

## Group misconduct

*When will dismissal be a fair remedy for employers?*

by P.A.K. le Roux

**W**hat can an employer do when confronted with the situation where it is incontrovertible that an act of misconduct has been committed by one or more members of a group of employees but the employer cannot determine which employee or which employees within the group actually committed the misconduct? Is it entitled to dismiss all employees who are members of the group or is it only entitled to dismiss those members of the group who, it can prove, actually committed the act of misconduct? The second option will mean that employees who are guilty of misconduct remain in the employment of the employer. The first option may mean that employees who are innocent of any misconduct may be dismissed simply because they are a member of the group of employees involved.

There are several awards and decisions where this first option has been rejected on the basis that the concept of “collective guilt” is repugnant to our law – an innocent employee cannot be held responsible for the misconduct or poor work

performance of other employees. This has meant that employers have had to devise other strategies to protect their interests, the most important being the development of the concept of “team misconduct” which was recently referred to with approval in **The Foschini Group v Maldi & others** [2010] 7 BLLR 689 (LAC). These strategies will be discussed in this contribution.

### Misconduct or poor work performance

The problem of “shrinkage” and the resultant losses suffered by retailers is well known. This problem has important additional aspects in that part of the retail sector where the business model involves the sale of relatively low value goods with low profit margins, often sold in stores with a small number of employees with a relatively flat managerial structure. It is therefore not surprising that these retailers have devised ways of attempting to prevent shrinkage and serious losses in “problem

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stores”.

Pep Stores is perhaps the most well known example of this model. From the published arbitration awards it appears that, during the 1990’s Pep Stores adopted a policy in terms of which shrinkage in excess of two per cent of total sales in a store would be regarded as unacceptable. If this standard was exceeded at a specific store, management would commence a process in which meetings would be held with staff, training sessions would take place and the level of stock losses would be monitored by means of regular stock taking exercises - conducted by the employees themselves or by outsiders. During the process the employees’ suggestions as to why the losses were being incurred would be considered and dealt with. Action plans would be implemented. If the situation did not improve to acceptable levels, employees would be informed that they faced dismissal. In at least certain circumstances union representatives would be involved in the process. In some cases the manager of the store appears to have been dismissed at an earlier stage, on the basis that his failure to manage the store and its employees properly lead, or contributed to, the losses. The final step in the process would be a formal hearing. Depending on the findings made at the hearing all the employees employed in the store faced dismissal.

The dismissals were premised on a finding that the stock losses could be attributed to all the employees - either on the basis that they were guilty of misconduct in that the losses were the result of their dishonesty or negligence, or on the basis that the losses had been the result of their poor work performance. Which motivation was present in a particular case is often not clear. In some instances there is also a reference to the operational requirements of the business. The statements of managers quoted in the awards often reflected both scenarios and perhaps a clear distinction was not drawn by the employer in its policies. See, for example, the finding of the chairman of the hearing as reflected in the following excerpt from the decision in **SACCAWU v Pep Stores** [1998] 6 BALR 719 (CCMA) –

*“the poor level of stock control has made your continued employment operationally unsuitable. It is one of the most important requirements . . . to keep stock losses under control. The continued failure in this area has led to serious losses in this shop –*

*presently standing at 81%. It is clear to management that staff had either colluded with customers or other persons to remove stock or were blatantly ineffective in stopping stock losses. Clearly all employees at the branch have paid scant regard to the severity of the losses and the continued breaches of the required stock loss standards (2%) in the shop.” (At page 721.)*

The Pep stores strategy appears to have been to adopt a process that was aimed at attempting to ensure that stock losses returned to acceptable levels. If this did not occur the process was aimed at ensuring that the continuing stock losses could not be ascribed to factors other than the employees’ conduct – in which case dismissal could take place. It was unnecessary to determine whether the losses were due to misconduct or poor work performance because the procedures followed satisfied the requirements for procedural fairness for both grounds for fair dismissal.

