work is such that he must at all times be at his/her post, dismissal will be justified if such late coming to work does not stop. The rule against absence from work without a valid reason originates from the common law obligation that the employee shall at all times makes his services available to the employer.63

In *Mkele v SA Breweries Ltd*\(^{64}\) the court upheld a dismissal of workers who had been expressly advised to report for duty in accordance with specific shift working arrangements and they failed to do so.

Where absence from work is the result of sick leave being granted, the employee is expected to be on sick leave and must not use the leave for other unauthorised purposes.

In *Rand Mutual and NUM*\(^{65}\) the arbitrator held that “the employer who is paying the employee while he or she is absent, has a material interest in the employee’s return to health; it is entitled to expect the employee to follow the prescribed treatment faithfully and return to work the moment he or she recovers. Sick leave is granted because the employee cannot work; it is intended as a period of recuperation during which the employee can recover his capacity to work, and, once the employee recovers, he or she is expected to return to work forthwith. The fact that a fixed period of sick leave has been granted does not alter this position in fixing the period of sick leave the employer does no more than indicate that a further absence will require a fresh application for leave which will have to be motivated. In my view an employee who is absent from work through illness is bound, within reason, to do whatever is required in order to make a proper recovery and to return to work as soon as he or she does recover. Failure to comply with this obligation would, in my view, amount to a disciplinary offence”. The employee must prove reason that will justify his absence from work.

### 3.2.1 USE OF ABUSIVE LANGUAGE

Employers are entitled to enforce good standards by all at work including harmonious relationship. Superiors, fellow workers and third parties must be treated with discipline and any use of abuse language against them may lead to dismissal, particularly when it amounts to insolence, and when it is directed at visitors such as customers and clients where abuse has racial connotations or sexual harassment.

\(^{64}\) (1991) 12 *ILJ* 900 (IC).

\(^{65}\) (1990) ARB 8.17.8.
The manner in which the language was used is very important to be taken note of as well as the circumstances and place in which the language was used. There is a clear difference between language that is merely jocular or rude, as opposed to abusive (uncivil). The nature of the business of the company plays a very important part to determine whether the language is abusive and the degree to which it may constitute such an abuse, in some workplace or business it may be endeared as not abuse whereas in another place it may be abusive.

It is even worse if the abusive language is directed at the officials such as superiors, supervisors and will constitute insubordination, justifying disciplinary steps and even dismissal. In *Union Spinning Mills and ACTWUSA* the arbitrator stated “it is often very difficult to distinguish between language used on the shop floor which undermines the authority of the employer and that which is jocular or rude. The degree of tolerance for what is sometimes called ‘industrial language’ varies from one plant to another and whether use of the same words constitutes insubordination may differ from plant to plant and circumstances to circumstances”.

Racial connotations are as bad and serious, it is beyond the humiliation and dignity of a person against whom it is directed. In *Siemens Ltd and NUMSA* the arbitrator stated that

“racial insults go beyond those to whom they are individually directed. They impact upon the workplace as a whole. This is particularly applicable where the bulk of the workforce is black and the language in issue has the effect of humiliating and degrading blacks generally. The company officials equated racially abusive language with any swear word. I regard this approach as simplistic. Racially abusive language is more serious precisely because of its broader implications.”

It is even worse if such racial remarks are directed by a white employee at a black employee in circumstances where there is a rule against verbal abuse. It is presumed that the rule is general even in cases where a black employee uses such derogatory remarks against a white employee, the rule will have been contravened. In *Checkers SA Ltd and SACCAWU* the arbitrator stated that

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67 (1989) ARB 6.3.4.
68 (1990) ARB 8.13.5.
“I am of the view that ordinary men and women ought to be protected from having to endure racial abuse and whilst no doubt every man and woman is entitled to think what he or she likes, it is incumbent upon him or her to conceal their socially unacceptable thoughts and to preserve at least a façade of respect for others. Accordingly I conclude that there was no substantive unfairness in the dismissal of the grievant.”

3.2.2 DRUGS AND ALCOHOL USE

Drug and alcohol use is a form of conduct that may indicate a serious form of incapacity and misconduct. It is suggested by the Code of Conduct that since it is a form of misconduct and incapacity, counselling and rehabilitation should be resorted to by the employer to assist the affected employee. The employer has every right to make rules prohibiting the use of both the substances and to treat a breach of such a rule in a more serious light although it must be noted that drunkenness at work and alcohol abuse in general are two separate things. Drunkenness at work will be followed by a severe disciplinary action including the sanction of dismissal, this is so in workplaces where drunkenness could be extremely dangerous, eg in mines, chemical industries, transport companies and explosives factories.

Where there are specific rules against abuse of alcohol at work, the rule will be specific to the fact that an absolute rule to the effect that no employee may be under the influence of liquor when on duty. When his ability to do the job may be impaired, and that an employee’s blood alcohol level may not exceed a certain specified level.

In many cases proof of drunkenness is ascertained through the use of a breathalyser test, although the use of a breathalyser is not essential, nevertheless it serves to provide evidence that the employee is indeed under the influence of liquor. Some arbitrators are reluctant to make use of the evidence of a breathalyser test and some have even condemned the use of such evidence.

In the case of Protea Gardens Hotel (Pty) Ltd\(^69\) the arbitrator made no finding on the reliability or fallibility of a breathalyser, something indicating that such a test is not favoured as conclusive evidence of intoxication. The use of the instrument was

\(^69\) (1986) ARB 8.11.1.
condemned in the strongest terms by the arbitrator in *Castle Lead Works (Tvl) (Pty) Ltd and NUMSA*\(^{70}\) where the arbitrator stated

“the system called ‘Alcolyser’ is quite unsatisfactory for the purpose of determining either the extent of the alcohol consumption or whether or not the employee was under the influence of alcohol and no possible finding can be made based on this test. If the company were to use this as a basis for a further test by a district surgeon then that would be its only value. It certainly would not justify a dismissal, irrespective of what this so-called test revealed.”

What is clear though is the fact that the use of a breathalyser test is permissible to provide evidence of intoxication, but such evidence must be supported by evidence of eyewitnesses who should testify as to the employee’s gait, manner of speech, his condition whether he was unsteady on his feet or not and whether his eyes were bloodshot. The evidence of a breathalyser test is not definitive, it must be corroborated by visual evidence. The evidence should indicate that the instrument was properly administered if any reliance is to be placed on it.

