The Labour Appeal Court's approach to dishonest employees

A review of some recent cases

by P.A.K. le Roux

The Supreme Court of Appeal (SCA) has recently reaffirmed the view that it would not easily entertain appeals against decisions of the Labour Appeal Court (LAC) simply based on the contention that the decision of the LAC was wrong. Special circumstances must first exist that “take it out of the ordinary” before it will hear an appeal. (National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochrome) (unreported 625/10) [2011] ZASCA 74, 25 May 2011)

The basis for this view is that the LAC is a “specialist tribunal” in labour matters. It also seems probable that legislation in the pipeline may, in any event, deprive the SCA of its jurisdiction to consider appeals from the LAC.

It is therefore of more than passing interest to consider some of the more recent decisions of the LAC, the most important body to shape the details of our labour law, and to see whether any recent decisions of the LAC, the most recent of which were [2011] ZASCA 74, 25 May 2011 can be seen to hold the dice for dishonest employees.

Miyambo v CCMA & others [2010] 10 ILJ 1017 (LAC)

In this decision the employee, whilst working a night shift, found some scrap metal that had been thrown into a skip. He was aware that the metal was not being thrown away but that it would be sold by his employer. Despite this knowledge, he decided to take the scrap metal for himself with the aim of using it to fix his stove.

When he left the premises after the completion of his shift he was subjected to a disciplinary hearing. He was aware that the metal was not being thrown away but that it would be sold by his employer. Despite this knowledge, he decided to take the scrap metal for himself with the aim of using it to fix his stove.

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Inside....

Breach of trust - says who? p6

Formulating disciplinary charges p8
'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer’s enterprise.'

De Beers Consolidated Mines Ltd v CCMA & others

fact guilty of stealing the scrap metal but found that dismissal was too harsh a sanction to impose. The commissioner ordered the reinstatement of the employee with retrospective effect without the forfeiture of benefits, but without the payment of back pay.

The employer took this award on review. The Labour Court adopted the test for review formulated in the decision of the Constitutional Court in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC) and considered whether the award was one that a reasonable decision maker could have reached. The Court found that this was not the case and overturned the award.

On appeal to the LAC it was conceded by the employee’s legal representative that he had committed an act of theft. As is usual in this type of case, the employer’s representative argued that the employee’s actions had destroyed the trust relationship and that it consistently applied a policy of “zero tolerance” towards acts of dishonesty. He emphasised the fact that the employee had given contradictory explanations for the attempted unauthorised removal of the employer’s property.

The employee’s representative, on the other hand, emphasised the employee’s long service (some 25 years) and his clean disciplinary record. He also argued that a distinction should be drawn between theft “in a technical sense”, which appears to have been equated to “unauthorised possession” and which it was conceded the employee was guilty of, and theft in “the strict sense”.

The Court’s approach to these arguments is instructive in that it starts off by emphasising the requirement of trust in the employment relationship and justifying this requirement on the basis of the employer’s operational requirements. In this regard it followed the approach adopted in the often quoted decision of the LAC in De Beers Consolidated Mines Ltd v CCMA & Others [2000] 9 BLLR 995 (LAC), also followed in Shoprite Checkers (Pty) Ltd v CCMA & Others [2008] 9 BLLR 838 (LAC), which justified a strict approach to dishonest conduct in the workplace on the basis of the employer’s operational requirements.

“[13] It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust. In De Beers Consolidated Mines Ltd v CCMA & others [2000] 9 BLLR 995 (LAC) para 22, the court, per Conradie JA, held the following regarding risk management:

‘Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer’s enterprise.’

The Court then addressed the issue of long service as a mitigating factor. It referred to the decisions in Toyota South Africa Motors (Pty) Ltd v Radebe & Others [2000] 3 BLLR 243 (LAC) and Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others [2008] 3 BLLR 241 (LC) where it was held that serious acts of misconduct,
such a gross dishonesty would render factors such as length of service and a clean disciplinary record irrelevant in determining the appropriate sanction to be applied and came to the conclusion that the Court placed a high premium on honesty in the workplace.