This strategy did not necessarily, address the problem of determining whether the losses were caused by the misconduct or poor work performance of **all** or only **some** of the employees and whether the principle of collective guilt had been applied. It is evident from the arbitration awards that arbitrators have taken differing approaches on this issue. In some awards the issue does not appear to have been considered at all. In **SACTU obo Motoung & others v Pep Stores** [2001] 8 BALR 905 (CCMA) and **SAGAWU obo Mdiya & others v Pep Stores (Pty) Ltd** [2003] 10 BALR 1172 (CCMA) the arbitrators appear to have accepted that the principle of collective guilt could be applied although these awards may have been influenced by the concept of team misconduct referred to below, at least in the context of the procedures adopted by the employer. On the other hand, in **DICHAWU obo Quabe & others** [2000] 2 BALR 130 (CCMA) the arbitrator found that, although the dismissal of the manager of the store on the grounds of poor work performance had been fair, the dismissal of the other employees was unfair because it involved the application of the principle of collective guilt. The following often quoted excerpt from the award, summarises the arbitrator’s views –

*“I accept that substantive proof of incompetence is often a difficult issue, particularly in the environment in which the*

*applicants were employed and I believe that that is the reason why the Respondent relies on a collective approach which has now become known as the doctrine of “collective responsibility”. In the context of the matter before me, I understand this to mean that the Respondent holds the entire staff complement responsible for stock losses. .... However, a proper analysis of the application of this doctrine by the Respondent to dismiss the applicants shows that it was not only relied upon to prove that it was part of the job functions of each individual Applicant, jointly and severally, to prevent stock losses, but also to argue that once it has been proved that stock losses were above the acceptable standard, it should be accepted that the performance of each individual was below standard.*

*If that was not the case, it would have been necessary for the Respondent to have assessed or appraised the performance of each individual Applicant to offer a judgment of the unacceptable performance which is alleged, and furthermore, to establish the reasons for the employee’s shortcomings. This process relates to procedural fairness, but its omission seriously compromises an employer’s ability to prove that the performance of the employee is unsatisfactory. The mere opinion of the employer that the employee’s performance is unsatisfactory is not sufficient, because it must be determined objectively and reasonably on evidence adduced by the employer that the employee was not competent or capable of performing the work for which he had been employed. (See *Kheswa v Gem Store Shoe Repair (1992) 1 LCD 188 (IC).*)*

*In my view this is where the “collective responsibility” approach is repugnant, not only to the basic principles of natural justice, but also to the principle that one employee should not suffer because of the poor performance of his colleagues, save of course where it is the particular responsibility of that employee to see that the others perform. The way in which and the extent to which it was relied upon to dismiss the applicants shows elements of the controversial doctrine known as “collective guilt” which rests on*

*the assumption that where some act of wrongdoing is performed by an individual member of a particular group, the entire group can be punished for that act. I do not intend to burden this award with an exposition of the debate on the doctrine of “collective guilt”. Suffice to say that it is wholly repugnant to our law. As was said by the Industrial Court in *NUM v Durban Roodepoort Deep Ltd (1987) 8 ILJ 156 (IC)* any policy in terms of which all the members of any group must bear collective punishment for the wrongdoings of some of the members is unacceptable because it runs counter to the tenets of natural justice and is a violation of the well-known principle that a person is presumed to be innocent until proven guilty. There is a failure of justice even if a single innocent person is presumed to be guilty and made to suffer with the rest. See also my judgment in the matter of *National Security Guards & Allied Workers Union & Others v Coin Security Group (Pty) Ltd t/a Coin Security (Case No NHE 12/3/109)* where I pointed out that in such circumstances one cannot exclude the possibility that some did not associate themselves with the behaviour of the perpetrators and consequently, of endorsing the dismissal of an innocent person.” (Emphasis supplied) (*At pages 134-135.*)*

The same arbitrator also rejected the principle of collective guilt in **SACTWU obo Baatjies & others v Pep Stores** [2004] 3 BALR 377 (CCMA) (in the context of what appears to have been an amended policy based to some extent on the context of team misconduct) but found that, on the facts of the case, it had been established that each of the employees had committed a disciplinary offence.

### Operational requirements

There are also reported decisions and awards where the possibility of a fair dismissal based on the operational requirements of the employer has been accepted, or raised.

In **SA Commercial Catering & Allied Workers Union & others v Pep Stores** (1998) 19 ILJ 1226 (LC) the employer temporarily closed two of its stores because of excessive stock losses. The employees employed in the store were suspended on full pay and

*"Misconduct per se cannot be said to constitute an economic rationale for a dismissal. The employer will have to persuade the court that the misconduct has caused an economic rationale for dismissal in the sense that the company's economic viability or economic stability is under threat to such an extent that dismissal on the basis of operational requirements is the measure of last resort."*

FAWU obo Kapesi & others v Premier Foods Ltd

discussions commenced with the recognised union to see whether the problem could be resolved. When this did not occur the employees were dismissed on the grounds of operational requirements. The Labour Court accepted the fairness of such an approach.

