

EMPLOYMENT

# Derivative misconduct in the workplace

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## Issue

Whether or not the dismissal of an employee, who failed to inform an employer of suspicious conduct concerning missing monies, was substantively fair.

## Derivative misconduct

The dismissal of an employee who failed to report the suspicious conduct of her colleague, in relation to missing monies, was found to be substantively fair. The failure of the employee to inform an employer of their business interests being improperly undermined, constitutes derivative misconduct for which dismissal may be afforded.

## Facts

The above issue was considered by the Commission for Conciliation, Mediation and Arbitration (“**CCMA**”) in the case of *Ncukana / AF Brands (Pty) Ltd* (2022) BALR 737 (CCMA).

The employer in this matter conducted business in the retail sector. A representative of the employer had discovered that money had gone missing due to a shortfall amount being deposited at a bank at one of their retail locations.

The missing money was ultimately found in a bank bag in a drop safe and that it had not been recorded elsewhere. The colleague of the employee in this matter admitted that she placed the unregistered money bag in the drop safe and had informed the employee that she had done so. The employee failed to report her colleague’s suspicious conduct to management and as a result, the employee was charged with derivative misconduct, which lead to her dismissal.

The employee however, denied having any knowledge of the conduct to a representative of the employer.

The employee contended that her dismissal was substantively unfair.

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## Summary of Findings

During the proceedings in the CCMA, the employee conceded to knowing of the suspicious conduct of her colleague. The question before the CCMA was therefore whether there had been an obligation on the part of the employee to disclose this knowledge. The Commissioner found that the employee was under an obligation to inform the employer of the suspicious conduct of which she was aware.

The CCMA relied on the finding of the Labour Court in *Dunlop Mixing and Technical Services and others v NUMSA obo Nganenzi and others* [2016] 10 BLLR 1024 (LC) (“**Dunlop**”). The CCMA relied on the test used in that matter namely –

1. the information or knowledge that the employee fails to disclose must be “actual knowledge”;
2. non-disclosure must be deliberate;
3. the seriousness of the primary misconduct and the rank of the employee who fails to disclose, at most affects the gravity of the nondisclosure;
4. a request to disclose information need not be made for the duty to disclose to be triggered, but if a request is made and is refused, culpability is aggravated; and
5. the employee need not have a common purpose with the perpetrator.

The Court in *Dunlop* held that an employee is implicitly bound by a duty of good faith towards an employer and that remaining silent about business interests being improperly undermined had been a breach of this duty. The failure to disclose the misconduct, informs that the dismissal of the employee had been derivatively justified in relation to the primary misconduct.

In this case, the employee also refused to disclose her knowledge of the matter, which amounted to an aggravating factor in favor of her dismissal. The CCMA affirmed that holding a common purpose with the colleague did not have to be established.

The dismissal of the employee was therefore found to be substantively fair.

## Importance of the Case

Employees hold a responsibility to act honestly even if it means such honesty exposes the misconduct of another employee.



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