After rejecting the distinction between theft in the “strict sense” and theft in the “technical sense” on the basis that it was an artificial distinction and undermined conceptual clarity, the Court came to the conclusion that dismissal could be justified on the basis of “operational reasons”.

“[21] Miyambo undoubtedly breached the relationship of trust built up over many years of honest service. The Company had a consistent policy of zero tolerance for theft and this had been clearly conveyed to all the employees including Miyambo. I agree with the Labour Court’s ruling that the Commissioner’s award was not justifiable in relation to the reasons given for it. On the basis of the factual findings made by the Commissioner, the dismissal of the Appellant was justified for operational reasons and was fair.”

**Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (Unreported JA 30/10 26 May 2011)**

In this case evidence obtained from concealed cameras on the employer’s premises showed that the employee concerned had, on two separate occasions, concealed property of the employer on her body. On the first occasion she was seen to conceal a ladies blouse, top or vest under her clothing. On the second occasion she concealed a belt under her clothing. The employer indicated that the merchandise referred to were items that had been returned to the employer by customers or “second grade” goods that, for example, did not meet the employer’s quality standards.

The employee was charged with gross misconduct. The allegation was that she “concealed merchandise without paying for it, which resulted in a loss to the company”. She was dismissed and challenged her dismissal in the CCMA.

At the arbitration the employer justified the decision to dismiss on the basis that the employee’s actions had destroyed the trust relationship, this despite the fact that the employee had 23 years service with the employer. The employee did not deny that she had acted as alleged. She admitted that she had placed the top/blouse/vest under her clothing but alleged that the garment was a “waste garment” which had no value and that she had placed it there in order to absorb sweat because the office that she worked in was hot. She also admitted that she had placed the belt under her dress but argued that the belt was her property. When questioned why she would have done so, she simply stated that she “felt like putting it there”.

The commissioner found that, as far as the first incident (i.e. relating to the top/vest/blouse) was concerned, the employer had not proved that the employee harboured any dishonest intent. The offence that she had committed was something akin to unauthorized use of company property. As far as the second incident (i.e. that relating to the belt) was concerned, the commissioner found that the employer had not proved that the belt was its property. The outcome was a finding that the employee was not guilty of a disciplinary offence in respect of the second incident and that, although she was guilty of a disciplinary offence in respect of the first incident, this did not justify dismissal. A final written warning was imposed.

Not surprisingly, the employer decided to review this award. On review the employer sought to overturn the finding that the employee had not committed a disciplinary offence in respect of the second incident as well as the finding that dismissal was not justified for the first incident.

For reasons not clear from the LAC judgment, the Labour Court did not deal with the first ground for review. It only dealt with the issue whether dismissal was an appropriate sanction for the first incident. On this issue it sided with the commissioner and found that the commissioner’s finding on this issue was reasonable - the employee had 23 years’ service with the employer and she had a clean disciplinary record.

Once again not surprisingly, the employer appealed against this decision to the LAC. Here the employer’s legal representative argued that the Labour Court had erred in approaching the matter on the basis that the employer was only challenging the issue of sanction in respect of the first incident. It was evident from the
papers that the employer was also challenging the commissioner’s finding that the employee was not guilty of misconduct in respect of the second incident. The LAC agreed with this view and then went on to consider the appeal on the basis argued for by the employer.

The Court found that the DVD video footage established that there was a prima facie case of “concealment” and an “element of dishonest intention on the part of the employee”. An evidentiary burden was then placed on the employee to show that she had not harboured a dishonest intention. The Court came to the conclusion that the commissioner had not acted reasonably in coming to the decision that the way in which the employee had acted was honest. There was no rational and credible basis on which the commissioner could have found that employee was a credible witness who provided a probable explanation for her actions.