The Labour Appeal Court has also accepted, in **Chauke & others v Lee Service Centre t/a Leeson Motors** (1998) 19 ILJ 1441 (LAC), that dismissal on the grounds of operational requirements may be permitted in circumstances where acts of misconduct were committed by one or more members of a group of employees but it cannot be ascertained which of the members of the group actually committed the acts of misconduct.

See also the award in **SAGAWU obo Cingo & another v Pep SA Ltd t/a Pep Stores** [2004] 10 BALR 1262 (LC) where the arbitrator rejected the idea that employees could be dismissed on the basis of collective guilt but accepted that a dismissal based on operational requirements could be justified.

However, there are also cases which argue that an employer cannot dismiss employees on the grounds of operational requirements where the real reason for the dismissal is the incapacity of the employees or the misconduct. See the discussion in **CLL Vol 17 No 6 p 51**. Whilst this approach may have some validity in the situation where the employer has the necessary evidence to dismiss on the grounds of misconduct or incapacity but rather elects to rely on its operational requirements, it is submitted that this will not be the case where the employer does not have the necessary evidence to do so – the situation envisaged in the **Chauke** decision.

See also **FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River** [2010] 9 BLLR 903 (LC) where the Court stated the following;

*"I am therefore not persuaded that an employer can never opt for the section 189 route where misconduct triggered the operational rationale. The section 189 route will, however, in my view, not be available to an employer simply because he cannot prove the charges against the employees. However, where the employer can prove that the misconduct affects the economic viability of a business (such as massive shrinkage – as in the *Pep* matter, supra) or where the misconduct prevents an employer from turning around its business because of the losses (*Tiger Foods* case, supra), the employer may well be able to proceed via a section 189 process. The section 189 process, although prompted or caused by misconduct, is about the continued economic viability or survival of the business. The reason for the dismissal ultimately is not about the misconduct; the reason for the dismissal is the operational requirements of the business. Whether or not an employer will be able to opt for the section 189 route will, however as already pointed out, depend on the particular circumstances of each case. I must also point out that it is envisaged that the court will not readily accept that an employer is entitled to opt for the section 189 procedures where misconduct prompted the process. ... Misconduct per se cannot be said to constitute an economic rationale for a dismissal. The employer will have to persuade the court that the misconduct has caused an economic rationale for dismissal in the sense that the company's economic viability or economic stability is under threat to such an extent that dismissal on the basis of operational requirements is the measure of last resort."*

## Team Misconduct

Although the concept appears to have first been referred to in the early decision of **SACCAWU & others v Cashbuild Ltd** [1996] 4 BLLR 457 (IC), and in the context of a highly participative management style adopted by the employer, the first detailed exposition of the concept of “team misconduct” is found in the award in **FEDCRAW v Snip Trading (Pty) Ltd** [2001] 7 BALR 669 (P). Like Pep Stores, Snip Trading had developed a detailed procedure for combating shrinkage in its stores. In terms of this policy employees were held collectively liable if the stock losses in a store exceeded one per cent of turnover. Central to this approach was that stock loss in excess of this limit was regarded as a breach of the employees’ contracts of employment. In 1996 the union FEDCRAW declared a dispute regarding this practice. This led to the employer and FEDCRAW entering into a collective agreement in terms of which individual employees could not be held collectively liable for stock loss - misconduct had to be proved against an individual employee. The emphasis was placed on the manager of a store being held accountable for losses. Not surprisingly, store managers were unhappy with this approach and in 1997 a further agreement was entered into which made provision for the establishment of joint tribunals to investigate stock losses when they occurred. However, if the joint tribunal failed to resolve the issues management still had the right to dismiss employees and dismissals did in fact take place. FEDCRAW challenged several of these dismissals in the CCMA but with mixed success. FEDCRAW then threatened strike action on the issue which the employer in turn sought to interdict in the Labour Court. In settlement of this dispute, it was agreed to refer the dispute to private arbitration and the parties agreed that it be conducted by John Grogan, an experienced labour lawyer and arbitrator. Three separate questions were referred to arbitration but the essence of the arbitrator’s mandate was to determine, at the level of principle, whether the procedures followed by the employer, and in particular whether employees could be held collectively liable for stock losses, were fair. There was no mandate to determine the fairness or otherwise of specific dismissals.

