COLLECTIVE GUILT: DERIVATIVE MISCONDUCT

Introduction

In principle, the courts require the same standards to be applied in cases of so-called group misconduct as they do in cases of individual misconduct. However, specific problems arise when a number of employees who were involved in the same act of misconduct are subjected to disciplinary action. These problems relate to the selection of employees to be disciplined, the situation that arises when there is no direct evidence against any or all of the individual employees, and the consistency or otherwise of the sanction applied.

Selection for discipline

In *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* [1] the Labour Appeal Court upheld the dismissals of employees who had taken part in a violent demonstration, even though other workers who had participated in the same offence had been acquitted by a different presiding officer because there was insufficient evidence of their involvement.

This suggests that employees who are guilty of misconduct cannot rely on the 'parity principle' to escape the consequences of their misconduct simply because their employer was unable to gather evidence against other employees who were also involved in the same misconduct. The situation is different if the employees can prove that the employer was *wilfully* remiss in obtaining evidence against other guilty employees for ulterior reasons.

Collective guilt

When a large or unknown number of employees have engaged in collective misconduct, and the actual perpetrators cannot be identified, the employer may be tempted either to select some employees for dismissal as an example to others, or to dismiss all employees who could conceivably have been involved, whether innocent or otherwise, in the hope that the guilty employees will be caught in the net. The first option is plainly unacceptable; the dismissal of the selected employees is unfair unless there is evidence to link them to the commission of the offence. Such dismissals will be stigmatised as arbitrary. On the face of it, the second option is equally unacceptable, as it appears to offend against the principle, endorsed by all civilised legal systems, that it is preferable for a guilty party to go free, than to convict an innocent person.

One way out of this problem is for the employer to rely on the notion of 'derivative misconduct'.

[1] (1999) 20 ILJ 2302 (LAC)

Derivate misconduct

The idea of 'derivative misconduct' was first suggested by the Labour Appeal Court in *FAWU v Amalgamated Beverage Industries* [2]. The Labour Appeal Court observed:

"In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remains passive in circumstances like the present, and that his failure to assist in an investigation of this sort may itself justify disciplinary action."

Later, in *Chuke & others v Lee Service Station Centre CC t/a Leeson Motors,* [3] a case involving industrial sabotage, the court explained the principle of 'derivative misconduct' as follows:

"This approach involved a derived justification, stemming from 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."

Although in both cases the courts' observations were *obiter,* it seems, however, clear that the judgments lay down the principle that, in appropriate circumstances, dismissals will be accepted as fair if the employees were aware of the identity of the perpetrators of serious misconduct, but declined to disclose this information to their employer after being requested to do so.

In *RSA GEOLOGICAL SERVICES (A DIVISION OF DE BEERS CONSOLIDATD MINES) v GROGAN NO & OTHERS* [4] the Court revisited the concept of derivative misconduct in circumstances where the employer had established prima t facia that all employees in its employ had either been involved in misconduct or were aware of it, but could not identify the actual perpetrators. The court held that the onus was then on the employees to rebut the facts and inferences and that when they failed to do so it must find that all probably knew of the misconduct and participated in it, and that their dismissals were fair.

[2] (1994) 8 ILJ 156 (LAC)
[3] (1998) 19 ILJ 1441 (LAC)
[4] (2008) 29 ILJ 406 (LC)