In the case of *Price Club and CCAWUSA*\(^{71}\) the arbitrator suggested the following procedure: “When a breathalyser is used it would seem essential that a witness be present for the employee. It would also seem desirable that there be a witness for the management. Here there was what the assistant manager claimed to be an independent, neutral witness in the form of the head of security. Security was supplied by an outside company but it is likely that the employees would have seen security personnel as being part of the management. If at the end of the test there had been a paper signed by the person conducting the test, in this case an assistant manager, and by a witness for management, in this case the head of security, and if it had been signed by the employee and his witness there would have been no dispute about the validity of the test.”

There is a view that a finding that an employee is intoxicated does not always warrant a dismissal, except where the occupation of the employee is relevant and therefore the intoxication would pose a threat to the safety of others as was the case

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\(^{70}\) (1989) 10 *ILJ* 776 (ARB).

\(^{71}\) (1988) ARB 8.11.5.
in *Rosenberg v Mega Plastics (Pty) Ltd*\textsuperscript{72} where the court upheld the dismissal for drunkenness of an employee who was the driver of a heavy duty truck. In *Finck v Ohlssons Cape Breweries*\textsuperscript{73} the court upheld a rule in terms of which the mere consumption of alcohol on the premises was a dismissable offence.

An approach that is bearing fruits where an employee has been found to be under the influence of liquor when on duty is to make an assessment to determine the reason for the liquor related misconduct through a subordinate inquiry to determine whether the employee has a drinking problem, but where the employee declines the assessment, and does not want to undergo counseling or treatment, disciplinary measures must be applied against him, starting by first warning or suspension without pay. In cases of repeated misuse of liquor at work and it is evident that endeavours to improve and correct his behaviour have failed, dismissal will be a fair penalty. The said approach is consistent with a progressive form of corrective discipline with a remedial purpose.

### 3.2.3 ASSAULT

Whether it is a minor assault or serious assault will be followed by a sanction of dismissal whether the employee is a first time offender or not, however, if the employee was provoked into committing the assault, the nature of such provocation and the workplace itself must be taken into consideration when imposing the sanction. In general the assaults are viewed as behaviour which is unacceptable. The more serious the assault is, the greater the chances that dismissal will be appropriate action.

### 3.2.4 CONFLICT OF INTEREST

An employment contract is based on a mutual trust between the employer and the employee and any breach of such trust on the part of the employee will in serious cases result into a dismissal action. If for instance the employee would act in a

\textsuperscript{72} *Supra.*  
\textsuperscript{73} *Supra.*
manner which is viewed as a direct competition with the business of his employer, or receives secret profits as a result of his employment status or his position, that will reflect dishonesty and a dismissal sanction could be imposed. If the employee uses a property of his employer eg being a driver of a vehicle for his own personal gain neglecting his own duty (that of employer) a dismissal sanction could be imposed once the employer is prejudiced in any manner, but in the absence of dishonesty the employee would not normally be viewed as having a conflict of interest.

In *Premier Medical & Industrial v Wrinkler*74 the court held that “there can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master’s interests.

In *SACTWU v R Stumpfe t/a De Lederhandler George*75 where the court held that it was not unfair to dismiss, without a formal hearing, an employee who refused to stop making shoes in competition with the employer’s business.

### 3.2.5 DAMAGE TO EMPLOYER’S PROPERTY

If an employee wilfully damages any property of his employer a sanction of dismissal will be imposed. In cases of negligently causing damage to such property the action may not be viewed as serious as when he wilfully and intentionally damages such property, a sanction of dismissal may not be imposed without warnings. To promote the interests of the employer, the employee is under an obligation to safeguard the employer’s property.

In *NUMSA v Dunlop Flooring*76 the Labour Appeal Court appears to have accepted that dismissal was justified in cases of malicious damage to property. The appellant employee had been dismissed for malicious damage to company property, the Labour Appeal Court found that on the probabilities that the grounds for dismissal had been overwhelmingly established.

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74 1971 (3) SA 866 (T) at 867.
75 *Supra*.
76 (1993) 14 *ILJ* 1291 (LAC).
3.2.6 DISHONESTY

It manifests itself in many ways, the non-disclosure of important information, supplying of false information, theft, fraud and pilfering. In all the mentioned instances the conduct of the employee would be regarded as dishonest and would normally justify dismissal even summary dismissal. The CCMA has a tendency of dealing with minor pilfering with leniency but the Labour Appeal Court has emphasised the importance of mutual trust and confidence in the employment relationship, it has even upheld dismissals as a result of dishonesty whether small amounts are involved. Dishonesty could include cases of qualification misrepresentation.

In Stroud v The Steel Engineering Co Ltd\textsuperscript{77} the Industrial Court upheld the dismissal of an employee, with twenty-seven years service in circumstances where the employee, while applying to join a benefit fund, intentionally concealed the fact that he was in receipt of benefits from other sources. The court held that the failure to reply to a prominent and very important question was tantamount to a false answer and that dismissal was justified on the basis of the breach of trust between the employee and his employer. Knowingly receiving wages that are not due has been held to be a fair reason for dismissal in ACTWUSA v JM Jacobson (Pty) Ltd\textsuperscript{78}.

3.2.7 GROSS DISHONESTY

There is almost no difference between gross dishonesty and dishonesty, the principles are the same. In cases of serious dishonesty (gross) where the employees enrich themselves unlawfully with the property of the employer, dismissal will be justified. In the case of Hoch v Musteck Electronics (Pty) Ltd\textsuperscript{79} an employee submitted a false claim that she possessed formal qualifications was held to have irreparably destroyed the employment relationship. In cases where a supervisor will close his eyes to theft by employees is as guilty as perpetrators. In the case of CWIU

\textsuperscript{77} (1993) 2 LCD 259 (IC).
\textsuperscript{78} (1990) 11 ILJ 107 (IC).
\textsuperscript{79} (1999) 12 BLLR 1389 (LC).
v Total SA (Pty) Ltd the driver of a petrol truck from which 4 000 liters of fuel had disappeared was held by the Court to have been fairly dismissed for the disciplinary offence of failure to care for company products even though theft or fraud on his part could not be proved.

3.2.8 INSUBORDINATION

Any employee who refuses to obey lawful and reasonable instruction by the employer will be charged for insubordination which is viewed as a serious conduct since the employment relationship is based on mutual respect and inherently of subordination. Therefore the employer must be in a position of authority at all times without being undermined. The act of insubordination could be “gross” and in such a case dismissal would be imposed. It will be a case of gross insubordination if the conduct is deliberate, intentional and is sustained for a very long time, but it must be a reasonable instruction and must relate to work performance.

Insubordination incorporates an element of disobedience, or challenging the authority of the employer. In CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg) the definition of insubordination was defined as follows:

“When the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilful disobedience), or when the employee’s conduct poses a deliberate (wilful) and serious challenge to the employer’s authority.”