FEDCRAW appears to have argued that ordinary employees could not be held liable for stock losses, either on an individual or a collective basis and that this

responsibility rested with the store manager. The arbitrator concluded that, although the manager of a store had ultimate responsibility for ensuring that procedures and policies combating stock loss were complied with, employees could not escape liability if they failed to follow procedures and tasks that fell within the scope of their duties. The question was whether this liability could take on a collective form.

Not surprisingly, the arbitrator felt it necessary to first deal with the argument that any policy introduced should not encompass the principle of collective guilt. In doing so he provided an important analysis of these terms as well as the forms of misconduct that could be of relevance in this situation. According to this analysis an employee can only be held accountable for acts of misconduct committed by members of a group of which he is a member in three circumstances.

- The first is if he was one of the persons in the group who actually committed the acts of misconduct.
- The second is where the employee may not actually have committed the acts of misconduct but associated himself with these acts of misconduct or associated himself with the common goal of the group concerned. Here the doctrine of “common purpose” applies.
- The third is where he is guilty of derivative misconduct – see the decision of the Labour Appeal Court in **Chauke & others v Lee Service Centre t/a Leeson Motors** (1998) 19 ILJ 1441 (LAC). Here the employee’s guilt is based on the fact that the employee did not co-operate with the employer by, for example, not identifying the employee or employees who were guilty of the “primary misconduct” in circumstances where he or she was able to do so. (Of course the concept of derivative misconduct can apply outside the context of group misconduct as well.)

In all three of these situations the employee is held liable for his or her own act of misconduct and not those of other employees - the concept of collective guilt therefore does not apply.

The arbitrator then went on to formulate the concept of team misconduct - a fourth form of misconduct for

which an employee can be held liable. He did so in the following terms -

*[32] In my view, the species of misconduct upon which the company relies when it calls members of an entire staff to book for a stock loss, though collective in nature, would be better described as 'team misconduct'. Team misconduct is distinguishable from the kind of 'collective misconduct' dealt with in cases such as Chauke, supra, in which the employees concerned were dismissed for industrial sabotage. In cases like Chauke, the employer dismisses a group of workers because it cannot identify the individual perpetrator. 'Team misconduct' is also distinguishable from cases like Nylon Spinners, supra, in which a number of workers simultaneously engage in conduct with a common purpose. In such cases the employer dismisses the group because each member is equally culpable. In cases of 'team misconduct', the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to prove individual culpability, 'derivative misconduct' (see Chauke's case, supra) or common purpose – the three grounds upon which dismissal for collective misconduct can otherwise be justified. In 'team misconduct', the employees are dismissed because as individual components of the group each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer.*

*[33] Is dismissal for 'team misconduct', in the sense in which that term is used here, inherently unfair? As in many sports, productive and commercial activities often depend for their success, not on the uncoordinated actions of individuals, but on team effort. In such situations, when a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be apportioned among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent.*

...

*[34] This is not to say that the concept of 'team liability' can be used in all*

*circumstances to justify collective punishment. If one member of a team fails to pull his or her weight, the success of the entire team may be jeopardised. When the 'guilty' member is identifiable, he or she can be removed – either for misconduct or for incapacity – and replaced. Where the guilty or deficient member of a group can be identified, it would clearly be unfair to punish the entire team. However, the problem arises when it is not possible to identify a guilty or deficient member. In this situation, there are two possibilities in a competitive world. The first is to replace the entire team. The second is to replace the captain.*

...

*[36] In situations of 'team misconduct', it is in my opinion permissible to act against the entire team if each member has a role to play in attaining the performance standard set for the team. If that standard is not attained, each member must be given an opportunity to explain the team's failure; the person to whom the explanations are given must be objectively satisfied that the team's failure cannot be blamed on any particular member of that team."*

As indicated above, this approach has now received the endorsement of the Labour Appeal Court in **The Foschini Group v Maldi & others** [2010] 7 BLLR 689 (LAC) and it is important to analyse what is meant by team misconduct as described above.

