an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'

The substantive and procedural fairness of the dismissal of the striking employees was challenged by their trade union, National Union of Metalworkers of South Africa (NUMSA), on their behalf through the Commission for Conciliation, Mediation and Arbitration's (CCMA) dispute resolution mechanisms. The arbitrator, when considering the issue of the substantive fairness of the dismissals, identified three categories of employees, namely –

- those who had been positively identified as having been perpetrators of the violence;
- those who were identified as having been present at the scenes of the violence but who were not identifiable as having committed any violent act; and
- those who were not identified as having either been present at the scenes of the violence, nor participant therein.

The arbitrator found that dismissal of the former two categories of employees had been substantively fair but found there to have been no substantively fair reason for the dismissal of the last mentioned category. These employees were awarded reinstatement.

On review to the LC by the employer the arbitrator's award of reinstatement was set aside. The Labour Appeal Court equally dismissed NUMSA's appeal against that decision.

On appeal to the Constitutional Court (CC) by NUMSA, the court was required to determine the reasonableness of the arbitrator's decision that the dismissal of the third category of employees had been substantively unfair. In a unanimous judgment handed down on 28 June the CC concurred with the arbitrator and substituted the order of the LC with an order dismissing the review application.

In arriving at its decision, the CC considered whether there was in fact a duty on the part of employees to disclose information pertaining to the misconduct of other employees to their employer. The court distinguished between fiduciary duties, which entail a unilateral obligation to act in the beneficiaries' interest, and the contractual duty of good faith, which is reciprocal in nature and requires no more than that the contracting parties have regard to the interests of the other. The court concluded that our law does not imply fiduciary duties into all employment relationships. The duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee to disclose information of misconduct of their fellow employees to their employer, in the absence of any reciprocal obligation on the part of an employer itself to give something to the employees in return (such as guarantees for their safety).

The CC pointed out that there are many ways in which employees can both directly and indirectly participate in or associate themselves with whatever primary misconduct has occurred. Evidence of such association or participation may be sufficient to establish complicity in the primary misconduct. On the facts of the matter before it, the CC did not find that the employees who had been awarded reinstatement could all have been identifiable as having been present at the scenes of the violence and accordingly, to dismiss all of them would not be justified.

The CC now having put an end to the notion of 'derivative misconduct', an employer wishing to sustain a dismissal based on collective misconduct is required to demonstrate by way of either direct or compelling circumstantial evidence that the employees in question directly or indirectly associated with or participated in the misconduct in question.

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Accidentally on purpose? A case study on the fine line between intentional and negligent misconduct

By Nkosilathi Moyo

Drs Dietrich, Voigt and Mia (Pty) Ltd t/a Pathcare v Bennet and Others [2019] 8 BLLR 741 (LAC)

Where one draws the line on what ought to be considered as intentional or negligent misconduct is often blurred. In the judgment of *Drs Dietrich, Voigt and Mia (Pty) Ltd t/a Pathcare v Bennet and Others* [2019] 8 BLLR 741 (LAC), an employee had been dismissed for falsifying overtime claim forms. The Labour Appeal Court (LAC) was faced with making a determination on whether the commissioner had correctly found the employee to have acted negligently for certain acts of misconduct as opposed to having acted intentionally as averred by the employer.

The employee had been charged and consequently dismissed for dishonest conduct specifically, it was alleged that –

- during the period from October 2013 to January 2014, on 13 occasions, the employee claimed full overtime hours despite having taken lunch breaks or being off of the company's premises; and
- during July, November and December 2013 the employee claimed overtime at an incorrect hourly rate of 1,5 instead of 1,0, which resulted in an overpayment.

Thereafter, the employee referred a substantive fairness challenge to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner's inquiry was confined to whether the breaches of the rule were intentional. The employee proffered to the commission that he worked for long agonising hours as overtime was scheduled over

the weekend. The employee further stated that due to the limited food options available at the employer's premises, he had to resort to purchasing food elsewhere and return to the workplace to eat while working. He admitted that there was a lack of proper record keeping on his part for the time he spent outside the workplace, during his meal intervals, which he did not deduct from his overtime claims for which he apologised. The employee also admitted that he claimed overtime at the incorrect rate during the months of July, November and December 2013 as a result of human error. The employee apologised once again and paid the overpaid amounts back to the employer prior to the disciplinary hearing.

Even though the commissioner found the employee to have committed the acts of misconduct articulated above, the commissioner found the employer to have failed to discharge its onus to prove that the employee acted intentionally. The commissioner was of the view that if the employee's actions were intentional, the employee would not have submitted the incorrect claim forms intermittently, but would have repeated this sequentially. Insofar as the allegation for overtime with regard to the lunch breaks is concerned, the commissioner noted that the employee struggled to justify his actions. The commissioner was of the view that a fraudster would have left less of a trail of evidential material and chalked up the employee's actions to 'merely slapdash or to put it in another way, negligent.' The commissioner could not fathom that fraudulent activity could have been so badly orchestrated.

On review, the Labour Court (LC) held that the employer did not prove the intention to falsify the overtime claim forms. It further held that the commissioner's finding, that the employee was careless; negligent; and had no intention to defraud the employer, was within the band of reasonableness. This finding was also informed by the fact that the employee's line-manager had checked the overtime claim forms before appending her signature thereto.

Dissatisfied with the LC's finding, the employer took the matter to the LAC. The court had to determine whether the employee acted intentionally or negligently, specifically whether the commissioner's conclusion, that the employee was guilty of negligence and not dishonesty, was reasonable. It was contended for the employer that the employee's unmethodical poor defences to the allegations of misconduct should have led the commissioner to a conclusion that the employer discharged its onus to prove that the employee was guilty of dishonest conduct.

The court held that to a certain extent, the commissioner misdirected himself in holding that the employer was confined to proving whether the breach of the rule was intentional without inquiring or establishing whether there was a rule, which precluded the employee from claiming for his lunch breaks. The court, relying on the precedent set in *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA), held that whether or not conduct constitutes negligence ultimately depends on a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand. In light of the fact that the claim forms in issue were structured in a way that the overtime rates, that is, both the 1,0 and 1,5 times rates were placed in adjacent columns, the commissioner readily accepted that the employee inserted his overtime in the wrong column because the claim forms were not submitted consecutively. The court concluded that the employee did not exercise the degree of care, which can reasonably be expected of an employee in his position, and as such, the commissioner's findings could not be faulted.

Conclusion

This decision seems to create uncertainty when it comes to matters where there is a dispute on the authenticity of the fault element of the alleged misconduct. On the one hand, an employee can possibly pull the wool over the commissioner's eyes by conveniently ascribing seemingly inconspicuous acts of misconduct as having been committed negligently. What this case illustrates is that the employee would not necessarily have to provide a credible explanation to sustain this defence apart from remorsefully crediting the act as pure human error. On the other hand, if an employer can establish a connection between the manner in which the acts of misconduct were orchestrated, however, inadvertently committed, and the perceived benefit stemming therefrom, an employee may very well face a charge of dishonesty or fraud if they proffer an explanation indicative of a mistaken belief of that employee's entitlement to act in whatever manner in question. Such actions would have been committed deliberately. It should follow that inquiring into the reasonableness of the misconduct in question does not necessarily provide a reliable point of departure when there is an allegation of this nature.

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