In Johannes v Polyoak Industries, the employee refused to complete certain quality checklists until the employer attended to her complaints. She admitted that this amounted to an offence, but claimed that the employer had acted unfairly when it had dismissed her because she had merely asked for a small indulgence. The court was unimpressed, saying that “it must have been clear to the employee that her lone crusade would end in disaster. The employer could not reasonably be expected to endure such defiance”.

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80 Supra.
81 (1989) 10 ILJ 311 (IC) at 314.
3.2.9 DESERTION

The act of desertion is different from the act of absence from duty without leave. The employee without any good reason would stay away from work with no intention of returning back to work and unless such an employee produces justified reasons for such desertion a sanction of dismissal would be imposed.

3.2.10 INTIMIDATION

Intimidation is a threatening conduct by an employee against anyone at work if such a threat will induce reasonable fear of being harmed in the person against whom such a threat is directed. Such a conduct is viewed seriously even in cases of first time offence. A sanction of dismissal would be imposed. In *Fulcrum Engineering v Chauke*\(^3\) the Labour Appeal Court held that a trade union representative had been fairly dismissed for intimidating the workforce not to participate in a project initiated by the employer. The court said about intimidation in the workplace:

“This court will do the cause of worker advancement through collective action a disservice by flinching from accepting the real import of such evidence of workplace intimidation. It is plain that in 1997, as in late 1994 when the events under discussion in the case occurred, we are a national which is increasingly bedeviled by coercive conduct. Intimidation and coercion in the workplace stifle our national life in various ways. First, intimidation casts a pall of fear and inhibition over the workplace, thereby damaging productivity essential to our nation’s wellbeing. Secondly, it casts its sombre shadow beyond the workplace into the lives of the communities from which the workers come. But thirdly, and from a union point of view perhaps most importantly, intimidation is destructive of unions themselves, whose leadership and social strength depend upon their moral authority. Moral authority can derive only from consent. It can never derive from intimidation.”

3.2.11 NEGLIGENCE

In this instance there is no deliberate intention to commit an offence by the employee and there is consistency in awards when considering the appropriateness of a sanction of dismissal. The damage or loss incurred by the employer as a result of the employee’s conduct will not be a determining factor but in cases involving senior employees who bear a high level of trust and responsibility who negligently cause a

\(^3\) *Fulcrum Engineering v Chauke* 18 ILJ 679 (LAC).
serious damage or loss to the property of the employer, a sanction of dismissal can be imposed. In some cases of this nature the CCMA has considered the contributor’s negligence of the employers when employees not suitable for a specific job are placed on such jobs without being assisted through training and guidance when determining the appropriateness of a dismissal sanction.

3.2.12 SEXUAL HARASSMENT

Sexual harassment constitutes a serious form of misconduct, usually at the workplace. In most cases it is directed at the woman employee by an employer or a male employee, however, it is possible that the act could be between the members of the same sex.

Conduct which can constitute sexual harassment can take the form of innuendo, suggestions, inappropriate gestures, fondling without consent of the woman’s body and even rape, the advances must be done against the will of the victim. A single act can constitute the harassment but according to Grogan\textsuperscript{84} “a single assault will not necessarily amount to sexual harassment, even if it is sexually motivated”. I find it very difficult to support the principle since the offence has been committed and sexual motivation has been proved to be present and the intention is clear. The same author goes on to say:

“However, this does not mean that such a conduct will be condoned, and still amounts to assault.”

In \textit{J v M Ltd}\textsuperscript{85} the court held that, “it is in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment”.

The sexual advances must be unwanted unsolicited and persistent. In English law the sexual harassment is viewed very seriously and persistent and unwanted amorous advances by an employer to a woman employee has been held to constitute constructive dismissal. This was a decision of the court in the case of

\textsuperscript{84} Supra at 149.
\textsuperscript{85} (1989) 10 \textit{ILJ} 755 (IC) \textit{ibid} at 757.
In America sexual harassment is viewed as a form of discrimination that should be prohibited by employers and that employers should adopt measures that would protect their employees from harassment by other employees and by customers.

In the case of *J v M* the South African court took a similar view, and it upheld the dismissal of a senior executive for his amorous behaviour. The court went on to state that depending on the form it took, such behaviour violates the victim’s right to integrity of the body and personality, and is aggravated in the employment context by the fact that the victims are sometimes afraid to complain because they fear this could lead to loss of employment opportunities or even to a dismissal.

De Kock defined sexual harassment in the *J v M* case as follows:

“In its narrowest form sexual harassment occurs when a woman (or man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is however any unwanted sexual behaviour or comments, which has a negative effect on the recipient. Conduct that can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worse form, namely rape. It is in my opinion also not necessary that the conduct must be repeated.”

From the definition two approaches have been identified:

- A narrow view which recognises sexual harassment as when someone is forced into sexual engagement in order to get a job or keep a job, be promoted and even enjoy favourable working conditions.

- An unwanted sexual behaviour or even comment that negatively affects the recipient or the victim. The elements of sexual harassment will entail the following:
  
  - The behaviour must be unwanted by the victim.
- It must be of a sexual nature.

- The behaviour could be in any of the following forms: verbal, physical *eg* by touching certain body parts or non-verbal ways. The unwanted behaviour must be distinguished from the behaviour that is accepted and welcome. Physical contact will include rape or ordering the victim to strip in full view of other people who may be of the opposite sex.

**Verbal**

It includes innuendoes, comments with sexual overtones, inappropriate comments or enquiries about a person’s sex life, sex related jokes and comment about one’s body structure.

**Non-verbal**

It will include offensive and distasteful gestures such as eye-winking, indecent exposure and the display of sexual explicit pictures and objects.

**Quid pro quo**

The abuse of authority by an employer or his representative, including all members of the management who have the power to influence the powers of employment, dismissal, salary adjustments, benefits, promotions by the suggestion of sexual favours. In *Sookunan v SA Post Office*, where the applicant, a supervisor and acting postmaster, the CCMA Commissioner made a distinction between *quid pro quo* harassment and hostile work environment harassment. The *quid pro quo* form of harassment was viewed more seriously than the environment harassment, although both forms of harassment might justify dismissal. “The evidence which included the pressure applied by the supervisor on the two complainants to drop the charges against him, smacked of the threats usually associated with *quid pro quo* harassment

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concluded the inquiry." In considering the appropriate sanction the Commissioner considered the following to be aggravating factors:

1. Although he claimed he did not see the relevant notices prohibiting sexual harassment at work, he knew and understood the subject of sexual harassment.