The following sets out the conclusion of the Court -

“[48] It has long been held that the employer’s decision to dismiss an employee will only be interfered with if that decision is found to have been unreasonable and unfair. The fact that an employee has had a long and faithful service with the employer thus far is indeed an important and persuasive factor against a decision to dismiss the employee for misconduct, but is by no means a decisive one. In Toyota South Africa Motors (Pty) Ltd v Radebe and Others, this Court held:

“Although a long period of service of an employee will usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.”

[49] Accordingly, notwithstanding her long service with the appellant, the employee committed, on two successive days, acts of gross misconduct involving gross dishonesty, in circumstances which, in my opinion, justified the appellant’s assertion that the trust relationship between it and the employee broke down irreparably.”

Rainbow Farms (Pty) Ltd v CCMA [2011] 11 BLLR 451 (LAC)

The employer in this case provided employees with free milk, tea, coffee and bread in its canteen. On 30 August 2004 the employee was found to be in possession of this “free issue” milk when he left the employer’s premises. As a result he was charged with the offence of unauthorised possession/removal of company property. This was on the basis that the employer had a rule in place in terms of which free issue milk could not be removed from its premises without authorisation. He was found guilty of unauthorised removal and dismissed.

He challenged the fairness of his dismissal. The CCMA commissioner found that the evidence established that there was a rule in place which prohibited the removal of free issue milk from the employer’s premises but held that that the employee had not realised that he was not doing anything wrong – presumably this was a finding to the effect that the employee did not have knowledge of the rule.

The Labour Court rejected the employer’s subsequent application to review and set aside this award. It did this on two grounds. The first was that the employee had been found guilty by the employer of the unauthorised removal of company property rather than the unauthorised possession of company property.

The evidence established that the employee had not removed property from the premises because he had been caught with the milk prior to leaving the premises – he was therefore not guilty of this offence. The fact that the employer had not found him guilty of unauthorised possession meant that this charge had “fallen away” and could not be considered by the commissioner.

After dealing with various other issues the LAC, on appeal, found that, when all the evidence was taken into account the conclusion was “inescapable” that the employee had breached a well-known and strict rule applied consistently.

This constituted dishonest conduct and that this conduct had destroyed the trust relationship between employer and employee. The LAC substituted the commissioner’s award with a finding that the employee’s dismissal had been substantively and procedurally fair.
In this decision the LAC had to deal with a different form of dishonest conduct. The employee concerned was employed as a “waste buster”. It was common cause that he had telephonically contacted a firm of attorneys who acted on behalf of the furniture retailer, Bradlows. He had done so on behalf of a fellow employee who owed money to Bradlows. During the course of the telephonic discussion he informed the attorney’s creditors clerk that he was an attorney and that he acted on behalf of his employer as well as on behalf of his co-employee. During the course of the conversation he became aggressive and abusive.

When this conduct came to the attention of the employer he was charged with misrepresenting himself as an attorney for his employer, threatening that he would take legal action on behalf of his employer and of bringing the name of his employer into disrepute. He was dismissed and he challenged his dismissal in the CCMA. The CCMA commissioner found that the dismissal was unfair on the basis that the employee had not acted wilfully – he had not had the intention to bring his employer’s name into disrepute and had merely intended to assist his fellow employee to obtain information from Bradlow’s attorneys. His sole intention was to use the weight of his employer to achieve this end. This was decision was overturned by the Labour Court on review.

The employee then appealed to the LAC. The LAC took the view that the issue whether the employer’s name had been brought into dispute did not depend on the intention of the employee concerned but had to be decided objectively. The LAC came to the conclusion that the employer’s name had indeed been brought into disrepute. It then considered the argument raised by the employee’s legal representative that dismissal was not justified in this case and that the principles of progressive discipline should be applied – the employee had an unblemished record. The Court rejected this argument in the following strongly worded passage –

“The decision maker who has to decide, whether an arbitrator or court, must be cautious, before simply assuming that disciplinary sanctions must always and invariably be based on a progressive system. In other words, in a case such as the present, where there is an egregious act of dishonesty, and I use that word advisably because, as I have already indicated appellant’s conduct throughout this dispute constituted a perpetuation of the dishonesty, by way of a denial, conversely, a complete lack of acknowledgement of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction. Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer’s organisation, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. In these circumstances, where there is nothing more than an aggressive denial and a perpetuation of dishonesty, it is extremely difficult to justify a progressive sanction, particularly in a case where the dishonesty is as serious as this dispute. In the result, I would dismiss the appeal with costs.” (At 834J-835D)

