Contemporary Labour Law

Vol. 19 No. 6 January 2010

# Resignations – an update

## *The final, unilateral act of an employee*

**by PAK le Roux**

The concept of a resignation is of relevance in two contexts. The first is in the context of a contractual dispute. Here the question will be whether an employee's attempt to terminate a contract of employment constitutes a lawful termination thereof through resignation or whether the employee's action constitutes a breach of contract. The second arises when an employee claims unfair dismissal and the employer raises the defence that the employee was not dismissed but in fact resigned.

In **CLL** Vol 18 No 2 Carl Mischke dealt with legal aspects of what constitutes a resignation. The recent decision of the Labour Court in **Mafika Sihlali v South African Broadcasting Corporation** (Unreported J700/08 14/1/09 ) deals with some of the issues raised in this article and they merit further comment. Although it deals with a contractual dispute the decision may also impact on unfair dismissal disputes.

### What is a resignation?

The starting point in answering this question must be to consider the issue from a contractual perspective. Most contracts of employment are entered into for an indefinite period of time and can be terminated by either party giving the required period of notice. The minimum period of notice required will generally either be that prescribed in the Basic Conditions of Employment Act, 75 of 1997 (BCEA) or a longer period of notice agreed to in the contract of employment.

When an employee exercises a contractual right to terminate the contract of employment by giving notice this is described as a resignation. Provided an employee gives the required period of notice the contract is terminated lawfully and there is no breach of contract. This must be contrasted with employee actions which can constitute a breach of contract but also lead to the termination of the contract of employment. An employee may simply walk off the job and never return or simply tell his employer that he has another job and will not be reporting for duty the next day. These



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Published by Gavin Brown & Associates
Box 31380 Tokai 7966
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www.workplace.co.za

"repudiations" of the employee's obligations in terms of the contract of employment clearly constitute a breach of contract. They do not, however, on their own, terminate the contract of employment. General contract principles provide that when one party to a contract is faced with a breach of contract by the other party, the innocent party does not have to accept this situation. It can approach a Court for an order in terms of which the guilty party can be required to comply with its contractual obligations – an order for "specific performance". In this case the contract does not come to an end. On the other hand the innocent party may come to the conclusion that it does not want to seek to enforce the contract. In this case it is seen as "accepting" the breach but with the right to claim damages for any loss it may have suffered as a result of the breach by the guilty party. It is this "acceptance" of the breach that leads to the termination of the contract.

These principles also apply to the contract of employment. If an employee refuses to comply with his or her contractual obligation to provide his or her services to an employer the employer has the right, in principle at least, to attempt to persuade a court to grant an order for specific performance. The fact that a Court is usually reluctant to grant such a discretionary order of specific performance, and that an employer may have to be satisfied with a claim for damages, does not affect the principle. See in this regard the decision in **SA Music Rights Organisation Ltd v Mphatsoe** [2009] 7 BLLR 696 (LC).

## The myth of accepting a resignation

From the above it is clear that when an employee resigns he is exercising a contractual right to terminate the contract lawfully. From this it seems to follow logically that there is no need for the employer to have to "accept" this resignation for it to take effect. Resignation is a unilateral act by the employee. This has been the view traditionally accepted by our courts.

However, there are decisions that appear to have taken the opposite view. The most notable is that of the Labour Appeal Court in **CPPWAWU & another v Glass & Aluminium 2000 CC** [2002] 5 BLLR 399 (LAC). This decision dealt with the situation where a shop steward alleged that he had been automatically unfairly dismissed by means of a constructive dismissal. In considering this question the Court had, of course, to determine whether there had been a resignation by the employee. In a confusing analysis of the law relating to resignations in the "heat of the moment" the decision does in fact state that "resignation brings the contract to an end if it is accepted by the employer". Apart from a reference to the decision in **Fijen v Council for Scientific and Industrial Research** (1994) 15 ILJ 759 (LAC) no reason is given for this statement. The reference to the **Fijen** decision is, with respect, misplaced. This decision is not authority for the view that a resignation must be accepted in order for it to take effect. It simply states that a resignation must be clear and unambiguous. In any event it seems that the reference, in the **CEPPWAWU** decision, to the acceptance of a resignation was of no relevance to the finding eventually made and is therefore *obiter*. The **CEPPWAWU** decision also appears to have been accepted on this point in **Uthingo Management (Pty) Ltd v Shear NO & others** (2009) 30 ILJ 2152 (LC).