2. He was effectively the complainant’s boss.

3. He tried to use that position to discourage the first complainant from reporting the matter.

4. His conduct was not isolated but directed to more than one female staff member and repetitive in both instances despite resistance.

5. His actions included physical touching and groping.

6. He interfered with the complainants after charges had been laid.

On this basis the Commissioner found that the employee’s conduct had irretrievably damaged the employment relationship and that dismissal was the appropriate sanction. The application was dismissed.

**Hostile environment**

In some workplaces the walls are pasted with posters or writings of sexual jokes and even abusive language, such an environment offends many people and the place is viewed very hostile.

**Sexual favouritism**

Where a person who is in a position of authority rewards only those people who respond to his sexual behaviour when deserving people who refuse his sexual advances are denied jobs, promotion, merit rating or salary increases.
3.2.12.1 CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES (THE CODE)

The Code provides guidance to employers, employees and others in the workplace. It was developed by NEDLAC to deal with cases of sexual harassment issued in terms of section 203(1) of the Labour Relations Act.90

3.2.12.2 THE COMPANY POLICY ON SEXUAL HARASSMENT

The employers must affirm everyone’s right to be treated with dignity at the workplace in a form of a written statement.

- Sexual harassment must be prohibited in the workplace.

- There must be a mechanism that are put in place to deal with such behaviour in the form of a grievance procedure and other reporting forms.

- Such cases must be investigated without undue delay.

A strong approach when dealing with the behaviour may help deter many people and that could lead to a harmonious working relationship at work. Nothing will create a sense of security and protection to the victims of this behaviour than to deal with or approach such cases very seriously, sensitively, confidentially and the assurance that they will be protected against victimisation, retaliation and false accusation. It is very common today that people who are accused of sexual harassment they tend to retaliate by lodging similar grievance against their victims. The complaints must be investigated thoroughly by people who understand the sexual harassment. In some cases it transpires that the sexual harassment is a fabricated story if one feels that he or she has been overlooked for a specific task he or she wanted in the job situation. It is best to inform all employees about the policy on sexual harassment at the workplace and the range of disciplinary sanctions that could

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90 66 of 1995.
be imposed if found guilty. The management should implement the policy and take disciplinary action against employees who do not comply with the policy. A policy on sexual harassment must explain the procedure which the victims must follow when reporting the grievance.

- That sexual harassment in the workplace will not be permitted or condoned.

- Persons who have been or are being subjected to sexual harassment in the workplace have the right to lodge a grievance about it and appropriate action will be taken by the employer.

3.2.12.3 GUIDING PRINCIPLES

- The employers must create and maintain a climate in which victims of sexual harassment will not feel that their grievances are ignored or trivialised or fear reprisals.

- Employers, managers and employees must refrain from committing acts of sexual harassment.

- They have a role in creating and maintaining a working environment in which sexual harassment is prohibited.

- The employers must protect people who are doing business with the company such as customers, suppliers, job applicants and others from being subjected to sexual harassment by the employer or its employees.

- Employers are required to take appropriate action when instances of sexual harassment are brought to their attention. The Code recognises the importance of collective agreements regulating the handling of sexual harassment and is not intended to substitute of collective agreements or the outcome of joint decision-making by an employer and a workplace forum, but such collective agreements should be guided by the provisions of the Code.
3.2.12.4 PROCEDURES

Employers must develop clear procedures to deal with sexual harassment which will ensure the resolutions of problems in a sensitive, efficient and effective way.

3.2.12.5 ADVICE AND ASSISTANCE

The victim may feel unable to face the perpetrator, lodge a formal grievance or turn to colleagues for support. It would be good if employers should designate a person outside of line management whom victims may approach for confidential advice. Such a person could be a person employed to perform such a function or a trade union representative, or co-employee or an outside professional, with appropriate skills and experience.

Could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

3.2.12.6 OPTIONS IN RESOLVING A PROBLEM

The employees should be advised that there are two options in resolving sexual harassment. The problem could be resolved in a formal way or a formal procedure can be embarked upon. It is important that the employee should not be forced to accept one or the other option.

3.2.12.7 INFORMAL PROCEDURE

The employee concerned may be happy to have an opportunity to explain to the person engaging in the unwanted conduct that the behaviour is not welcome, it offends her or makes her uncomfortable and that it interferes with his/her work. If this approach does not help or stop the behaviour it may be more appropriate to embark upon a formal procedure.
3.2.12.8  FORMAL PROCEDURE

If the formal procedure is chosen, it should be made available to the aggrieved party and should specify with whom the employee should make the grievance or complaint. The matter should be dealt with immediately as to the time frames, provide that should the case not be resolved satisfactorily, the matter can be dealt with in terms of the dispute procedures.

3.2.12.9  INVESTIGATION AND DISCIPLINARY ACTION

The investigation of sexual harassment must not disadvantage the aggrieved party, and that the position of other parties is not prejudiced should the grievance be found to be groundless. The Code of Good Practice regulating dismissal contained in Schedule 8 of the Labour Relations Act\footnote{66 of 1995.} provides that an employee may be dismissed for serious misconduct, or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences.

The disciplinary sanctions to which employees will be liable should be clearly stated and that it will be a disciplinary offence to retaliate, victimise an employee who in good faith lodges a grievance of sexual harassment.

3.2.12.10 CRIMINAL AND CIVIL CHARGES

A sexual harassment victim has every right to press separate criminal and civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by the Code.

3.2.12.11 DISPUTE RESOLUTION

If the victim of the alleged sexual harassment’s complaint is not satisfactorily resolved, either party may refer the matter to the CCMA within 30 days of the dispute having arisen for conciliation, and if the dispute is unresolved, any party may refer
the dispute to the Labour Court within 30 days after the receipt of the certificate issued by the commissioner to the fact that the matter is unresolved.

3.2.12.12 CONFIDENTIALITY

The investigation of grievances of sexual harassment must be handled in a manner that protects the identities of the people involved. The parties concerned must endeavour to ensure confidentiality at the disciplinary inquiry. The people who should be present at the enquiry are the members of the management who should be there, the aggrieved party or his representative, the perpetrator, witnesses and an interpreter, if required.

3.2.12.13 ADDITIONAL SICK LEAVE

When the complainant’s sick leave entitlement has been exhausted, the employer should consider granting additional sick leave in cases of serious sexual harassment where the complainant requires extensive medical care and trauma counseling.

3.2.12.14 INFORMATION AND EDUCATION

Since the sexual harassment is becoming a common problem in the workplace, it is necessary that the Department of Labour should distribute copies of the Code so that they are available at all workplaces.

The information should be extended into orientation seminars, education and training programmes for all employees. Organisations such as trade unions must cover sexual harassment in their education and training sessions for shop stewards and employees.

