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# EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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### DISMISSING AN EMPLOYEE WITHOUT EVIDENCE OF A BREAKDOWN OF TRUST

*Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration 8 BLLR 783 (LC).*



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# DISMISSING AN EMPLOYEE WITHOUT EVIDENCE OF A BREAKDOWN OF TRUST

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## ***Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration 8 BLLR 783 (LC).***

The nature and seriousness of misconduct can be enough to infer the breakdown of the trust relationship without evidence being led to prove the breakdown.

In this matter, the employee was dismissed by Easi Access Rental after being found guilty on 5 charges of misconduct, including *inter alia* dishonesty and gross negligence. The employee, a Payroll Officer, had disclosed all of the employer's payroll information to a fellow employee. Aggrieved by the outcome of the disciplinary hearing, the employee referred an unfair dismissal dispute to the CCMA. The Commissioner found that the dismissal was unfair and awarded compensation to the employee. The employer referred the matter to the Labour Court on review.

The Commissioner's finding was based on two grounds, firstly that he did not find the employee guilty of all the charges against him, and secondly that there was no evidence produced by the employer to show that the trust relationship had broken down between the parties.

In relation to the trust issue, the Commissioner relied on the 2009 SCA decision of *Edcon Ltd v Pillemer N.O and Other*, where the court found the dismissal of an employee to be inappropriate where an employer alleged that the employee was dismissed because the trust relationship had broken down and then failed to lead evidence confirming/supporting this allegation.

In the Labour Court, the judge in the present case found that the Commissioner misinterpreted the *Edcon* judgment to mean that, if there is no direct evidence of the breakdown of the trust relationship, then the dismissal should be unfair. This is a one sided interpretation of the decision.

The judge found that in cases where direct evidence of the breakdown has not been led, the enquiry into the fairness of the dismissal by the Commissioner should include a determination of whether the breakdown cannot be inferred from the nature of the offence. In support of this position, the judge referred to *Department of Home Affairs and Another v Ndlovu*, where the court held that the employer

# DISMISSING AN EMPLOYEE WITHOUT EVIDENCE OF A BREAKDOWN OF TRUST

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*Accordingly, in determining the fairness of the sanction, the nature of the offense, seriousness of the misconduct and the circumstances of the case had to be considered.*

has an obligation to lead evidence to justify a dismissal, unless of course the conclusion of a broken relationship is apparent from the nature of the offense and/or circumstances of the dismissal.

Accordingly, in determining the fairness of the sanction, the nature of the offense, seriousness of the misconduct and the circumstances of the case had to be considered. This decision clearly illustrates the point that even though evidence relating to the breakdown in the trust

relationship between the parties in a dismissal case is of critical importance in the assessment of the fairness or otherwise of the dismissal, where no such evidence has been led, the Commissioner still has to determine whether the breakdown in the trust relationship cannot be inferred from the nature and extent of the misconduct and the surrounding circumstances as a whole.

*Gavin Stansfield and Zola Mcaciso*



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# Employment STRIKE GUIDELINE

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Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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