It is submitted with respect, that the approach adopted in these two decisions is wrong. That this is so is evident if one considers the implications of this approach. If this were to be accepted it would mean that an employer could require an employee to remain in service by not accepting the resignation – an approach that implies notions of "indentured labour". Resignation must be seen as final, unilateral act that can be taken by an employee. The recent **SABC** decision makes this point forcefully.

The employee in this matter had been employed as the head of the SABC's legal department. In this capacity he commenced an investigation into breaches of the Public Financial Management Act by officials of the SABC. Some months later he was advised that a decision had been taken to investigate the law firm of which he had been a director prior to his appointment to the SABC. This followed allegations that emanated from the SABC's internal audit department. This led to him first taking two weeks leave whilst investigations into these allegation were being conducted. This was followed by a further period of special leave. Shortly after his return to work the Mail and Guardian sought to publish an article in this regard. He obtained an interim interdict preventing publication. At this time he

indicated to the head of the SABC that he intended to resign but agreed not to do so. The interim interdict against the Mail and Guardian was discharged shortly thereafter and the article was published. He was then suspended after lodging an an unsuccessful court application to prevent this.

On 25 August 2007, on the day after the SABC issued a press release stating that he had been suspended, the employee sent an SMS message to the SABC's CEO in which he indicated that he was "quitting". The employee testified that the period between 25 August 2007 and 11 October 2007 was a "dark period" in his life. He later realised that when he sent the SMS to the CEO "he was not thinking straight" and that his actions could have been construed as an attempt to avoid disciplinary charges being brought against him. The only way in which he could clear his name was for the disciplinary action to proceed and that the matter be cleared up. On 11 October 2007 he then sent the CEO an e-mail which read as follows –

> *"Dali my contract still subsists. You should proceed with your disciplinary charges within the next 14 days. Otherwise I will take it as repudiated ."*

On 12 October 2007 the CEO's assistant sent the employee a letter dated 28 September 2007, which the SABC had apparently being trying to send to him for some time, setting out the SABC's view that the employee's resignation had been accepted. This then led to the employee bringing a contractual claim in which it was alleged that the SMS message sent to the CEO by him on 25 August 2007 did not constitute a valid termination of his employment because it was not given in writing as required by s 37(4) of the BCEA and because, in any event, he had withdrawn his resignation before it had been accepted by the SABC. He claimed damages for the salary due for the remainder of his fixed term contract – which would have already expired by the time the matter came before the Court.

After the employee and one other witness had given evidence the employee closed his case. The SABC then applied for absolution from the instance on the basis that, on the evidence of the applicant and his witness themselves, he had not proved a case. It argued that the evidence established that the employee had in fact resigned, alternatively had repudiated the contract of employment which repudiation had been accepted by the SABC.

The Court first considered the question whether an SMS message could constitute a valid resignation as envisaged in the BCEA. The Court stated that it was not convinced that where there is a resignation in the form of a clear and unequivocal intention not to continue with the employment contract that it is invalid because it is not in writing – this requirement may be waived. However, it found that it need not make a definitive finding in this regard and based its decision on the provisions of s 12 of the Electronic Communications and Transactions Act, 25 of 2002 which provides that a requirement in law that a document must be in writing is met if the document is "in the form of a data message". A data message is defined as "data generated, sent, received and stored by electronic means". An SMS message fell within the ambit of these provisions and the resignation had therefore been in writing.

The Court then went on to consider the argument that the employee had been entitled to withdraw his resignation because it had not been accepted by the SABC. The Court rejected this argument in the following terms.

> *"[11] A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention (see Council for Scientific & Industrial Research (CSIR) v Fijen (1996) 17 ILJ 18 (AD), and Fijen v Council for Scientific & Industrial Research (1994) 15 ILJ 759 (LAC). Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent (see Rustenburg Town Council v Minister of Labour & others 1942 TPD 220; Potgietersrus Hospital Board v Simons, Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC) and African National Congress v Municipal Manager, George & others (550/ 08) [2009] ZASCA 139 (17 November 2009) at para [11]). In other words, it is not necessary for the employer to accept any resignation that*

*"Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent...In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it."*

**Mafika Sihlali v SABC**

*is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T)). Were a resignation to be valid only if it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour."*

The Court refused to follow the **CEPPWAWU** and **Uthingo** decisions on the basis that that the statements they made were *obiter* and need not be followed.