It is therefore important and necessary that CCMA commissioners should receive specialised training in cases involving sexual harassment because of their sensitive nature.
3.2.12.15 PROVING SEXUAL HARASSMENT

Although there are quite many definitions of sexual harassment, the Code does not clearly defines what an employer must prove to secure a guilty verdict for the perpetrator of sexual harassment. In Gerber v Algorax (Pty) Ltd\(^{92}\) the arbitrator stated that:

> “I am of the view that the test to be applied to determine whether the conduct of the alleged perpetrator constitutes sexual harassment, should be an objective one. Campanella and Brassey in their article entitled ‘to refrain from embracing’ in Employment Law Vol 10 Part 4 suggested that the test is whether the advances were welcome or whether the accused reasonably believed them to be so. So much was clear to the drafters of the Ontario Human Rights Code. They defined harassment as engaging in a course of a vexatious comment or conduct that is known or ought reasonably known to be unwelcome.”

Landman and Van Niekerk\(^{93}\) defines sexual harassment as follows:

> “Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. Sexual attention becomes sexual harassment if

(a) the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment and/or

(b) the recipient has made it clear that the behaviour is considered offensive; and/or

(c) the perpetrator should have known that the behaviour is regarded as unacceptable.”

The definition makes it clear that the perpetrator committed the act knowingly and with the intention, therefore negligence does not seem to constitute the offence. To constitute the offence the act must be accompanied by intention to commit the offence. The test is therefore twofold, that was the action of the perpetrator of such a nature that it can be classified under the definition of sexual harassment and whether the perpetrator knew or should reasonably have known that his actions or proposals would be unwelcome.

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\(^{92}\) (1999) 20 ILJ 2994 (CCMA).

The employers and managers can no longer ignore or stand on the sideline with regards to the cases of sexual harassment, they must play a proactive role in its prevention. The NEDLAC guidelines should be the basis of a substantive policy that needs to be adhered to and monitored strictly by employers if sexual harassment is to be overcome.

In the case of Reddy v University of Natal, Myburg stated that: “It would become paramount for an employer not merely to ignore the complaints with regard to sexual harassment”. He went on to state that “in terms of the Constitution, sexual harassment infringes the right to human dignity. Everyone has inherent dignity and the right to have their dignity respected and protected and right to privacy enshrined in section 14”. The failure by the employer to act or be proactive could have severe civil and criminal consequences, not only for the perpetrator but also for an employer.

### 3.3 GROUP MISCONDUCT

Sometimes it happens that an offence is committed at the workplace by unknown people making it difficult for the employer to point out the culprit because there is a group of employees employed who are working at the same place and the employees are not prepared to assist the employer by pointing out the culprit. This is a difficult situation more so when a serious offence has been committed. The employer may contemplate dismissing the whole group but there could be some problems in taking such a decision without first taking into account the possibility of intimidation to innocent workers who may lose their jobs for the sake of one or two culprits. The employer must act tactfully when dealing with the situation, it would be better for him to approach the matter in a fair but serious manner. In Chauke v Lee Service Centre CC t/a Leeson Motors, the employer had experienced a number of industrial sabotage in its paint shop, the culprits could not be traced, the employer issued an ultimatum that if any further damage was caused and the culprit was not identified, the entire paint shop and cleaning staff would be dismissed. After another incident of sabotage the employer requested the workers to identify the culprit and

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95 S 14 of Act 108 of 1996.
when they failed to do so all were dismissed. The Industrial Court held that all were
guilty of a systematic sabotage and dismissed their application for reinstatement. On
appeal, the Labour Appeal Court observed that the central question was whether the
employer was entitled to dismiss a group of employees when a misconduct was
committed by a member of the group who could not be identified. They were all
charged with a misconduct. The justification of their dismissal were that they had all
been obliged to assist in the identification of the culprit and that they shared a
responsibility for the misconduct when they kept quiet. The court noted that “where a
worker has or might reasonably be supposed to have information concerning
misconduct, failure to divulge it might amount to misconduct serious enough to
undermine the relationship of trust with the employer, even if the employees were
innocent of the initial misconduct. However, in the present case it was unnecessary
to decide whether the appellants had been guilty of ‘derivative misconduct’, as the
respondent had dismissed them for their involvement in the primary misconduct”.

There were two justifications for dismissing the workers. Firstly, the failure to
disclose the identity of the culprit in itself constitutes a dismissible offence and
secondly, their silence in fact their refusal to disclose the culprit gives rise to the
inference that they had made common cause with the actual culprit. There are many
ways of justifying action against an entire group where a misconduct has been
committed by any of their group. The doctrine of “common purpose” applied mostly
in criminal law in which liability for an offence committed by an unknown person is
attributed to those who assisted or made common purpose with the culprit. In the
case of SACCAWU v Cashbuild\textsuperscript{97} the entire staff of a branch of a company, from
manageress down, was dismissed after it was discovered that its “shrinkage” level
exceeded the maximum acceptable to management. No individual could be
identified or linked to the losses, the Industrial Court found that the company had
acted fairly because it had clear rules regarding stock control, which had been
negotiated with the workers. The employees had been finally warned that further
stock losses would result in their dismissals.

\textsuperscript{97} (1996) 4 BLLR 457 (IC).
It was proper to dismiss the entire staff in such circumstances even though the notion of collective guilt was repugnant to our law. In *NSCAWU v Coin Security (Pty) Ltd t/a Coin Security*98 the court emphasised that the doctrine of common purpose must not be confused with that of collective guilt, which rests on the supposition that an entire group can be punished simply because one of its members had committed a wrongful act, whereas the doctrine of common purpose can only be applied where it is proved on a balance of probabilities that the employees who did not actually perpetrate the act had common intention to bring about the unlawful result.

The court agreed that while the workers were engaged in a collective action (strike) but there was nothing to show that any individual had been directly involved in any particular act of misconduct. The employer was in fact relying, not on the doctrine of common purpose, but on the collective guilt, which, it said, was foreign to our legal system and repugnant to the principles of natural justice.

### 3.4 WHOSE JUDGMENT: THE EMPLOYER’S OR THE PERPETRATOR’S?

A value judgment in addition to findings of fact of law is very important when adjudicating the substantive fairness of a dismissal. The reasonable employer’s test has been applied by our courts in so far as the first enquiry is concerned, but according to Le Roux and Van Niekerk99 the test has been rejected by our courts in so far as the first enquiry is concerned. They argue that “by requiring the employer only to show that there were reasonable grounds for believing that the offence was committed rather than showing that, on the balance of probabilities, the offence was actually committed the court significantly lessened, the evidential burden placed on employers”.