Firstly, it envisages the existence of a team, i.e. a group of employees who have a common objective. Each member in the team must have a role to play in attaining the objective set for the team. Secondly, and at first sight, it envisages the whole team being liable if the team does not meet the objectives set for it. The responsibility for the collective conduct of the group is "indivisible". The employees are dismissed because, as individual components of the group, they each "culpably failed to ensure that the team met its obligations." But the assumption that each member is culpably liable simply because the group failed to meet its obligations comes uncomfortably close to the concept of collective guilt. The problem is that all members within a team do not necessarily perform the same functions. Can the loss suffered by a football team due to the bad performance of a goal keeper mean that other players must be held "culpably liable" for the

loss suffered. By the same token, why must a member of a team who has performed his or her duties admirably be held liable for the team's failing to meet its targets. The mere fact that the team has "lost" cannot mean that he is necessarily or always "culpably liable". Grogan realises that this is the case by indicating that if it can be shown that the failure by one or more members of the team to perform their duties led to the team not meeting its obligations, it is this person or these persons that can be dismissed, not the whole team. Presumably, if it can be shown that one of members of the team did not contribute to the failure of the group to meet its obligations, then this member of the team should also not be dismissed. The concept of team liability may be easier to apply where the teams are relatively small and they all perform the same or very similar functions and perhaps it has a role to play in this setting. But it is submitted that, in order to prevent unfair treatment it will be necessary to at least consider whether one or more members of the teams were or were not guilty of any misconduct and we are therefore brought back to the idea of individual responsibility or liability of each member of a team.

What is interesting is to see how Grogan approaches the issue when he considers the fairness of the employer's stock loss policy in the **Snip Trading** decision. He does so without reference to team misconduct. Instead he points out that in terms of decisions such as **Metro Cash & Carry Ltd v Tshela** [1997] 1 BLLR 25 (LAC) an employer is entitled to introduce "strict rules" to protect its property. Apart from the obvious and self evident rule prohibiting theft and other forms of dishonesty other rules aimed at preventing or limiting dishonest conduct such as unauthorised possession of company property, a failure to submit to a search, or a failure to comply with specific policies relating to the handling of stock or stocktaking can be introduced and that these rules can generally be justified on the basis of the employer's operational requirements.

It also seems that the Labour Appeal Court took the same view in the **Maidi** decision where it stated the following—

*"[46] According to Professor Grogan in Snip Trading, supra, the justification for the dismissal of each employee lies in his or her individual culpability for the failure of the*

*group to attain the performance standard set by the employer. This justification is permissible if one accepts that an employer is entitled to introduce strict rules in order to protect its assets. It is often extremely difficult to prove that stock losses are caused by a particular employee. Consequently, it is acceptable for employers to introduce rules into the workplace and employment contracts which, if breached carry the sanction of dismissal, even for a first offence, and even if it is not a criminal offence. "Unauthorised possession" and "failure to follow security procedures" were examples given by Professor Grogan of such offences. These rules are reasonable, he reasoned because "rules are assessed not only in terms of fairness, but also in terms of operational requirements"*

In other words, the concept of team misconduct seems to be based on the employer introducing detailed policies and rules prescribing how the employee should (or should not) perform her duties. If this is the case, and an employee is being held liable for not complying with a rule applicable to her specifically, why does there have to be a reference to team misconduct?

Whilst the concept of team misconduct may be useful in certain circumstances, it is submitted that the more useful response to issues of shrinkage will usually be for the employer to formulate detailed and specific disciplinary rules aimed at preventing shrinkage - some of which may be aimed at certain categories of employees and others at other categories of employees - the contravention of which could lead to disciplinary sanctions being imposed. Whether dismissal would be

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justified for the first instance of a particular offence may be a more difficult issue to determine but, once again, the employer's operational requirements could justify a strict imposition of sanctions as well. When one considers that both the intentional as well as the negligent failure to comply with a rule could constitute misconduct and when one takes into account the potential applicability of the doctrine of common purpose, the concept of derivative misconduct as well as the common law duty of an employee to act in good faith *vis-a-vis* his employer, it seems that an employer has the necessary flexibility to formulate an approach that is aimed at individual culpability rather than relying on the concept of collective guilt or even team misconduct. Similar principles could also apply to an approach based on poor work performance.