Why the idea that resignations have to be accepted has taken hold is difficult to understand. Perhaps employers and employees equate resignation to termination in the circumstances of a breach of contract. But to equate a lawful termination achieved by giving notice with a breach of contract seem illogical. From an employer perspective it has attractions in some circumstances. As Mischke points out, this could enable an employer to retain in its service skilled and valuable employees who have resigned to join another employer. However, employers attracted to this argument should consider the potential consequences. If applied to the situation where an employer wants to terminate an employee's services by giving notice by reason of redundancy the employee could simply prevent this by refusing to "accept" the notice of termination. This is not to say that the idea of an acceptance has no role to play in the context of a resignation. This will be the case if the employee purports to resign but does not do so properly. For example, an employee whose contract provides for a resignation period of two months may address a resignation letter to his employer stating that he is resigning and in which he further states that he will not work the required two month notice period but will continue to work for one month in order to clear his desk. If the employer accepts this proposal of early resignation there will be a lawful termination **by agreement**. If the employer rejects this proposal and requires that the employee give the proper and agreed two months notice of resignation, and if the employee does not work out his notice period but leaves after a month this will, of course, constitute a breach of contract. In these circumstances it is unlikely that the employer will seek to enforce the contract. It will simply accept the breach and, if it so desires, sue for damages – if it has indeed suffered a loss as a result of the breach of contract.

The confusion is also illustrated in the often used phrase where an employee is said to have "tendered" his resignation. Depending on the circumstances, this can have various meanings. It may mean that the employee has in fact resigned by giving the required period of notice of termination of employment. It may also mean that the employee may simply be indicating to the employer that the employee is willing to resign if the employer requires this action. It may also be an indication that the employee wishes to negotiate the terms on which his employment will be terminated.

## Withdrawing resignations

It follows from the above, and this was accepted in the **SABC** decision, that an employee who has resigned cannot later have second thoughts and then withdraw the resignation. The resignation can only be annulled with the agreement of the employer concerned. But what is the position if the resignation

takes place in what Mischke describes as a "white hot moment" ie where the resignation is tendered in the heat of the moment and without proper consideration being given to the consequences. In these cases the resignation will usually meet the requirement that it is clear and unambiguous - the issue is whether this unconsidered and hasty action, perhaps the result of anger or provocation, really does constitute a resignation? As a matter of principle it seems that a resignation may not be valid because it was given in circumstances where the employee was not capable of making a rational and considered decision – in effect the employees' state of mind was of such a nature that he or she could not make a valid, legally binding decision. But this would surely be a rare exception. In any event in this type of case an employee may have a remedy outside the law of contract. He may have a statutory claim based on an allegation of a constructive dismissal. The **SABC** decision also illustrates another issue related to this. For how long can an employee be permitted to rely on the allegation that his resignation had no force? In this decision the employee waited several weeks before sending the e-mail indicating that he had not resigned. In this case the Court did not have to consider this question because it came to the conclusion that there had been a genuine, legally binding decision to reign.

In principle, the longer the employee takes to allege that his resignation was not valid the stronger the inference must be that his original resignation was in fact a considered and valid resignation – alternatively that the employee's subsequent inaction means that he has, in effect, "ratified" the resignation taken in haste. Finally, it may be argued that the inaction constitutes some form of waiver or that the employee is estopped from arguing that he had not resigned. ■

**PAK le Roux**

# Discipline and consistency

## *The difficulties of comparing*

As the number of contributions in **CLL** dealing with the topic illustrate, the question of when inconsistent treatment will impact on the fairness of a dismissal remains a difficult one for employers (and their lawyers) to answer.

Although it does not formulate any new principles, the decision of the Labour Court in **Southern Sun Hotel Interests (Pty) Ltd v CCMA & others** [2009] 11 BLLR 1128 (LC) does provide an interesting and useful illustration of the relevant principles.

The employer in this matter operated the Johannesburg International Airport Holiday Inn. After experiencing problems with costs of sales in the hotel's food and beverage department it installed video cameras at various places in the hotel. The footage from these cameras was monitored for approximately 6 weeks. Some 36 employees were charged with the disciplinary offence of the unauthorised consumption of company beverages. Some were also charged with the consumption of alcohol. Three resigned and another absconded after these charges were brought. Thirty two disciplinary enquiries where then convened. Following from these enquiries, two employees were found not guilty, 29 were found guilty and dismissed and one was found guilty but given a final written warning.

Nineteen of the employees challenged the fairness of their dismissals at the CCMA. Two of these applicants argued that they were not guilty of the offences. It was common cause that the other 17 applicants were guilty of the offences for which they had been charged. It was also accepted that the disciplinary sanction of

**Contemporary Labour Law**
is published monthly from August to July of each year. Visit our website at **www. workplace.co.za** for information and subscription details.