Comment

The above decisions illustrate that the LAC continues to take the view that employers are entitled to take a strict approach towards dishonesty as a reason for dismissal. Where dishonesty has been shown to exist, mitigatory factors such as length of service and a clean disciplinary record seem to carry less weight. However, employers should nevertheless still take into account the decision of the LAC in Edcon Ltd v Pillemer NO [2010] 1 BLLR 1 (SCA) where the point was made that it is still incumbent on the employer to lead evidence as to why dismissal is an appropriate sanction in a particular case.

In most cases the test adopted for deciding whether dismissal was justified is whether the trust relationship between employer and employee has been destroyed. What is of interest, however, is the way in which this approach was applied in the Miyambo decision where it was accepted that the underlying rational for requiring
a trust relationship was the employer’s operational requirements. The importance of the concept of operational requirements as a reason for dismissal outside the ambit of retrenchments and restructuring, and in situations where there is an overlap with misconduct cases, is illustrated in two recent LAC decisions. In **SA Transport & Allied Workers Union & Others v Khulani Fidelity Security Services** (2011) 32 ILJ 130 (LAC) the refusal of an employee to undergo a polygraph test was found to be fair on the basis of the employer’s operational requirements. In **Jordaan v CCMA & Others** [2010] 12 BLLR 1235 (LC) the LAC indicated that it might be fair to dismiss on the grounds of operational requirements where the employee refused to sign a restraint of trade agreement.

The decision of the **Supreme Court of Appeal in Edcon Ltd v Pillemer NO** [2010] 1 BLLR (SCA) is an important decision in that it emphasises that it is not sufficient for an employer’s representative to make the bold (or bland) statement during the course of an arbitration that the relationship of trust between employer and employee has been destroyed and that the dismissal was fair. Although there may be situations where this is self-evident, usually evidence will have to be led to show why the employer thinks that this is the case. The nature of the offence committed, the type of job performed by the employee, the provisions of the employer’s disciplinary code, the employee’s disciplinary record as well as the nature of the employer’s business are some of the factors on which evidence can be led in this regard.

But who must give this evidence? This question was one of the issues dealt with in the recent arbitration in **Madonsela v SARS** [2011] 30L 27449(CCMA). The employee in this matter had been charged with being party to the submission of fraudulent tax returns relating to himself and was dismissed. At the subsequent arbitration proceedings the commissioner found that he was not guilty of the disciplinary offences he had been charged with. However, the commissioner also went on to decide that the dismissal was unfair for another reason as well. The employer not only had to lead evidence to show that a disciplinary offence had been committed but it also had to lead evidence to establish that dismissal was justified. This had not been done in this case. According to the arbitrator, this evidence had to be given by the chairperson of the disciplinary hearing, or perhaps the chairperson of any internal appeal process. After referring to the factors to be taken into account in this regard, the arbitrator said the following –

\[44\] An employer’s failure to take the said factors into consideration may render dismissal procedurally unfair and inevitably raises a serious question about the appropriateness (substantive fairness) of dismissal. The evidence of the person who takes the ultimate decision to dismiss is therefore crucially important and an employer who fails to call such a person to testify at arbitration does so at its own peril because it may be impossible to discharge the onus of proving the fairness of a dismissal."

If this was not clear enough this was repeated later in the following terms-

\[68\] The respondent’s failure to call the person who had dismissed the applicant to testify about the reason why the sanction of dismissal had been imposed leaves me with no option but to

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**Breach of trust - says who?**

*The need for evidence*

by P.A.K. le Roux

The decision of the Supreme Court of Appeal in **Edcon Ltd v Pillemer NO** [2010] 1 BLLR (SCA) is an important decision in that it emphasises that it is not sufficient for an employer’s representative to make the bold (or bland) statement during the course of an arbitration that the relationship of trust between employer and employee has been destroyed and that the dismissal was fair. Although there may be situations where this is self-evident, usually evidence will have to be led to show why the employer thinks that this is the case. The nature of the offence committed, the type of job performed by the employee, the provisions of the employer’s disciplinary code, the employee’s disciplinary record as well as the nature of the employer’s business are some of the factors on which evidence can be led in this regard.