Finally, it is also important to consider the approaches adopted by the Court in the **Kapesi** decision and by John Grogan in another important arbitration award in **NUM & others v RSA Geological Services, A Division of de Beers Consolidated Mines Ltd** [2004] 1 BALR 1 (P) which may assist employers to establish misconduct. In the **Kapesi** decision the Court seems to have taken a more relaxed view to the use of hearsay evidence, especially in the situation where witnesses are too scared to give evidence. In the **De Beers** award, Grogan dealt with the situation where the employer is faced with a "wall of silence" and employee's are unwilling to assist the employer in its investigations. This failure to co-operate may constitute derivative misconduct but it may also have evidential implications because of the failure by a person subject to disciplinary procedures to give evidence to explain his or actions (or lack thereof) may also lead to certain adverse inferences being drawn against him. See the following excerpt -

*"[35] I agree that the evidence adduced by the applicants at the disciplinary inquiry and in these proceedings has shed little if any light on the extent to which knowledge of the dumping of sample was shared by the employees. Like the presiding officer at the disciplinary inquiry, I am confronted with an impenetrable wall of silence which precludes proper evaluation of the employees' claim that none of them were aware that sample was being dumped by their colleagues. This wall of silence may have prevented the respondent from proving that*

*each and every one of the employees was aware of the scam. ...*

*[36] The implications of a party's failure to give evidence were considered in the ABI case supra. While Nugent J accepted that such failure cannot itself constitute proof of what is alleged against a party, he added (at 1062H-I):*

*"Nevertheless the evidence against him, though not conclusive, may be such that an explanation would be expected if one was available. In such cases his failure to provide an explanation may well be placed on the balance against him."*

*The court's comment that more may be expected of employees than merely remaining passive (see paragraph 24 above) occurs immediately below this quotation. This suggests that in the industrial relations context the courts regard the duty to provide an explanation to rebut a prima facie case as even more pressing in labour matters."*

## Other contexts

The above discussion took place in the context of a situation common to the retail trade, namely that of shrinkage where employers are able to introduce rules and policies on a pro-active basis. An employer may face greater difficulties where it is faced with a single instance of group misconduct which could not necessarily be foreseen. Here no detailed rules and policies can usually be drafted to cater for the situation. But this problem applies to the use of the concept of team misconduct as well – perhaps with more force as it may be difficult to define the "team". Nevertheless, the decisions in **Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd** (1994) 15 ILJ 1057 (LAC) and **Chauke & others v Lee Service Centre t/a Leeson Motors** (1998) 19 ILJ 1441 (LAC) illustrate that the employer may not be helpless in this situation. The first mentioned decision dealt with a serious incident of assault committed by one or more members of a group of employees who could not be identified. The Court found that the inference could be drawn from the facts that all the members were guilty of a disciplinary offence – either on the basis that they actually participated in the assault or had lent their support to the person who committed the assault. The second decision dealt with incidents of malicious

damage to property committed by one or more a group of employees. In this case the Court was also prepared to find on the facts that each employee had culpably committed the acts of damage to property.

Finally, it is submitted that, as indicated in the **Chauke** decision, an employer may be permitted to rely on its operational requirements to dismiss, albeit in exceptional circumstances. The **Kapesi** decision appears to put a significant limitation on this possibility by insisting that

this can only be utilised when the conduct of the employees affects the financial viability of the employer. The test of economic viability has never been regarded as an essential prerequisite in deciding the fairness of operational requirement dismissals in other contexts and there is no reason why it should be applied in this situation. An employer should be able to justify the dismissals on other grounds in this context as well. ■

P.A.K. le Roux

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## Operational requirements and polygraph tests: two new decisions

by P.A.K. le Roux

**B**y far the majority of decisions dealing with the fairness of dismissals based on the operational requirements of an employer deal with the situation where the employer is alleging that the employees concerned have been dismissed because they have become redundant to the needs of the business. However, the concept had a wider application and has been applied to justify the dismissal of employees who refuse to accept changes to conditions of employment, to dismissals demanded by third parties and to dismissals based on an employee's incompatibility with other employees. As can be seen from the previous contribution, it could also be applied in the context of group misconduct.

In this contribution we deal with two recent decisions where the applicability of the concept has been widened even further in the context of the controversial use of polygraph tests

### **SA Transport & Allied Workers Union & others v Khulani Fidelity Security Services (Pty) Ltd (2011) 32 ILJ 130 (LAC)**

The employer in this case provided security services to various clients, one of them being Aviation Coordination Services (Pty) Ltd (ACS), the entity that runs certain airports in South Africa. The commercial contract between the employer and ACS provided that the employer was required to conduct polygraph testing, on a quarterly basis, on each member of its security personnel who worked at an airport. It further

provided that this testing had to be carried out by an independent third party with the aim of analysing the "integrity, honesty and suitability" of the employees. If an employee "failed" the test ACS was to be informed of this fact. ACS then had the power to require the employer to remove the employee from its premises. The employer's witnesses testified to the fact that they had consulted with the recognised union on this issue and that the union had agreed to the polygraph testing and the consequences that could flow from a "failed" test. This evidence was not challenged by the employees or their union.

