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*Employment Newsletter*

Even if you don't know the wrongdoers, you can still dismiss...but do it the right way!

This is all but related to a difficult concept of "derivative misconduct", which lies in an employee's failure to offer reasonable assistance to an employer to disclose information about individuals, the wrongdoers, who are responsible for the primary misconduct. Derivative misconduct therefore provides an employer with grounds for dismissal when there is no direct evidence that the employee in question committed the primary misconduct.

Where derivative misconduct is present, dismissal is justified. Because in instances where employees possess information that would enable the employer to identify wrongdoers and these employees fail to come forward when requested to do so, they violate the trust upon which the employment relationship is founded.

The Labour Appeal Court in *Western Platinum Refinery Ltd v Hlebela & Others* (2015) 36 ILJ 2280(LAC), provided guidance on the elements of derivative misconduct as follows:

- (a) there must be actual knowledge of wrongdoing on the part of employees who are expected to assist the employer in identifying the perpetrators;
- (b) the employees' non-disclosure of information, when requested to do so by the employer, must be deliberate;
- (c) account must be taken of the gravity of the non-disclosure versus the gravity of the primary misconduct;
- (d) further account must be taken of the level/status of the employee, which may have a bearing on the gravity of non-disclosure;
- (e) the employer must have specifically asked for the information in the context of duty of good faith owed to the employer.

In accordance with the employee's duty of good faith, mere knowledge of the information triggers the employee's duty of disclosure. In the circumstances, an employer requesting a disclosure does not enforce the employee's duty but will influence the severity of the employee's misconduct in cases of non-disclosure.

From the guidelines set out above, it is significant to note that actual knowledge of the misconduct

on the part of the employee is required. Alternatively, the circumstances must be such that the employee ought to have knowledge of the misconduct.

One of latest cases faced with derivative misconduct is that of *National Transport Movement and others v Passenger Rail Agency of SA* (2018)39 ILJ 560(LAC). NTM engaged in a protected strike where the union was demanding for its organisational rights to be recognised by PRASA. NTM was also calling for the suspension of and investigations into the alleged corrupt activities of certain senior officials at PRASA.

Following the strike, numerous trains and train coaches were burnt down, which PRASA suspected was caused by the striking employees and/or persons acting in association with the striking employees. PRASA's suspicions were based on the inciting statements that were made by union officials at gatherings. During these gatherings, the striking employees were informed by the union officials that they should do all that was in their power to stall train activities, even if this meant burning down trains. Inevitably and in light of the burnt down trains and train coaches, PRASA sought to dismiss the striking employees and invited them to make representations as to why they should not be dismissed. Pursuant to receiving the representations, PRASA rejected the furnished reasons and dismissed the employees.

It is critical to note that there was no direct evidence that the striking employees or persons associated with the strike were responsible for the burnings and damage caused to the trains. PRASA accordingly relied on the concept of derivative misconduct in dismissing the employees. According to PRASA, it was of the view that the striking employees must have had knowledge of the employees who were responsible for the primary misconduct and their failure to disclose such information breached the trust relationship, warranting the dismissals.

The Labour Court found that the dismissals were not automatically unfair, and that based on the principle of derivative misconduct, the dismissals of the employees were substantively and procedurally fair.

The Labour Appeal Court differed with the Labour Court and held that despite that the burnings took place during or immediately after the strike, PRASA failed to prove that the burnings were committed by the striking employees. The LAC further held that PRASA could not prove that the striking employees had knowledge of the misconduct or the persons responsible for burning the trains.

The court found that PRASA's real reason for dismissing the employees was not as a result of their failure to disclose information regarding the burnings. This was so because the notice calling upon the striking employees to make representations merely called upon them to say why they should not be held jointly and severally liable and did not call on them to disclose the names of the perpetrators. The employees' termination letters made it clear that the strikers were dismissed, not for failing to disclose information, but for their alleged involvement in the primary misconduct. It is evident therefore that derivative misconduct was not the true reason for dismissing the employees; it was merely used as a farce, so the LAC stated, designed to rubber-stamp the employer's intention to dismiss the employees.

For the reasons set out above, the LAC held that PRASA's reliance on derivative misconduct as a ground for dismissal was misplaced. The appeal was upheld with costs and PRASA was ordered to reinstate the employees with retrospective effect.

While the concept of derivative misconduct is accepted as a valid ground for dismissal, employers must remember that the onus still rests on them to prove that employees are guilty of the main elements of the primary misconduct.

Employers must keep in mind that it is not enough to show that the employees might have knowledge relevant to the primary misconduct – the employer must be able to show, on the balance of probabilities, that each and every one of the employees had such knowledge. Furthermore, the notice must specifically call upon the employees to disclose information in accordance with the duty of good faith to the employer and as well as informing them of the implications of not providing such information, or providing false information. In this instance, employees may then be charged with material breach of duty of good faith, with the charge sheet specifying the knowledge allegedly possessed by the employee as well as a charge relating to non-disclosure.

In conclusion, it is our view that, in line with best IR practices, it will also be prudent for an employer to conduct a full investigation prior to considering dismissal based on derivative misconduct to avoid serious implications of such a decision being overturned by the CCMA or a court of law.

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