



Dismissal for theft

In the not-too-distant past commissioners and Labour Court judges had no qualms to rule that the dismissal of someone for theft was fair. In a number of cases the Labour Court and Labour Appeal Court (LAC) held that the value of the item stolen was immaterial: theft is theft and goes to the heart of the relationship of trust that is supposed to exist between employer and employee. Some even held that mitigating factors are irrelevant in such cases.

However, in *Shoprite Checkers (Pty) Ltd v CCMA & Others* the LAC held essentially that theft should be treated like all other forms of misconduct and that mitigating factors must also be taken into account. These will include the circumstances of the theft (in this case the employee was caught on camera on three occasions taking and eating food belonging to the company); the employee's length of service (he had 30 years of service); the employee's disciplinary record (his was clean); and the value of the items stolen - it was common cause that the value was not high, although the exact amount could not be determined. Although the LAC's decision was later overturned on appeal by the Supreme Court of Appeal (the SCA), this was on technical legal grounds that did not disturb the LAC's decision on the merits of the case. The ultimate outcome was that the employee was reinstated with a "severe written warning", but not with full retrospective effect.

The Code of Good Practice: Dismissal, which refers to "gross" dishonesty as a possible ground for dismissal, provides some support for the court's view that not all forms of dishonesty justify dismissal.

The practical import of the LAC's decision is that an employer who defends its decision to dismiss someone for theft before a commissioner should try to present evidence to prove that –

- All the elements of theft are present, i.e. unauthorized possession or removal of the employer's property with the intention to steal.
- In the circumstances of the particular case, the theft caused a breakdown in trust and made a continuing relationship intolerable. This may include factors such as the value of the item stolen; the circumstances of the theft (e.g. well planned and not a spur of the moment action); the nature of the employer's business and its particular circumstances (e.g. a retailer trying to limit stock theft); actions taken by the employer to combat theft; the impact of the theft on the employer, its reputation, or others; the employee's conduct during the investigation of the allegations (e.g. refusal to cooperate, concealing evidence, etc.) and the employee's lack of remorse.
- The particular mitigating circumstances of the case (e.g. long service and a clean record) do not detract from the seriousness of the situation.
- Employees have been warned about the seriousness with which any form of dishonesty, including theft of any item irrespective of its value, is viewed.

This information must be supplied through a witness or by way of documentary evidence. One cannot merely raise it during closing argument.

Using the allegation 'theft' in the disciplinary notice may also be a problem if an employer is unable to prove that all the elements of theft are present. We would therefore encourage employers to rather use an alternative allegation, such as gross dishonesty or unauthorized possession of the employer's property. Better still, one could merely allege gross misconduct without labeling the nature of the misconduct. Such an allegation might read as follows: "It is alleged that you have committed gross misconduct in that on <date> you removed company property without authorization; alternatively, were found in possession of company property without authorization".