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**ISSN-1995-218X**

dismissal would have been fair but for the allegation that three other employees – only one of whom was one of the employees charged in this matter, had not been dismissed for similar offences. It was also argued that the dismissals had been procedurally unfair.

The arbitrator rejected the argument that the dismissals had been procedurally unfair. He also found that the employees were guilty of the charges brought against them. The dismissals were nevertheless unfair because of the employer's inconsistent application of discipline. The employer had failed to dismiss persons by the name of "Peter", "Nyembe" and "Kele".

The employees were not reinstated on the basis that they had given "dishonest evidence" and had shown no remorse. They were awarded compensation equal to 11 months remuneration. This award was taken on review.

The Labour Court commenced its analysis with the following exposition of the legal principles relevant to this case –

- The courts have distinguished between two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply disciplinary sanctions consistently with the way in which they have been applied in the past. The latter requires that employers impose disciplinary sanctions consistently with respect to employees who are guilty of committing the same offence at the same time.

- Alleged inconsistency has both a subjective and an objective element. The subjective element requires that the employer must know of the misconduct allegedly committed by the comparator. The employee alleging inconsistency must identify the person with whom he or she is comparing herself so that the employer can deal with the issue. The objective element requires that the employee must be comparing himself or herself with a "similarly circumstanced employee" who was subjected to different treatment. An employer will be able to defend an inconsistency challenge if it is able to differentiate between employees who have committed similar acts of misconduct on the basis of *inter alia,* personal circumstances, the severity of the misconduct and other material factors.

- Employees cannot profit from a "manifestly wrong" decision of an employer and that steps can be taken by employers to protect themselves from the consequences of such a decision.

The Labour Court then considered the evidence presented before the arbitrator as to the alleged inconsistencies.

The allegation relating to Peter was that he had been found eating a sandwich and had not been charged or dismissed. He had only been required to pay for the sandwich. The evidence to this effect was provided by one Nkuzi, an applicant who had also been dismissed. The employer's witness stated that he was unaware of such a case. The arbitrator found that Nkuzi had lied and had not been a credible witness with regard to her own guilt but found that, this notwithstanding, Nkuzi had been "able to establish" that Peter had not been charged or dismissed. The Court found that, in coming to this decision the arbitrator had failed to consider properly the evidence before him and should not have accepted Nkuzi's evidence. The evidence did not establish that there was somebody by the name of Peter with whom Nkuzi could have compared herself – there was no "similarly circumstanced" comparator proven.

As far as the case of Nyembe was concerned, it was common cause that he had been subjected to disciplinary action for being in unauthorised possession of company property. He had pleaded guilty but had testified in mitigation that he was being treated for schizophrenia and that on the day in question he had not taken his medication. He stated that at the time "he couldn't think properly" but had discovered afterwards that it was wrong. He produced a letter from the hospital at which he was being treated to prove that he suffered from schizophrenia. On the basis of this evidence, and that he had shown remorse, a final written warning was imposed.

At the arbitration three of the applicants argued that they should also have had the benefit of this " medical defence". The one employee stated that she had consumed two brandy and cokes to "soothe her throat" as she was ill. The other two argued that they had consumed soft drinks because they were diabetic. The arbitrator accepted that there had been inconsistent treatment on the basis that there was no proof that Nyembe's actions had been caused by his illness. The Court also found that in this case the arbitrator had committed a reviewable defect by not considering all the relevant evidence. This included the fact that the arbitrator misconstrued the relevance of Nyemebe's illness and the fact that his illness was only one of a number of factors taken into account in determining that dismissal was not justified. In other words, the arbitrator had erred in deciding that Nyembe was similarly circumstanced and that there were factors that differentiated the three employees' situations from that of Nyembe.