Also of interest, for lawyers at least, is the approach of the LAC in the **Woolworths** decision to the effect that, although the onus of proving the fairness of a dismissal rests on an employer, an evidentiary burden can be placed on an employee to rebut inferences that can be drawn from evidence presented by the employer.

These decisions also indicate that the line between a review and an appeal is sometimes difficult to draw. The way in which the Court analysed and dealt with the evidence in the **Woolworths** decision seems to indicate that the Court almost dealt with the evidence as if it were an appeal rather than a review.

PAK le Roux
"The respondent's failure to call the person who had dismissed the applicant to testify about the reason why the sanction of dismissal had been imposed leaves me with no option but to find that the respondent has not discharged the onus of proving that dismissal had been the appropriate penalty and that the applicant's dismissal had consequently been substantively unfair."

Madonsela v SARS

find that the respondent has not discharged the onus of proving that dismissal had been the appropriate penalty and that the applicant's dismissal had consequently been substantively unfair."

In so far as the award indicates that an employer must address the issue of sanction specifically at the arbitration hearing and lead evidence to justify the decision to dismiss, it is correct. Where it does, with respect, err, is to insist that the employer must lead the evidence of the chairman of the enquiry as to why the disciplinary sanction of dismissal was imposed. The award does not refer to the Edcon decision and it appears that it was not the basis for the arbitrator's approach. This is unfortunate because this narrow approach is not supported by the Edcon decision. In the Edcon decision the only witness called by the employer at the arbitration was a Mr Naidoo, the person who had conducted the investigation into the activities of the employee concerned and was not one of the managers to whom the employee, a Ms Reddy, reported or with whom she interacted. The Court had the following to say in this regard –

"[19] It is to Naidoo's testimony, as Edcon's sole witness in the arbitration, as well as the documentary evidence referred to above, that one must look to see if indeed there was evidence showing that Reddy's conduct had destroyed the trust relationship between her and Edcon. Naidoo's testimony in the arbitration was mainly to recount the investigative history of the matter. He also testified that Edcon was intolerant towards dishonesty and that employees were generally dismissed if they committed dishonest acts. This, he said, was one of Edcon's core values. As already mentioned, Naidoo was the investigator of Reddy's misconduct and fielded some of her lies. It was at his recommendation, as investigator, that Reddy was suspended and eventually disciplined. What becomes immediately apparent is that Naidoo's evidence did not, and could not, deal with the impact of Reddy's conduct on the trust relationship. Neither did Naidoo testify that Reddy's conduct had destroyed the trust relationship. This was the domain of those managers to whom Reddy reported. They are the persons who could shed light on the issue. None testified."

and

"[20] Edcon's policy regarding the misconduct at issue here was also before Pillemer. But that document is just that – a policy – and is no evidence of the consequences of misconduct based on it. On its own it evinces Reddy's failure to comply with its dictates. It cannot be correct that mere production thereof would suffice to justify a decision to dismiss. The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship." (Emphases added)
This broader approach is correct, subject to the qualification that there would appear to be nothing wrong in calling the chairman of the disciplinary enquiry to give this evidence, especially if the chairperson was part of the management team to whom an employee reported. To the extent that the SCA seems to ignore this possibility it is submitted that this is incorrect.

