

DEALING WITH SUSPECTED EMPLOYEE DISHONESTY

1. INTRODUCTION

What actions can fairly be taken to apprehend employees suspected of dishonesty? Employers have every right to protect their assets and to institute any reasonable steps required to do so, such as the use of searching procedures, surveillance equipment and administrative checks. They also have the right to investigate any suspicions they may have that employees are acting dishonestly. However, employees too have rights, especially regarding their person, privacy and self-esteem and there are thus limits as to how far one can go to confirm a suspicion that employees are cheating, robbing or defrauding you. Employers should as a rule avoid encroaching into an employee's private domain (e.g. his/her person, locker, briefcase, personal correspondence) unless a "reasonable" suspicion exists that the employee is engaged in serious misconduct (such as dishonesty), or that the nature of the business is such that special precautions need to be taken to protect the employer's business interest (e.g. a diamond sorting house). In addition, the means used to confirm or allay the suspicion, or to protect the employer's business interests, must be "proportional", i.e. the end must justify the means.

2. WHAT IS REASONABLE SUSPICION?

There is no "definition" of what would constitute a reasonable suspicion of dishonesty. The bottom line is that you need to be able to prove that at the time when you infringed the employee's privacy, you had reason to believe that the employee was possibly engaged in dishonesty (for example, money or merchandise went missing, or your bookkeeper suddenly starts arriving at work in a Mercedes 9000XLC and tells you that she's been saving up for it). Whatever the reasons for your suspicions may be, you are allowed to take action to determine whether or not they are well founded. However, the fact that you are free to investigate whether or not employees are acting dishonestly does not mean that you are free to do this in any way you choose. There are limits to what constitutes acceptable means of establishing the facts, and exceeding them can result in serious and costly repercussions. Generally speaking, the means you use must justify the end that you seek to achieve.

3. UNACCEPTABLE MEANS

In general, any action which would be unlawful under our legal system, or unfair in terms of present labour legislation, is unacceptable. For example, raiding employees' homes, searching their person or private possessions without permission, threatening to assault or dismiss them unless they "confess", or fabricating and planting evidence in an attempt to prove their dishonesty, are actions which could lead to allegations of invasion of privacy, assault, or unfair labour practices. Simply

put, actions such as these undermine the protections provided to employees in the Constitution or the Labour Relations Act, and are therefore unacceptable. Apart from the fact that you might lose if an employee dismissed on the basis of such actions challenges the dismissal in the CCMA, you may also face a civil claim for invasion of privacy. In terms of the available options there is no need to resort to this type of unacceptable action and most organisations are able to resolve questions of suspected dishonesty through use of the methods which are discussed below.

4. ACCEPTABLE MEANS

4.1 Undercover Agents

Undercover agents may be placed in the workforce to obtain information about what is actually happening on the shop floor, or in any area of the business. The difficulty is that undercover agents are often reluctant to give evidence in open court or at disciplinary hearings, and employers may have to rely on their affidavits only. This is not ideal, as the alleged offenders will rightly claim that they are unable to cross-examine an affidavit, and are thus prevented from presenting a proper defence. Further, they may claim that the undercover agent has a personal and biased interest in the matter, because he or she is rewarded in terms of how many dishonest employees are reported to management. When undercover agents are used, it is generally best to use their information to catch the offenders in the act, rather than to use them as witnesses.

4.2 Surveillance Equipment

There is today a considerable amount of hi-tech equipment available, which can be installed in virtually any part of the business. With cameras the size of a five cent coin, it is possible to set up hidden video monitors in any place where there is sensitive merchandise, where there is a suspicion that employees are stealing, or where you suspect unauthorised use or removal of confidential company documentation and information. Videotapes or pictures are admissible as evidence, and, providing they clearly show what happened and who was involved, are as good as, if not better, than having a witness.

4.3 Tape Recordings

It is possible to “bug” anyone anywhere, and the information gathered in this way may be used either as evidence, or to set up a situation where the dishonest employee/s are caught in the act. Note that if recordings are used as evidence, they will only have value if they clearly identify who was recorded and confirm that they were planning to commit a dishonest act, or discussing an unlawful event which has already occurred. This is rarely the case, and it is advisable to obtain expert information before deciding to lay a charge on this evidence only, or to introduce it at a disciplinary hearing.

4.4 Phone Tapping

This is a grey area. However, it is our opinion that if the only reasonable way in which you can confirm your suspicions is to tap an employee’s phone, then this may

be done. Providing that the evidence obtained clearly confirms that the employee is acting dishonestly or against the best interests of the company, it may be used against him or her for the purposes of disciplinary action.

Note that the above refers only to tapping or “bugging” of company phones.

The tapping of employee’s home or personal phones is not admissible as it is a gross invasion of privacy and evidence gained in this way may well be inadmissible in the Labour Court or the CCMA .

4.5 Setting Traps

Where there is suspicion of dishonesty but little or no evidence to prove who is guilty, it would not be unreasonable to provide an opportunity for the unknown or suspected offender to expose him or herself. For example, if it was suspected that employees were stealing merchandise or money whenever the chance arose, then you could deliberately arrange for such an opportunity to occur, say by leaving the stockroom open for a few minutes, or by leaving cash on a desk. If an employee took advantage of this to take the merchandise or money, then he or she has committed theft, and any claims that he or she was induced or entrapped into committing the act will carry little weight. Employers have the right to expect employees to act honestly at all times, not only when they fear that they may be caught. Be aware however that you need to ensure that merely having the merchandise or money in his or her possession is an offence in terms of your disciplinary code, as otherwise the employee could claim that he or she only took it to give to someone else for safekeeping. If this is not the case, i.e. if unauthorised possession is not an offence, then you will have to ensure that you only take action once the employee has shown that he or she has no intention of returning or retaining the items taken for safekeeping. Be aware also that it is not a good idea to keep setting traps even when there is no real cause to do so. The majority of employees are honest and any management action which implies that they believe all employees are potential crooks can only have a disruptive effect on employer-employee relationships.

4.6 Searching Private Possessions

It may be tempting to peek into the employee’s briefcase, locker or desk drawers, in the hope that you will find a piece of incriminating evidence that will prove your suspicions. However, it needs to be remembered that there is a difference between searching company property, such as desks or lockers, and private property such as briefcases or handbags. The former is probably acceptable providing you have good reason to do so, while the latter is simply unlawful as only the police have such powers of search. And even if you do find something, the employee’s defence will be that it was planted, an allegation which you may find hard to refute. If you decide to search you should only do so with the employee’s consent. However, ensure that your disciplinary code allows for disciplinary action to be taken against anyone who unreasonably refuses to subject him or herself to a search when requested to do so by an authorised person. In general, searching of this nature should be seen as a possible means to uncover information which may allow you to take further action at a later stage, e.g. which will let you set up something to trap the employee or indicate what you should be monitoring and when. And note that private property is just that - private!

5. CONCLUDING COMMENT

There are sufficient lawful ways to prove or disprove dishonesty and thus no need for management to take the law into their own hands or undertake risky action. Our experience suggests that problems arise when management act in haste or emotion and fail to consider their options in an objective way.

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