Misconduct:
The importance of clear and known rules and clear charges

The key difference between misconduct and incapacity lies in the fact that the former involves the breaking of rules applicable to the workplace in either an intentional or negligent manner. In other words, the employee breaks a rule in circumstances where he or she is able to comply, but either refuses or fails to do so. In the case of incapacity, on the other hand, one is dealing with an employee who is unable (not unwilling) to do what is expected.

Most employers are probably aware by now that the determination of whether an employee is guilty of misconduct depends on whether or not the following questions can be answered affirmatively, i.e. whether: the rule that has allegedly been broken in fact exists; the employee was aware of the rule or the rule was so well known or obvious, that the employee ought to have known about it; the rule has been applied consistently; the rule is valid or reasonable; and has been broken by the employee, either deliberately or negligently. If an employee is dismissed, the dismissal must be an appropriate sanction for breach of the rule given the aggravating and mitigating factors present in the particular case.

The rule may derive from a number of sources, e.g. the employee's contract; an agreement between the employer and a trade union; legislation (e.g. health and safety rules); it may be a rule that the employer introduced unilaterally (e.g. operating procedures or a disciplinary code); or it may be found in the common law. The latter, in essence, includes all legal rules not found in legislation and covers things such as the employee's duty to obey lawful instructions; the duty of good faith and honesty; the duty to cooperate with the employer; and the duty to do the job with reasonable care and skill.

While there are certain rules that are fairly obvious and, strictly speaking, need not even be mentioned in disciplinary codes, e.g. the prohibition against theft or assault, or absence without leave, it is good practice to include all rules applicable to a workplace in a document of some kind. It doesn't matter whether one calls it a disciplinary code, rules of conduct, or something similar – the important thing is that the rules should be documented to avoid any uncertainty regarding the existence. In addition, supervisors and line managers should ensure that the rules are made known to staff, e.g. during induction or team meetings. This is especially important for those rules that might not be generally

known because they are peculiar to a particular work environment or job. For example, in the food processing industry, clean hands are critical, but new employees might not know this when they first start out. The more obscure the rule, the greater the need for employees to be informed about it in specific terms.

Since the decision of the Constitutional Court last year in *Sidumo v Rustenburg Platinum Mines*, it has become essential for employers who have dismissed someone for transgressing a rule to prove to an arbitrator that the rule in question is valid or reasonable.

Dismissing someone for theft or fraud is unlikely to raise eyebrows. But outside of these, the employer will have to provide some evidence at arbitration that dismissal was an appropriate response to the breach of the rule. Take, for example, fighting in the workplace. Not all instances of fighting will justify dismissal. But if an employer can prove, for example, that, given the nature of its operations, fighting creates a serious safety risk and that it has informed employees that it would take a very hard line if people engaged in fighting, it would be able to convince an arbitrator that dismissal of those involved in the fight was appropriate. Obviously, evidence that one party provoked the fight while the other was merely defending himself will have to be considered too. The point, however, is that employers must not assume that arbitrators will necessarily know why a particular rule is viewed in a serious light – it is imperative that documentary or verbal evidence should be provided at arbitration to substantiate the claim. Merely relying on the fact that one's disciplinary code says that dismissal will follow may not be sufficient.

The existence of clear rules is also necessary for the proper formulation of disciplinary "charges" (which, it should be added, can only be done if the matter has been investigated properly). A number of recent cases confirm that an employer cannot find an employee guilty of allegations which the employee was never charged with and which, accordingly, he or she never had an opportunity to prepare for. In *Edcon Ltd v Pilemer N.O. & Others* (2008) 29 ILJ 614 (LAC) the employee was charged with failing to report that her company car was involved in an accident while her son was at the wheel. Under the incorrect impression that she was not allowed to lend her vehicle to her son, she lied about the details when confronted. At her disciplinary hearing she admitted to lying and was found guilty of dishonesty and dismissed. The CCMA reinstated her, a decision that was confirmed on review by the Labour Court and subsequently by the Labour Appeal Court (LAC). The LAC found that the hearing was unfair because the employee had been charged with failing to report an accident and had not been given an opportunity to explain why she had dishonestly tried to cover up the accident.

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