The application has been criticized and the courts have seemed to reject the approach and instead adopted the view that the balance of probabilities should be the standard to be applied. The criticism of the reasonable employer test according

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98 (1997) 1 BLLR 85 (IC).
to Brassey et al\textsuperscript{100} to some extent overlooked the fact that, in English law, the concept of reasonableness is all pervasive.

The reasonable employer test has been invoked by the South African Industrial Court on an \textit{ad hoc} basis in three separate instances, \textit{eg}

\begin{enumerate}[(a)]
\item whether the employer had reasonable grounds for believing that the misconduct alleged was committed by the employee;
\item whether the procedure was reasonable in the circumstances; and
\item whether the penalty imposed by the employer was reasonable in the circumstances.
\end{enumerate}

The critics of the reasonable employer test have directed their critics at the requirement that the employer must have reasonable grounds for believing that the misconduct alleged was committed by the employee. They argue that “a distinction should be drawn between reasonableness and fairness since what is fair is reasonable but what is reasonable is not necessarily fair, and secondly, that the purpose of the Labour Relations Act is defeated where there is no proper arbitrary into the facts. The fairness of a dismissal is determined ultimately by consideration of injustice in the workplace. The reasonable employer test compels a tribunal to focus its attention on the employer and not on any injustice the employee may suffer”. In \textit{Ferodo Ltd v Barnes}\textsuperscript{101} the English Employment Appeal Tribunal expressed the following view:

“\textit{It seems to this Tribunal, therefore, that the law is quiet plain and that what the Industrial Tribunal ought to do is, not to ask the question which this Tribunal did. Are we satisfied that the employers had, at the time of the dismissal, reasonable grounds for believing that the offence put against the applicant was in fact committed.”}

It is clear that in the employment context there is a valid distinction between fairness and reasonableness. A determination of reasonableness requires a tribunal to

\textsuperscript{100} Brassey, Cameron, Cheadle and Olivier \textit{The New Labour Law} (1987) at 72.
\textsuperscript{101} Supra.
evaluate the actions of the employer not in terms of whether the tribunal thinks it was reasonable but in terms of whether an employer would think it was. In a situation like this one has to ask a simple question whether the distinction between reasonableness and fairness necessary preclude any consideration of the reasonableness of the employer’s conduct in a determination of fairness. Obviously not, provided that the concept of reasonableness employed is that of objective reasonableness. The consideration of the employer test has given rise to the question of whether the court in determining the fairness of a dismissal will only look at the facts available to the employer when the employee is dismissed or whether any new evidence may be adduced during the proceedings. In South Africa reasonableness is an objective concept just like in the English law. Where wrongfulness is in issue, the question is whether it was objectively unreasonable for the employee to bring about the consequences he did when considered in the light of all factors and those not were foreseen by him and out of his control. The main focus being on the effect of the conduct, wrongfulness expresses disapproval of the result of the employee’s conduct. Reasonableness will always be viewed as a sense of objective reasonableness which inherently incorporates an effective approach to fairness. The court is obliged to consider whether it was objectively reasonable for the employer to bring about the consequence he did. In *NUM v Vaal Reefs Exploration & Mining Co Ltd*,\(^{102}\) the test for reasonableness was formulated as a test of “prevailing circumstances and social conditions plus the good judgment of the market place (*boni mores*)”. Translated into as nothing more than the test for fairness, means of balancing competing rights and accommodating the vagaries of the workplace within a plurarist system. The Labour Court has recognised the range of possible circumstances where a person may differ with another person without any of them being unreasonable. In the case of *Nampak Corrugated Wadeville v Khoza*,\(^{103}\) the Labour Appeal Court applied the “reasonable” employer test of English law where the test is not whether the court or arbitrator would have imposed the same sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable. Later on the decision of the *Nampak* case was viewed by the court in the case of *Toyota South Africa Motors (Pty) Ltd v Radebe*\(^{104}\)

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102 (1987) 8 ILJ 776 (IC).
103 *Supra*.
as wrongly decided, and that the proper approach was whether on the evidence before the arbitrator, the sanction imposed by the employer was fair. It is clear therefore that the concept of fairness in dismissal cases on the part of the employer remains a dominant feature.

The task faced by the chairperson of a disciplinary inquiry is quite difficult when he considers a suitable disciplinary sanction; he has to take into consideration a wide range of often conflicting issues, the fact that consistency has to be maintained and the fact that personal circumstances of an employee have to be taken note of are very important. It is the reason you find that the decisions of the inquiry chairperson, the person hearing the appeal, the arbitrator often differ. The question of the approach that must be applied by the courts and arbitrators should involve a measure of discretion and to some extent defer to the views of the manager making the decision but a caution must be exercised because if the courts and the arbitrators defer easily to the opinion of the manager there will always be a danger that protection against unfair dismissal will be weakened and that managerial disciplinary decisions will not be subject to sufficient control. The approach is similar to the English industrial tribunals, their views as to the reasonableness of a sanction may differ and will not intervene if they are of the opinion that the sanction imposed by the employer is reasonable. According to Le Roux\textsuperscript{105} the criticism of the application of the reasonable employer test in this context is that it requires no more than the lowest acceptable standard of reasonable managerial practice to be the norm. In the English approach as was illustrated in the \textit{British Leyland (UK) Ltd v Swift}\textsuperscript{106} as follows:

\begin{quote}
\textbf{"The correct test is this:}

\textit{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. It must be remembered in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another (may) quite reasonably take a different view."}
\end{quote}

\textsuperscript{105} The reasonable employer test in \textit{The South African Law of Unfair Dismissal} (1994) at 106.
\textsuperscript{106} (1981) IRLR 91.
According to Le Roux\textsuperscript{107} the acceptance of the manager’s margin by arbitrators when assessing the appropriateness of the sanction imposed by management is also not unknown in the United States of America and Canada. The balancing of the interests involved is illustrated by the following excerpt:

“When confronted with a union grievance that challenges a decision by management, arbitrators will generally uphold management’s determination unless the union can show that the determination was unreasonable, arbitrary or capricious or contrary to the provisions of the labor contract. Most arbitrators respect the results of collective bargaining as well as the managerial process and do not want to become ‘super-managers’. Yet they also believe they can properly protect the interests of the individual employee against decisions that go beyond the bounds of reasonable managerial discretion necessary to operate the enterprise.”

