

EMPLOYMENT

DERIVATIVE MISCONDUCT IN THE WORKPLACE – NEW LIMITATIONS?

Employers are often faced with scenarios where theft or other misconduct occurs within the workplace and the culprits cannot be identified. Very often, there is simply no direct evidence against a specific employee in order for the employer to take effective disciplinary action. However, the doctrine of derivative misconduct has in the past come to many employers' aid where employees' reticence to disclose information that would aid the prosecution of an offence has resulted in disciplinary action being instituted against those employees.

Derivative misconduct, as per *Chauke and Others v Lee Service Centre t/a Leeson Motors 1998 19 ILJ 1441 (LAC)* is defined as:

The situation where employees possess information that would enable an employer to identify wrongdoers and those employees who fail to come forward when asked to do so, violate the trust upon which the employment relationship is founded.

However, this often welcomed helping hand to employers has very recently seen its scope restricted by the Labour Appeal Court as discussed below.

On 3 June 2015, the Labour Appeal Court in *Western Platinum Refinery Ltd v Arnold Hlebel* (unreported case, case number JA32/2014) revisited the concept of derivative misconduct. Briefly, the facts of the case were as follows:

- The employee was dismissed on the charge of culpable involvement in theft of platinum group metals (PMGs) over an extensive period from the employer and non-disclosure of information of such theft.
- The South African Police Service informed the employer that the employee was a 'person of interest' in police investigations and alerted the employer to the fact that the employee was particularly wealthy and that such wealth was likely to have been accumulated through involvement in theft of PMGs. It was unlikely that such wealth was accumulated through his mediocre salary.

- The employer implemented a sophisticated clocking system which revealed movements of the employee in sections of the workplace where the employee had no justifiable reason to be.
- Such information was thought to justify an inference that the employee was involved in the theft and allegations of misconduct were issued against the employee. In prosecuting the allegations, the employer focused on the financial information of the employee.
- The employee was found to have committed the misconduct and was dismissed.

In arbitration, the dismissal was held to be fair but upon review the Labour Court declared the dismissal substantively unfair. The Labour Court found that reinstatement was not appropriate and ordered compensation of 12 months' remuneration. The employer appealed the decision to the Labour Appeal Court and the employee cross-appealed the compensation order seeking reinstatement.

In analysing the nature of the misconduct, the Labour Appeal Court addressed the concept of derivative misconduct. The court confirmed the established principle that a breach of the duty of good faith by an employee can justify a dismissal and that "non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith".



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The court placed emphasis on the fact that the undisclosed knowledge must be *actual knowledge*. The employer needs proof that the employee had actual knowledge and that the non-disclosure was *deliberate*. Accordingly, an employee may not be found to have committed misconduct where the failure to disclose or acquire knowledge was negligent. The court summarised the position as follows:

Furthermore, if as I have stated, actual knowledge is required to trigger the duty to speak up, the employer must prove actual knowledge not merely putative knowledge, and no room exists for considerations of negligent ignorance.

This appears to place a higher onus on the employer in proving derivative misconduct.

The court also considered the question as to whether an employee's rank within the organisation will play a role in determining culpability. The court answered in the negative, but stated that an employee's rank will influence the degree of blameworthiness and the appropriate weight afforded to it in mitigation of sanction.

Also of importance is that an employee's disclosure of information in accordance with the duty of good faith is not dependant on the employer requesting the information. Merely having actual knowledge of the information triggers the employee's duty to disclose. In the event that requests are made by the employer, this will aggravate the culpability of non-disclosure.

In this case, the court set aside the employee's dismissal on the basis that the information requested from the employee and his refusal thereof, relating to his financial affairs, was not the type of information that could form the basis of culpable non-disclosure. In other words, the knowledge of the employee's finances could not be linked to the fact that the employee had actual knowledge of theft committed by others. Further, the evidence relating to irregular movements around the workplace yielded nothing of value. The court also upheld the employee's cross-appeal and ordered that the employee be reinstated with retrospective effect.

Employers should be conscious of the restrictions placed on the use of derivative misconduct in disciplining employees. Employers are now required to prove deliberate non-disclosure of information and must bear in mind that the mere negligent failure to disclose such information is insufficient. Further, employers in cases of derivative misconduct are not required to first issue requests for the information, before such non-disclosure constitutes derivative misconduct.

We understand that this judgment is to be taken on appeal to the Constitutional Court.

Mohsina Chenia and Sean Jamieson

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