This debate does raise another issue that arises with some frequency. The representatives of employees at arbitration proceedings often attempt to persuade witnesses to concede that the trust relationship has not been destroyed. Whilst this is, of course, a valid approach, it should be less appropriate where these questions are aimed at lower level managers such as supervisors of an employee. The concession made by the supervisor of an employee that he would still be prepared to work with the dismissed employees in cases, for example, of dishonesty and breaches of the duty of good faith should carry little weight, if any. The foreman cannot speak with authority on behalf of the employer on issues such as this. These broader policy issues are formulated by senior management and a supervisor has no right or authority to contradict them. To permit this could, inter alia, lead to inconsistency in the application of discipline and the undermining of company values.

Formulating disciplinary charges

by P.A.K. le Roux

In CLL Vol 20 no 4 we dealt with recent decisions dealing with the formulation of disciplinary charges. In Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others [2010] 5 BLLR 513 the Court dealt with the issue of when vaguely formulated disciplinary charges would give rise to a procedurally unfair dismissal. The test was whether the employee understood the charges against him and whether he was able to conduct his case properly.

The decisions in First National Battery (Pty) Ltd v CCMA & Others [2010] 5 BLLR 534 (LC) and National Commissioner of the SAPS v Safety and Security Sectoral Bargaining Council (Unreported JR 2938/09 12 November 2011) took the view that a dismissal was not necessarily unfair solely because the employer had “mislabelled” the disciplinary offence which the employee faced.

Two recent decisions dealing with the formulation of, and amendments to, disciplinary charges take these issues further.

In Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (Unreported JA 30/10 26 May 2011)( other aspects of which were discussed in the preceding article) the common cause facts were that the employee had, on two separate occasions, hidden certain merchandise under her clothing. This conduct had not been discovered as a result of a search when she tried to leave the employer’s premises. It had been picked up when the product of concealed video camera’s was inspected some time later. This notwithstanding, the employer clearly drew the inference that she was up to no good and charged her with the disciplinary offence of gross misconduct in that she –

“concealed merchandise without paying for it, which resulted in a loss to the company”.

The CCMA commissioner found that one of the instances of concealment did not constitute misconduct on the basis that the employer had not proved that the goods so concealed were the employer’s property. The commissioner did find that the second instance of concealment constituted misconduct but that dismissal was not an appropriate sanction for this act of misconduct. As indicated in the previous article, the LAC on review accepted that the employee had been guilty of misconduct in both cases of concealment. It then considered the issue of the appropriate disciplinary sanction and stated that this had to be determined in the light of the employer’s disciplinary code.

The relevant part of the employer’s disciplinary code listed certain “dismissible transgressions” – these included dishonesty and unauthorised possession. According to the LAC the use of the word concealment denoted an element of dishonesty and that the conduct
complained of therefore constituted a dismissible transgression. It also had the following to say about the formulation of disciplinary charges:

“[32] Unlike in criminal proceedings where it is said that "the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient", the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant’s disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux and Van Niekerk where the learned authors offer a suitable example, with which I agree:

‘Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.’”

In Munnik Basson da Gama Attorneys v Commission for Conciliation, Mediation and Arbitration (Unreported JR 1154/08  3 December 2010) the Court dealt with the interesting allegation that an amendment to the disciplinary charges brought against the employee constituted procedural fairness. The employer in this matter conducted a business as a debt collection agency and the employee concerned was employed by it as a letter administrator. She was provided with the following charges of misconduct—

“NATURE OF COMPLAINT
1. failed to activate the letters for ASC WW VISA 2 (498) and ASC Homechoice (499);
2. failed to correct the PTP due date on a Metropolitan PTP letter;
3. failed to approve the test data letter samples provided by Laser Facilities facility proofs on the 7th and 8th August 2007;
4. failed to identify and rectify the errors in the Botswana letterhead.”

On the face of it these charges are, to the outsider at least, incomprehensible. However, the employee seems to have understood them. She did not challenge them on the basis that they were too vague to enable her to prepare her defence and proceeded to defend herself at the disciplinary enquiry convened to consider these charges.