The motivation for this view is expressed as follows:

“In short, the awards reflect the general recognition by arbitrators that an arbitrator, as a third party, is generally incapable of being as sensitive to legitimate managerial needs as is management itself. By utilising an appellate-type standard of review under which management decisions in this area are sustained so long as they are free from invidious motivations and are based upon the exercise of reason, judgment, and discretion, arbitrators give play to what was described above as the manager’s margin.”\textsuperscript{108}

Le Roux\textsuperscript{109} agrees that there will be a minority of cases where, in all honesty, they will realise that the matter is not that clear cut and that the manager’s decision may be justified even though the arbitrator or member does not necessary agree with it, he goes on to say that in such circumstances they should not intervene, provided that the manager’s decision is well reasoned and not the result of improper motivation.

In the case of \textit{Bhengu v Union Co-operative Ltd}\textsuperscript{110} the court stated that the employer has to establish whether he applied the “reasonable employer test” when he decided to dismiss the employee. Where employees had deliberately falsified worksheets, unnecessary expense caused to the employer which resulted in the loss of confidence and dependability. Dismissal was not unfair in such a situation.

\textsuperscript{107} Supra at 119.
\textsuperscript{108} See Schoonhoven \textit{Fairweather’s Practice and Procedure in Labour Arbitration} (BNA 1991) at 205 and Brown and Beatty (note 3) 361.
\textsuperscript{109} Supra at 118.
\textsuperscript{110} (1990) 11 \textit{ILJ} 117 (IC).
3.5 NON-WORK RELATED CONDUCT

The employer may not take any disciplinary proceedings against an employee unless it can be shown that the act has some interest in the conduct of the employee, such as when there is some connection between the employee’s conduct and the employer’s business good name and reputation. If the connection cannot be proved there can be no connection between the act and the workplace, more so if the conduct is committed outside the normal working hours. The employer will have to prove that it has a legitimate interest in the matter. In **NUM v East Rand Gold & Uranium Co Ltd**\(^{111}\) the employee was dismissed for assaulting a fellow employee on a company bus transporting employees to a local township after a shift work. The employee applied for reinstatement to the Industrial Court. It was argued on his behalf that the offence was non-work related and that the company consequently had no right to exercise any form of discipline against him. The court held that the dismissal was competent notwithstanding the fact that the assault occurred after hours, away from the workplace, and in circumstances in which the employee who perpetrated the assault was not acting within the course and scope of his duties as an employee. It was held that the employees in the bus were within the scope of their employment while in transit and therefore the company’s disciplinary arm was long enough to reach into the bus. The court put an emphasis on the fact that the company owed a duty to ensure that its employees were transported safely and without interference. In the case the act of the employee affected a legitimate interest since there was a connection between the employee’s conduct and the business of the employer.

The company bus could have been labeled unsafe and a dangerous place to be, this could have had a detrimental effect on the good name of the company. In **Van Zyl v Duvha Opencast Services (Edms) Bpk**\(^{112}\) the court refused to reinstate an employee who had been dismissed for assaulting his foreman after hours in the mine village. Argument by the union that the company had no right to take disciplinary action since the offence was not work related. The court held that the test to be applied was

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\(^{111}\) (1986) 7 ILJ 739 (IC).

\(^{112}\) (1988) 9 ILJ 905 (IC).
whether the offence was work related in the sense that it had an effect in the work situation. The effect of the assault on the employment relationship was such that the company was entitled to take action.

(a) The assault was perpetrated on the immediate supervisor.

(b) The assault took place in the view of colleagues.

(c) The harmonious relationship between the employees concerned and the residents of the mining was adversely affected.

The decision of the court demonstrated the employer’s duty to create the safe and peaceful conditions of the employees. In *Mavumengwana v Samancor Ltd*, the case concerned an assault on an immediate superior in an area of the company’s premises that was accessible to the public. The court held that the incident was work related.

It must be noted that in *Hoechst (Pty) Ltd v CWIU* the Labour Appeal Court held that it was not competent for an employer to discipline an employee in circumstances where the alleged misconduct was perpetrated against a co-employee and was not covered by the disciplinary code. The court formulated the test as follows:

“In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi faceted factual enquiry. This enquiry would include, but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer’s size, the nature and size of the employer’s workforce, the position which the employer occupies in the marketplace and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the workforce as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee’s misconduct ‘had the effect of destroying, or of seriously damaging the relationship of employer and employee between the parties. Employees holding the position of special trust eg where an employee has a position of special trust, and the conviction violates that trust, dismissal would normally be justified.’”

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113 (1992) 1 LCD 200 (IC).
114 (1993) 14 ILJ 1449 (LAC).
The employer if he is of the view that a criminal conviction for non-related work conduct is serious enough, it is suggested that an enquiry must be held, the enquiry is not to establish the facts which gave rise to the conviction but rather to establish the extent to which it impinges on the employment relationship.

In the NUM case\textsuperscript{115} the court quoted Anderman:\textsuperscript{116}

\begin{quote}
"Where the act of misconduct by the employee consists of a criminal act committed out the scope of employment, however, this may also be a sufficient ground to warrant dismissal as long as the act has been shown to affect the business in some way. Thus where the criminal act impinges in some way on the employment either by affecting the reputation of the business, or the employee during the course of his work, or where the employee has a position of special trust, criminal acts committed outside the scope of employment may be sufficient grounds to justify dismissal."
\end{quote}

The English Code of Practice on Disciplinary Practice and Procedures\textsuperscript{117} provides as follows:

\begin{quote}
"These should not be treated as automatic reasons for dismissal regardless of whether the offence has any relevance to the duties of the individual as an employee. The main consideration should be whether the offence is one that makes the individual unsuitable for his or her type of work or unacceptable to other employees. Employees should not be dismissed solely because a charge against them is pending or because they are absent through having been remanded in custody."
\end{quote}

There is not much difference between the two approaches. What is clear is the fact that dismissal is possible for offences committed outside the scope of duty if such act is likely to taint the good name of the company.

3.6 THEFT/UNAUTHORISED POSSESSION OF COMPANY GOODS\textsuperscript{118}

The unauthorised possession of goods belonging to the company by employees is very common in many companies, the actual intention in most cases is theft of such a property. The common law views “theft” very seriously, it is a form of breach of the employment contract and the perpetrator loses all claim to further employment. He

\begin{footnotes}
\textsuperscript{115} Supra.
\textsuperscript{116} Law of Unfair Dismissal (1985) 2\textsuperscript{nd} ed at 160.
\textsuperscript{117} S 15(c): criminal offences outside employment.
\textsuperscript{118} See also the discussion under 3.2.6.
\end{footnotes}
can be charged in a criminal court and be punished and still be dismissed from work. The Labour Appeal Court in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*\(^{119}\) held that the dismissal cannot constitute an unfair dismissal, but the Industrial Court made it clear in *Nkomo v Pick 'n Pay Retailers*\(^{120}\) that “petty pilfering” which did not manifest a degree of dishonest intent, did not justify dismissal. The approach taken by the court is difficult to explain if one views that theft will always remain theft no matter how small or big the stolen item might be, if the intention to steal is proved then it is theft, however, recently the Labour Appeal Court has given some light in cases involving theft. In the *Anglo American Farms* case\(^{121}\) the court regarded the value of the stolen item as relatively unimportant and considered instead the effect of the employee’s conduct on the employment relationship and, particularly, whether the continuation of the relationship could be regarded as intolerable.