The case involving Kele was the most interesting. He was one of the original 36 employees charged with the offence of unauthorised consumption of company property. He had been found guilty at a disciplinary enquiry but the chairperson of the hearing decided that dismissal was not an appropriate sanction. He was the only employee who was found guilty who was not dismissed. Naturally, the other employees argued that this inconsistency in sanction rendered their dismissals unfair. Management witnesses testified that when they were informed about this decision they were shocked and alarmed about is consequences. They came to the conclusion that this was not a case where they could overturn the decision without breaching the double jeopardy rule. They then attempted to "buy out"Kele by offering twelve months remuneration. She refused to accept this settlement. A letter was then addressed to her in which it was made clear to her that any act of misconduct involving dishonesty would be regarded by the company in the most serious light and that employees should anticipate that they would ordinarily be dismissed for this type of action. The company also pointed out, however, that in the absence of "deliberate manipulation of the disciplinary process" she was entitled to believe that the case against her had been concluded. She was then told to report for duty. The third step taken was that a memorandum was issued to all employees in which it was made clear that there was a zero tolerance approach towards dishonesty and that this would be applied in the future. Finally, a letter was addressed to the chairperson of the disciplinary enquiry in which the error of her ways was pointed out to her and which, in effect, constituted a form of a warning. The above notwithstanding the arbitrator found that the dismissals were unfair because of this one instance of inconsistency. It appears that the reason for this was a finding that the chairperson had in fact been dishonest. The implication of this appears to have been that Kele could have been charged again without breaching the rule against double jeopardy. On review the Labour Court also overturned this finding. The basis for this finding was that, once again, the arbitrator had misconstrued the evidence. It was never the employer's case that Singleton had been honest or dishonest.

In light of the above, the Court did not refer the matter back to the CCMA for a further arbitration, but simply reviewed and set aside the award. In effect the dismissals were fair. ■

**PAK le Roux**

# Proving the fairness of the dismissal

## *The need to present evidence*

Prior to the decision of the Constitutional Court in **Sidumo & another v Rustenburg Platinum Mines Ltd & others** [2007] 12 BLLR 1097 (CC) most decisions accepted that arbitrators, when considering whether dismissal was an appropriate sanction to be applied, should accord a measure of deference to the employer's view in this regard. Whilst the arbitrator had the right and the duty to determine, on the basis of the evidence before him or her, whether the employee was in fact guilty of a disciplinary offence, when it came to the question of whether dismissal was an appropriate sanction for that offence, the arbitrator should not easily overturn an employer's decision. This was often referred to as the

"reasonable employer test" – the idea being that, even if the arbitrator was of the opinion that dismissal was not the correct sanction to impose, the employer's sanction should not be overturned if a reasonable employer could have come to this decision.

It is at least arguable that this was one of the main reasons why so little attention has been paid to the issue of sanction at disciplinary hearings and arbitrations. Experience has shown that by far the greatest part of any arbitration deals with the question of whether the employee is indeed guilty of a disciplinary offence. Employers could afford to pay scant attention to justifying the imposition of the sanction of dismissal and would simply argue in most cases that deference should be shown to their decision.

The same applied to disciplinary enquiries. Whilst chairpersons of hearings would often spend some time considering the evidence as to whether the employee was guilty, the question of the appropriate sanction was often dealt with in a cursory manner.

*When employers seek to justify the dismissal of an employee they also need to lead evidence to show why dismissal was justified and to make an effort to persuade the arbitrator of this fact.*

The **Sidumo** decision rejected this approach. An arbitrator is required to decide whether the dismissal was fair, and in doing so he or she should not defer to the decision of the employer. It is the arbitrator's sense of fairness that should prevail and not that of the employer.

But there are also indications in the **Sidumo** decision that arbitrators do not have a blank sheet in this regard. Navsa AJ set out a list of factors that must be taken into account when deciding this issue. He does so in the following terms-

> *"[78]In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.*
> *[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."*

Ncgobo J took a similar approach ,

> *"What this means is that the commissioner ... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.*
>
> *In answering this question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed, the exercise of a value judgment is something about which reasonable people may readily differ.*
>
> *But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case, the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness*

*"Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner."*

**Navsa AJ in Sidumo et al v Rustenburg Platinum Mines**

*requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.*

*These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to deference to the employer's decision in imposing a particular sanction. ... what is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.*

*However, such respect for the employer's knowledge is not a reason for the commissioner to defer to the employer. The commissioner must seek to understand the reasons for a particular rule being adopted and its importance in the running of the employer's business and then weigh these factors in the overall determination of fairness."*

From the above it is clear that the arbitrator, when considering the fairness of the sanction, must take into account a range of factors, including the reasoning adopted by the employer when deciding on the sanction.

This has two consequences. Firstly, it is no longer feasible, especially in potential borderline cases, for the chairperson of an inquiry to deal with the issue of sanction on a cursory basis. Proper attention must be given to the issue and a properly motivated decision made. Secondly, it is important to give proper attention to the issue at the arbitration. Evidence must be led to explain why the employer regards dismissal as the appropriate sanction. A mere reference to the destruction of the trust relationship is not enough.

