

UNDERSTANDING GROSS NEGLIGENCE AND WHEN IT JUSTIFIES DISMISSAL

by Maserumule Corporate Employment Law

Introduction

The concept of gross negligence in employment law is significant because, like dishonesty, it can irreparably damage the employment relationship. However, its application is context-dependent and must be evaluated based on workplace policies, industry standards, and the nature of the employee's duties. The Labour Appeal Court (LAC) decision in *Standard Bank of South Africa v SASBO and Others*¹ of earlier this year provides a clear illustration of how gross negligence is assessed in employment law and whether it justifies dismissal.

Background of the Case

Ms Nontokozo Ngcobo, a Human Capital Consultant ("the employee") was accused of acting outside her mandate and in a grossly negligent manner by authorising a lease agreement in contravention of the Standard Bank Housing Policy. The lease agreement was improperly signed, and the required approvals had not been obtained. The Bank dismissed the employee for gross negligence, arguing that her actions compromised financial integrity and damaged the trust relationship.

The CCMA found the dismissal to be substantively unfair and ordered retrospective reinstatement, reasoning that the Housing Policy was ambiguous regarding her role. The CCMA further held that the employee did not act dishonestly, and training, rather than dismissal was an appropriate corrective measure. The Labour Court upheld the CCMA's ruling but increased her back pay to five months. The Labour Appeal Court (LAC) was called upon to determine whether the dismissal of the employee for alleged gross negligence was substantively fair.

Key Issues in the Dispute

Specifically, the LAC had to evaluate whether the employee's conduct constituted gross negligence. In doing so, the LAC had to

determine whether the employee's actions amounted to a reckless disregard for the Bank's policies; whether the employee failed to meet the required standard of care, given her role and responsibilities; and whether her mistake was so serious that it justified termination rather than corrective action. Furthermore, the LAC had to decide whether the Commissioner had applied the law correctly and reached a reasonable decision and whether the Labour Court erred in upholding the CCMA award. The Labour Court had confirmed that the dismissal was substantively unfair because the Housing Policy was unclear, and that the employee did not act dishonestly and that the Bank did not prove that gross negligence was present.

The Bank argued that the employee's failure to verify a lease agreement before processing a PRU caused financial loss and violated strict compliance standards. The CCMA and Labour Court found that her actions were negligent but not grossly negligent, as the Housing Policy was ambiguous, and she reasonably believed the senior employee had followed protocol. The LAC's majority decision concurred that gross negligence was not proven, emphasising that the employee had been employed for only one year, the Housing Policy did not clearly define her responsibilities, the employee did not act with reckless disregard, but rather under the assumption that she had the authority to approve the lease, and coaching and training could correct her mistake.

A minority judgment disagreed, arguing that her failure to follow procedure and verify the lease caused financial harm and amounted to gross negligence. The dissenting judge focused on the seriousness of her mistake, the lease agreement was unauthorised, and she failed to escalate it, financial loss suffered by the Bank and the need for strict adherence to policies in the financial industry.

¹ (JA107/2022)

Majority View: the employee's conduct did not meet the threshold for gross negligence because she lacked intent to disregard policy, and the Housing Policy was unclear. Dismissal was too harsh and therefore reinstatement was appropriate.

Dissenting View: her conduct was grossly negligent, warranting dismissal.

Outcome: The Bank's appeal was dismissed, and the employee was reinstated.

Key Takeaways for Employers

Negligence occurs when an employee fails to exercise the standard of care that a reasonable person would exercise in the same situation. It is an act or omission that falls short of what a competent employee in a similar role would do. Key features of negligence include unintentional failure to meet required standards, it may result from carelessness, mistake, or lack of awareness and negligence can often be corrected through guidance and counselling to increase awareness. In application in the current case, the CCMA and Labour Court found that the employee acted negligently by signing the Personal Record Update (PRU) form without verifying whether the lease agreement had been properly signed. However, they ruled that her actions did not amount to gross negligence or dishonesty, particularly given the unclear Housing Policy and her limited time in service (only one year).

Gross negligence is a serious, reckless disregard for duties. It is more than just carelessness; it involves a fundamental failure to exercise the level of diligence expected of a reasonable employee in a critical role. Key features of gross negligence include a high degree of carelessness or failure to act prudently and a serious breach of duty that could lead to significant harm or loss. Often gross negligence justifies dismissal, particularly where trust is compromised. In application in the current case, the Bank argued that the employee's actions were grossly negligent because she approved a PRU without verifying the lease agreement, which resulted in financial loss to the Bank. The CCMA and Labour Court disagreed, stating that the Housing Policy was ambiguous, and it was not clear that she lacked authority to sign the PRU.

The employee had no reason to foresee harm, believing that a senior employee had followed the correct process. The Bank failed to prove that her conduct was reckless enough to amount to gross negligence, absence of reasonably foreseeing a certain outcome. The LAC (Majority Decision): Agreed with the

lower courts that her conduct was negligent but not grossly negligent because there was no wilful disregard of duty.

Dishonesty involves intentional deception, fraud, or misrepresentation. It is one of the most severe forms of misconduct in employment law, particularly in industries like banking, where trust is a fundamental requirement. Key features of gross dishonesty include, intentional misconduct, the employee knows their actions are wrongful and a breach of trust which directly impacts the employer-employee relationship, justifying dismissal, without warning. In application in the current case, the Bank alleged that the employee acted dishonestly by improperly authorizing the PRU.

The CCMA and Labour Court found no evidence of dishonesty, stating that the employee did not intend to mislead the Bank. She acted under the mistaken belief that her actions were allowed. Furthermore, she showed remorse and apologised when questioned. The LAC (Majority Decision): agreed that she was not dishonest and reinstated her. The dissenting judgment: argued that she failed to disclose her actions in a timely manner and therefore breached trust, which could amount to dishonesty.

Conclusion

Gross negligence, like dishonesty, constitutes a serious form of misconduct that can severely damage the employment relationship. However, determining whether negligence amounts to gross negligence is context-specific, requiring an examination of whether the employee was persistently negligent; the seriousness of the act or omission, whether the outcome was reasonably or should reasonably have been foreseeable, whether the conduct was inexcusable, whether the employee knew the required standard or procedure, the consequences of the act or omission, including financial loss, the skills, experience, and position of the employee.

This case underscores the need for clear company policies and proper compliance training. It also highlights the high burden of proof required to establish gross negligence or dishonesty, particularly when an employee's actions stem from misunderstanding rather than intent to cause harm.

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