In *Central News Agency (Pty) Ltd v CCAWUSA*\(^{122}\) the Labour Appeal Court noted as follows:

> “In my view it is axiomatic to the relationship between the employer and employee that the employer should be able 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. An employer unquestionably is entitled to expect from his employees that they would not steal from him and if an employee does steal from the employer that is such a breach of the relationship and of the contract between them and such a gross and criminal dereliction of duty that dismissal undoubtedly would be justified and fair.”

The appropriation of the employer’s goods with intention to permanently deprive him through stealing is viewed very serious and correctly so. The stealing in the company by the employees can stagnate the production causing hardships to other employees who could be put on retrenchment, even early pension and short time as a result of such thefts. In *Williams v Gilbeys Distillers & Vinters (Pty) Ltd*\(^{123}\) the court

\(^{119}\) (1992) 13 ILJ 573 (LAC).
\(^{120}\) *Supra*.
\(^{121}\) *Supra*.
\(^{122}\) (1991) 12 ILJ 340 (LAC) at 344F-I.
\(^{123}\) (1993) 2 LCD 327 (IC).
stated that:

“If an employer for instance mistrusts an employee for reasons he must obviously justify and he can show that such mistrust, as a result of certain misconduct of the employee is counterproductive to his commercial activities or to the public interest (where appropriate) he would be entitled to terminate the relationship.”

This is very fair because where there is a lack of trust, relationship is not strong and there can be no fruitful results that could flow from such a situation.

3.7 UNAUTHORISED USE OF COMPANY VEHICLES

The company’s vehicles sometimes are used by the drivers of the company without authority, the vehicles are used in most cases for private business. The conduct has been viewed very serious and a dismissal is always imposed, particularly where there is an order prohibiting such unauthorised use. In Tool Wholesale (Pty) Ltd and CCAWUSA124 the arbitrator refused to uphold a dismissal for unauthorised use of a company vehicle where it was not clear that a previous warning had been conveyed to the employee that a repetition of the offence would lead to dismissal as opposed to some lesser form of discipline.

To be effective, there must be an order written or verbal to the effect that unauthorised use of the company’s vehicles is prohibited and an employee would be dismissed if found guilty by the enquiry. The employer could also open a criminal case against the employee.

In Interstate Matsebulas Bus Service and TGWU125 the arbitrator found that a dismissal for the use of a company vehicle for a purpose other than that for which it was given was not unfair in circumstances where the employee was involved in an accident during a period of unauthorised use.

125 (1989) ARB 8.4.1.
CHAPTER 4

CONCLUSION

Substantive fairness requires a valid and fair reason for dismissal on the grounds of misconduct. The old style of discipline under the common law was authoritarian and paternalistic, it afforded the employer wide powers of dismissal with little, in fact very insignificant security of employment for the employee, this was the result of the economic and social ordering which existed at the time, also the employer’s ownership of and control of the company. According to Brassey:126

“The common law offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to the change. It allows him to flout the bargain whenever he likes, provided that he does not mind paying a paltry sum, which is invariably all the damages amount to. And all this he is allowed to do without consulting the other party first, or paying the slightest heed.”

Legislation intervention helped by improving the position of the employee more especially the present LRA. In the area of dismissals there has been a significant departure from the common law approach. The new approach under the LRA puts it in no uncertain terms that it is not sufficient for the employer to act lawfully when he dismisses an employee, he must also act fairly, meaning that sufficient reasons must be proved before the employee can be dismissed from work followed of course by a fair procedure before dismissal is pronounced.

The substantive validity of the dismissal requires that a valid reason should have existed when the employee is dismissed. The reason must be evident and the onus lies with the employer to prove reasonable grounds for his decision that the employee concerned has committed the alleged misconduct and apart from the requirement that a valid reason in fact exists, it is furthermore required that the reason must have been serious enough to warrant dismissal. The provisions of the ILO Recommendations have also been regarded as decisive guidelines in regard to

126 Brassey et al supra at 5.
the conduct of an employer in which matters surrounding dismissals are measured. The courts always refer to the ILO Recommendation 119 of 1963 on the termination of employment concerning a valid reason for dismissal. Section 188 of the LRA provides that

“If a dismissal is not automatically unfair, it is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employee’s conduct, and that the dismissal was effected in accordance with a fair procedure.”

The International Labour Organisation Convention 158 has a similar classification. Article 4 of the Convention provides that “the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.

The Convention also requires a fair procedure that will enable the worker an opportunity to defend himself against the allegations put against him before the dismissal.

In the employment relationship of today it is not a matter of contract alone as was the case under the era of common law. Under the common law period it is noticed that the authority received statutory endorsement from the state in the form of master and servant legislation in which criminal sanction was invoked to enforce discipline at work. In cases of the employee’s dismissal there is a clear shift from the common law position which offered little protection against unfair dismissal. The belief that only management could make disciplinary decisions and that there could be no question or challenge by employees was drastically changed by the legislation intervention which curbed the arbitrary exercise of the employer’s disciplinary rules which were sometimes administered in a harsh and inconsistent manner.

The modern employment relationship emphasises a more enlightened and acceptable approach when dealing with disciplinary matters in the workplace. The LRA recognises that dismissal from work is a serious issue that should be reserved for serious cases of indiscipline, the employer must try and find a mechanism of corrective discipline. He must give guidance of what is expected from the employee
and that unacceptable conduct will not be tolerated. In essence the reason for dismissal will be regarded as fair if the employee’s misconduct is regarded as serious under the circumstances and if the facts show that the employee knew that he could be dismissed for such a misconduct.

Substantive fairness of dismissal for misconduct implies that an honest endeavour to fairly justify the dismissal was undertaken by the employer. Substantive fairness of a dismissal also involves the question whether the sanction of a dismissal was suitable in the circumstances as the Labour Court requires the employers to consider sanctions short of dismissal, such as suspension, demotion, final warnings and mitigating factors before terminating the contract of employment for disciplinary misconduct, something not known during the common law era. Although the factors are not definitive the employer must nevertheless be shown to have considered them at the time of dismissal.
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