

EMPLOYMENT

Taking stock of collective misconduct

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The retail sector is often burdened with the issue of stock losses or shrinkage. Employers also grapple with identifying the perpetrator(s) of the offence who sometimes act in concert with other employees. In these circumstances, the employer may want to charge a group of employees with collective misconduct.

The issue of collective misconduct in the workplace was considered by the Labour Appeal Court ("**LAC**") in *South African Commercial Catering and Allied Workers Union and Others v Makgopela and Others* (JA38/2021) [2023] ZALAC 8 (14 March 2023) ("*SACCAWU v Makgopela*").

Facts

In this case an appeal was brought by 12 employees ("**the employees**") (represented by their trade union), who were employed at one of the employer's stores in various capacities ranging from cashiers, forklift drivers, general assistants, sales coordinators, a sales assistant, a system supervisor and an assistant manager.

Following three stock-takes between January and March 2016, the employer detected alarming stock losses. In response to the stock losses, the employer convened two "shrinkage workshops" ("**workshops**") for employees in March and June 2016.

At the workshops employees were interviewed and given shrinkage questionnaires to identify the cause of the continued stock losses.

The questionnaires uncovered a number of deficiencies in the store's systems, controls and security measures. The deficiencies were not sufficiently addressed, which lead to the continuation of stock losses.

Following the second shrinkage workshop, the employees were charged with collective misconduct/team misconduct. The charge read:

"You on or during the period 28 March 2016 to 25 June 2016 as individual components of the group each culpable failed to ensure that the group complies with a rule or attains a performance standard set by the employer where shrinkage reaches unacceptable levels in the amount of R202 317,72."

After a disciplinary hearing, all the employees who were charged were found guilty of misconduct and were dismissed.

Dissatisfied with their dismissals, the employees referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**").

The Commissioner applied the concept of derivative misconduct to determine whether the employees had contravened the employer's rule regarding stock losses and disclosure of the cause of such stock losses. The Commissioner rejected the employees' contention that they had fulfilled their duties as required.

The Commissioner found that the employees had "implicated each other on the shrinkage workshop questionnaire" by referring to others among them who were not doing their duties. Had they disclosed the cause of the stock losses, they could have been prevented. Their dismissals were found to be both procedurally and substantively fair.

Labour Court Finding

On review, the Labour Court found that the arbitration award was reasonable and dismissed the review application.

LAC Finding

On appeal, the LAC held that four different approaches to collective misconduct are discernible in South African Law. The LAC distinguished between the four approaches to collective misconduct as follows:

1. The doctrine of common purpose

Employees may be collectively charged with reliance placed on the doctrine of common purpose as the basis on which the misconduct was committed. A dismissal for misconduct based on common purpose arises as a consequence of the deemed participation of an employee as part of a group which committed the primary misconduct.

Common purpose and involvement with the primary misconduct will generally occur if the employee:

- i. was present at the scene of the misconduct;
- ii. was aware of the misconduct;
- iii. intended to make common cause with those who perpetrated it;
- iv. manifested some common purpose with the perpetrators of the misconduct by performing an act of association with the conduct of others; and
- v. possessed the requisite *mens rea* ("guilty mind").

The LAC considered *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited (Dunlop)* [2019] 9 BLLR 865 (CC), where the Constitutional Court found that an employer relying on common purpose as a ground for dismissal must produce either direct or circumstantial evidence that the employees directly or indirectly associated with or participated in the misconduct.

- Team misconduct

Team misconduct occurs when a number of employees are disciplined collectively as members of a team for the same misconduct because the individual responsibility of individual employees in the team cannot be determined. This is where a group of employees are dismissed because each employee failed to ensure that the team complied with a rule or standard set by the employer.

- Derivative misconduct

Employees have a derivative duty to their employer to disclose information about the participation of their colleagues in collective misconduct when they are expressly requested to disclose information known to that employee pertinent to the wrongdoing, but consciously elected not to do so.

- Operational rationale for collective dismissal

The fourth approach to collective misconduct was articulated by the LAC in *Chauke v Lee Service Centre CC Motor* (1998) 19 ILJ 1441 (LAC), namely that dismissals for misconduct may occur when the individual culpability of employees cannot be determined and there is an operational rationale for their dismissal.

The Court noted that the fact that misconduct is concerned with fault while operational requirements are not, means that reliance on the latter as a consequence of the former, may create difficulties.

For example, in a case in which the culpability of individual employees in certain acts of violence during a violent strike was not proved, their dismissals on grounds of operational requirements were found to be unfair.

LAC's analysis

After careful analysis the LAC held that the employees' dismissals were substantively unfair for the following reasons:

- The employer relied on team misconduct, the essence of which related to the failure of the employees as members of a team to adhere to its rule to prevent and halt shrinkage at its store;

- In issue was whether it was shown that the employees, as members of a team, had culpably failed to ensure that the team complied with the rule or attained the performance standard set by the employer to prevent shrinkage;
- To prove this required the employer to rely on direct evidence of the failure on the part of the employees as members of the team to adhere to the rule or performance standard sufficient to warrant a finding of team liability; and
- The employer failed to do so.

The LAC distinguished the current matter from other instances which have been found to justify the dismissal of all employees in a team for, among others, the following reasons:

- No evidence was presented by the employer as to the details of the systems and controls in place at its store to prevent stock losses;
- There was no evidence of any attempt to ascertain through an investigation how stock was being lost or from which part of the large store this was occurring, including relying on CCTV footage or available documentary evidence;
- There was also no evidence which indicated that, given the size of the store, employees in one section of the store would have been aware of stock being lost in another section; and
- The evidence indicated that employees performed diverse functions across the large area of the store and that when they raised a number of concerns and made proposals for system improvements to prevent such losses, these were not acted upon by the employer. The employees therefore did not remain silent.

Importance of the case

In conclusion the Court highlighted the importance of this cause as follows: *"This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal. This is so given that workplace discipline must at all times be fair and just.*

As much is required by the Labour Relations Act in giving meaning to the constitutional right to fair labour practices. Our law does not allow a determination of guilt simply by association.

Where team misconduct is relied upon there must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule.

A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists."



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