This is illustrated in the recent decision of the Supreme Court of Appeal in **Edcon Ltd v Pillemer NO & others** [2010] 1 BLLR 1 (SCA). The employee in this matter, a Mrs Reddy, was employed by the employer as a Quality Control Auditor. She was entitled, in terms of the employer's car policy, to make use of a company vehicle. In June 2003 the vehicle was involved in a collision with another vehicle whilst being driven by her son. In terms of the policy Mrs Reddy was obliged to report the accident to the employer, to the South African Police Service and the relevant insurance company within twenty-four hours. The policy also provided that she could not carry out repairs to the vehicle without the approval of the insurance company. Mrs Reddy did none of the above. She arranged for her husband to repair the vehicle at his own panel beating business shop at his own cost. She concealed this from her employer. When the truth of the matter later became evidence she lied to her superior, one Dwyer, and an investigator, on several occasions.

It was common cause that in terms of the policy, the son was entitled to drive the vehicle as he was in possession of a valid driver's licence. She could therefore not be charged with an offence in this regard. However, she was guilty of several instances of deliberate dishonesty when concealing the true state of affairs and she was charged on this basis. The essence of the charges was that she was dishonest

and failed to act with integrity and that this had affected the trust relationship between her employer and herself. She pleaded guilty to the charge. She was found guilty and dismissed.

The chairperson of the enquiry, a Ms Ismail, appears to have motivated her decision on the basis that Mrs Reddy had behaved without integrity and honesty – values highly regarded by Edcon. Her unblemished record and character were not regarded as sufficiently mitigatory of her conduct. On appeal the disciplinary sanction of dismissal was upheld.

Mrs Reddy referred a dispute to the CCMA. The arbitrator stated that Mrs Reddy's failure to report the collision was not in itself misconduct that warranted dismissal, but that the real issue was whether her lack of candor and dishonesty destroyed the trust relationship to such an extent that it justified dismissal. In deciding this matter, the arbitrator also found that she was entitled to have regard to correspondence from Mr Dwyer and another manager by the name of Mr Barnes, who had at some stage worked with Mrs Reddy. Neither of these had testified in the arbitration, but their views as captured in the correspondence was that there was no breakdown in the trust relationship.

The arbitrator found that no direct evidence had been led by the employer to show that the trust relationship had been destroyed by Mrs Reddy's misconduct and lack of candor. She further found that for a decision to dismiss a person with Mrs Reddy's track record of 43 years unblemished employment to be justified her misconduct had to be gross and evidence was necessary to show that the trust relationship had in fact been destroyed.

The views expressed by Messrs Dwyer and Barnes were an indication that dismissal in the circumstances was not an inevitable result. She concluded that the employer had failed to prove that dismissal was a fair sanction.

The employer took the matter on review to the Labour Court. The Labour Court refused to set aside the award. On appeal the Labour Appeal Court dismissed the appeal and concluded that the award was unassailable. The employer then appealed to the Supreme Court of Appeal.

Before the Supreme Court of Appeal, the employer's legal representative raised various arguments – the most relevant one here being the arbitrator's finding that the employer had not established that the trust relationship had been destroyed was not justified on the evidence. The Court then went on to examine the arbitrator's reasons for her conclusion and the material that was available to her in arriving at this decision. It found that insufficient evidence had been led to show that the trust relationship had been destroyed.

The sole witness led by the employer at the arbitration was the chairperson of the disciplinary enquiry, Mr Naidoo. He recounted the investigative history of the matter and testified that the employer was intolerant towards dishonesty and that employees were generally dismissed if they committed a dishonest act. This was one of the employer's core values.

The Court pointed out that Mr Naidoo's evidence did not, and could not, deal with the impact of Mrs Reddy's conduct on the trust relationship. Mr Naidoo did not testify that Mrs Reddy's conduct had destroyed the relationship. This would have been in the domain of those managers to whom Mrs Reddy reported. They were the persons who could shed light on the issue. None testified in this regard.

The Court came to the conclusion that the arbitrator had been entitled, and was in fact expected, to explore if there was evidence led by the employer and/or on the record before her showing that dismissal was the appropriate sanction in the circumstances. This was because the employer's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence to indicate this. The arbitrator's finding was beyond reproach and could not be overturned.

The lesson of this decision is clear. It is no longer open to an employer to simply allege that the trust relationship has been destroyed - it must justify this allegation by leading appropriate evidence. ■ **PAK le Roux**