

DISCIPLINARY SANCTIONS: DOES TRUTHFULNESS PLAY A ROLE?

It is generally required that employers must behave consistently when dealing with transgressors. The employer's rules must be applied consistently, that is, where sufficient evidence exists, action must be instituted against transgressors in accordance with the employer's disciplinary code and procedure. Inconsistency in the application of rules where evidence exists that a rule has been broken is, in most cases, difficult to justify. Yet, consistency does not mean that all employees who are found guilty of a particular transgression must always receive the same sanction, as different aggravating or mitigating factors may apply.

In this regard the question arises whether an employee's truthfulness may justify different sanctions being imposed for the same transgression? Should the fact that an employee shows remorse for his/her misconduct be taken into consideration in determining an appropriate sanction?

These were two of the issues considered in the matter of *NUMSA obo Skhalipi & others / Guestro Forging & Machining [2009] 9 BALR 880 (MEIBC)*. Thirteen employees were charged with consuming alcohol whilst on night shift. During the disciplinary hearing all the employees denied that they had consumed alcohol, save for two – the 'whistleblower' in the matter (a certain Jansen) and another employee, a certain Jacobs. All the employees were dismissed, save for Jacobs and Jansen who both pleaded guilty and who were given final written warnings. Before the MEIBC the eleven dismissed employees argued that the employer had been inconsistent in applying the sanction of dismissal.

The employer in this matter differentiated between the eleven employees and Jansen and Jacobs on the basis that the latter had assisted in the enquiry; they did not lie; they were completely open about their involvement in the events; and they had shown true remorse for their actions. The arbitrator was of the opinion that remorse could be inferred from an admission of guilt and in assisting in an investigation. The arbitrator stated that *'[e]ven if the element of remorse is omitted from the equation, I find a significant distinction between Messrs Jansen and Jacobs on the one hand and the applicants on the other hand and that is the former were truthful about the incident, whereas the applicants persisted in their lies and denials.'* The arbitrator held that the differentiation between the applicants and Jansen and Jacobs were not capricious, unreasonable or arbitrary.

As authority for his findings, the arbitrator, amongst others, referred to the matter of *SACCAWU & Others v Irvin & Johnson Ltd [1999] 8 BLLR 741 (LAC)* as well as articles by some labour law experts. In summary, the following guidelines may be used when one is faced with the issue of consistency in sanction:

- the so-called 'parity principle', which requires consistency in the application of sanctions, should not be used too rigidly;
- when deciding on whether the parity principle applies, a court or arbitrator should not lose sight of the gravity of the misconduct committed by the employee who wants to rely on this principle;
- where a disciplinary officer errs on the side of leniency in respect of an employee, the employer need not be burdened by that error to the extent that

- the employer has to reinstate or compensate employees who, viewed independently, deserved to be dismissed;
- the test is whether it is possible to maintain a proper relationship between dismissed employees and their former employer. If a working relationship cannot be maintained, the parity principle will not assist the employee concerned;
 - parity is just one of the factors to consider in determining whether a particular sanction is fair;
 - the fact that different sanctions are imposed on employees who committed the same offence does not automatically render the more serious sanction unfair if there are sound reasons for the differentiation;
 - should a dismissal be fair and justified in the circumstances of the case, an employee cannot simply rely on the fact that another employee was not dismissed, provided that the differentiation between the two employees was not cautious, arbitrary or without reasonable foundation.

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