The applicant employees in this matter, all baggage handlers at OR Tambo Airport, failed a polygraph test and it appears that ACS requested that they be removed from the site. An employer representative consulted with them on this issue and offered them an alternative post at a site operated by another client. They refused this offer and were eventually dismissed on the grounds of the employer's operational requirements. They challenged the fairness of this dismissal. The Labour Court rejected their claim and an appeal to the Labour Appeal Court ensued. The union's representative argued that the employees had, in effect, been dismissed for theft, that the dismissal was substantively unfair as well as procedurally unfair because a proper consultation process had not been followed. The Court rejected all these arguments. The purpose of the polygraph test had not been to prove theft but rather to test the integrity of the employees involved. The dismissal could be justified on the basis

of the employer's operational requirements and the consultation process complied with s 189 of the Labour Relations Act, 66 of 1995 (LRA). The Court's views are set out in the following excerpt -

*"There is no evidential basis to conclude that there had been non-compliance with the provisions of s 189 of the LRA. To sum up, therefore, there was an agreement. That agreement was designed for operational reasons, namely to ensure that only people of proven integrity would be maintained in these positions. That was the purpose of the agreement with respondent's client. It was the reason why consultations took place with the first appellant. The position was also known to all the workers employed therein, that is failure of the test gave rise to termination from that post for the reasons I have mentioned, being operational reasons. Thereafter there was an obligation to engage in a process of consultation with relevant employees and to offer, if at all possible, alternative positions. Not only was that done, but an offer was made to make representations concerning further alternative positions, other than that which was offered by the respondent." (At 136 E-G)*

**National Union of Mineworkers & others v Coin Security Group (Pty) Ltd t/ Protea Coin Group (2011) 32 ILJ 137 (LC).**

The most startling aspect of the abovementioned decision is that the Court did not deal with the acceptability and accuracy of polygraph testing - presumably because the parties themselves had not raised the issue. It was, however, an issue that was considered by Court in this case. The employees in this matter were also employed by an employer providing security services. It was a term of their contracts of employment that they could be required to successfully undergo a polygraph test if the employer, or a client of the employer, required them to do so. They were requested to undergo such a test and they did not "pass" the test. They were then dismissed on the grounds of the employer's operational requirements. They challenged the fairness of their dismissal but the matter was settled prior to the Labour Court hearing the matter. The parties could not reach agreement on

the issue of costs and the Labour Court was requested to decide this issue.

In determining this issue the Court had to consider the merits of the case, at least to some extent. The first question it considered was whether the dismissals in question were "for operational requirements". The Court was clearly reluctant to find that dismissals in these circumstances could constitute a dismissal for operational requirements but felt that it was bound by the Labour Appeal Court's decision in the **Khulani Fidelity Security Services** decision discussed above and that, in principle at least, such a dismissal could be for operational requirements.

It then went on to consider whether these dismissals were fair on the facts of the case as presented in the pleadings. It came to the conclusion that they were not fair. Its reasoning was squarely based on the accuracy of polygraph tests. The Court referred to a report that appears to have been part of the pleadings prepared by a Professor Tredoux from the University of Cape Town in which he dealt with the reliability of polygraph tests. He expressed the view that polygraph tests had not been scientifically shown to be an accurate and valid means of detecting deception. On this basis the Court came to the conclusion, following the decision in **FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River** [2010] 9 BLLR 903 (LC) that a polygraph test could not be used as a basis for selecting who should be dismissed. (It is perhaps arguable whether the tests were used as a basis for **selection** rather than as **the reason** for the dismissal but nothing really turns on this point.)

Also of importance was the finding by the Court, based on a report by another expert on polygraphs, that the conclusions drawn by the original polygraphists were not sustainable because the original polygraphists had committed a number of irregularities and there had been inconsistencies in the findings made. The test were therefore not "valid" tests and the employer could therefore not have relied on them to dismiss the employees.

So the debate on polygraph tests continues. However, it is understood that the **Kapesi** decision has been taken on appeal and it will be interesting to see whether the Labour Appeal Court is called upon to deal with the issue. ■

PAK le Roux