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EMPLOYMENT

# Dismissal due to the breakdown of the trust relationship

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**Issue**

Whether an act of dishonesty would lead to a breach in the trust relationship so as to render the continuation of employment intolerable.

**Summary**

Where an employee commits a dishonest offence which reveals a stratagem of dishonesty or deceit, it can be accepted that a reasonable employer will lose trust in the employee, who, by reason of their misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the employment relationship intolerable or unfeasible. This is because such conduct inevitable poses an operational difficulty for the employer, making the employer hard pressed to trust such employee.

**Facts**

In the case of *Autozone v Dispute Resolution Centre of Motor Industry and Others* [2019] JOL 41073 (LAC) the above issue arose. The facts of the matter are briefly as follows.

Autozone ("**the employer**") employed Allen Sikhakhane ("**S**"). At the time of his dismissal, S was employed as a driver. S was instructed by the employer's regional manager, Alvin Govender ("**Govender**") to employ three casual workers to clean up waste and rubble. In the presence of S, Govender informed the casuals that they would each be paid R50 for the work. Once the task was completed Govender, in the presence of the employer's branch manager Paul Thakalani ("**Thakalani**"), instructed S to obtain R150 from the cashier. S requested R180 from the cashier. S only paid over R150 to the casual employees. It subsequently came to Thakalani's attention that S withdrew R180 and only paid over R150. When confronted about the missing R30, S could not provide an explanation but later explained that he had acted out of his own initiative to pay the workers more and had withheld the balance until the work was complete.

The employer dismissed S for dishonesty (theft, misappropriation of company funds or attempted theft or misappropriation). S lodged an unfair dismissal dispute at the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") and testified to the same version. The arbitrator concluded that the employer had discharged the onus of proving on a balance of probabilities that the dismissal was for a fair reason and was accordingly substantively fair.

Aggrieved by this outcome, S took the matter on review to the Labour Court ("**LC**"). He reiterated his version. The appellant argued for the reasonableness of the arbitrator's award. The LC accepted (without explicitly finding as such) that the misconduct had been proven but made no attempt to analyse the evidence to determine the nature of the transgression. The LC held that there was no evidence that showed how the conduct for which the employee was found guilty of impacted on the relationship of trust (emphasis added). The LC held that the test is whether the trust relationship has been breached to the extent that it renders a continued employment intolerable. This is a question of fact to be established by evidence. In the absence of such evidence, it was found that the dismissal was unfair. The LC set aside the CCMA's award and ordered S's reinstatement to the date of dismissal. It was also ordered that S be issued with a written warning for the misconduct. This indicated that the LC accepted that misconduct had indeed been proven.

**Court's evaluation**

The employer appealed to the Labour Appeal Court ("**LAC**") on the grounds that the LC erred by failing to assess the facts and circumstances of the case and in finding that no evidence was led relating to the breakdown of the trust relationship. S persisted with his denial of

dishonesty.

The LAC was tasked with answering the legal question – whether S's conduct breached the trust relationship so as to render continued employment intolerable.

The LAC held that undeniably, the evidence on the issue was somewhat thin. Where an employer relies on irreparable harm to the employment relationship to justify a dismissal, it would be prudent to lead evidence to support that claim, unless the conclusion that the trust relationship has broken down is apparent from the nature of the offence or the circumstances of the dismissal (emphasis added). In cases where the offence reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of his misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the employment relationship intolerable or unfeasible.

It was further held that employees who engage in dishonest or deceitful conduct pose an operational risk to the employer's business. This operational risk alone would suffice to justify dismissal. In this case, the appellant was entitled to have a driver who would act in good faith and advance and protect the appellant's interests. S's conduct showed that he was not such a driver. The appellant did not have to present evidence that the trust relationship had been irreparably damaged as the nature of the offence and the manner of its commission were indicative of such a conclusion.

The LAC held that the CCMA's finding was not one which a reasonable decision-maker would reach and set aside the LC's award. S's dismissal was declared to have been substantively fair.

**Importance of the case**

The LAC decision illustrates that an employer need not always present evidence of a breakdown of the trust relationship in order to justify dismissal for dishonesty. If the nature of the offence is such that it would lead to a breakdown in trust, no further evidence would be required. Nevertheless, employers should err on the side of caution and present some evidence of this breakdown.




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