At the commencement of the second day of the disciplinary hearing the employer’s representative “brought an application to amend the charge sheet”. He stated that an error had occurred in the preparation of the charge sheet and he requested the chairperson to insert the words

“You are charged with gross negligence in that you .... “

The effect of the amendment was simply to further describe the charges. The employee “objected to the proposed amendment”. This objection was rejected by the chairperson and he "granted the amendment to the charge”. He did so on the basis that the evidence led up till that point would probably not have differed if these words had been there from the start of the hearing. He also offered the employer and the employee an adjournment to consider their position and, if necessary, to present further evidence. Neither the employer nor the employee made use of the offer to adjourn proceedings and the hearing concluded and was finalised. The employee was found guilty of the four abovementioned charges and dismissed.

The employee challenged the fairness of her dismissal in the CCMA. The commissioner found that the dismissal was substantively fair but procedurally unfair - this on the basis that the amendment to the charges was unfair. This aspect of the ruling was challenged on review in the Labour Court.
The Court referred to the principles dealing with the amendment of pleadings in court proceedings which provide that amendments can be sought at any time prior to judgment and that a court has the discretionary power to grant such an amendment. It accepted that the same principles applied to disciplinary hearings and that nothing prevented an employer from amending a charge sheet before a chairperson of a disciplinary hearing makes his or her finding.

It also referred with approval to the often quoted decision in *Avril Elizabeth Homes for the Mentally Handicapped v CCMA & Others* (2006) 26 ILJ 1644 (LC) where the Court accepted that the Labour Relations Act opted for a more flexible, less onerous, approach to procedural fairness where there is—

"...clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like."

It then went on to state that-

"[12]It is clear from the evidence led at the arbitration proceedings that the applicant had on the second day of the disciplinary proceedings brought an application to amend the charge sheet. The applicant’s representative explained how the error came about. It centred around a categorisation of the charge sheet to read ‘gross negligence’. The third respondent had objected and after arguments were heard, the amendment was allowed. The labelling of particular charges of misconduct as gross negligence did not in any way add to the complexity or substance of the charges. The focus must always be in the factual allegations in the charge sheet, and not their categorisation. The chairperson of the disciplinary hearing afforded both parties an opportunity to address him on the proposed amendment. He allowed them to adjourn to consider their position and to present any further evidence should they wish to do so, following the amendment to the charge sheet. The position would have been different if the chairperson did not allow the parties to make representation or to lead further evidence."

It is submitted that this is correct. But there is a certain irony in the approach adopted by the Court. Despite the fact that the Court accepted that disciplinary proceedings should not be equated with court proceedings it still felt it necessary to justify its approach, a least in part, with reference to the principles dealing with pleadings in the civil courts.

Unless the employer has opted to hold itself bound to follow a more formal, stricter, procedure, the test for a fair procedure is that set out in Item 4 to the Code of Good Practice: Dismissal – was the employee given the opportunity to state a case or, in the words utilised the *Avril Elizabeth* decision, was there an opportunity for “dialogue and reflection”? There is no need to refer to what is provided for in civil proceedings. In this case any prejudice or unfairness that may have been suffered by the employee was avoided by the fact that the employee was offered an adjournment if she felt that she needed to re-assess her position.

But another question may be asked. Why was it necessary for the employer to amend its charges and even to ask leave from the chairperson to do so? It is possible that this was a case where the employer had utilised the services of an independent person from outside the business to chair the meeting and, if this was the case, the answer to this question could depend on the mandate given to this outside chairperson. But in the absence of this factor, an employer should be entitled to do so without leave from the chairperson of the hearing. The risk is that, if the employer does this in an unfair manner, the dismissal will be held to be procedurally unfair but this is a risk that the employer must take. The tradition of formalism seems to run deep in our disciplinary procedures.

Finally, why it was necessary for the employer to amend the charges? It seems clear that the employee understood the charges against her. The chairperson simply had to decide whether there had been the failures complained of. Presumably there would be a finding also as to whether the failure was intentional, negligent or grossly negligent (whatever this may mean). Perhaps this was the reason for the employer’s decision to amend the charges i.e, to make it clear to the employee that the employer was arguing that dismissal would be the appropriate disciplinary sanction, but this may not be necessary in every case. ■

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