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EMPLOYMENT ALERT

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COMPARING APPLES TO ORANGES: CONSISTENCY AND WORKPLACE SANCTIONS

The consistency principle requires that employers impose consistent sanctions on employees who are found guilty of the same misconduct.



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COMPARING APPLES TO ORANGES: CONSISTENCY AND WORKPLACE SANCTIONS

The employee, Singh, alleged that his dismissal was substantively unfair on the basis that other employees had committed the same misconduct as he had, but were not dismissed whereas he was.

Singh alleged that he was treated inconsistently, and referred to another employee, who he alleged had committed a similar misconduct but was not dismissed.

The consistency principle requires that employers impose consistent sanctions on employees who are found guilty of the same misconduct. Item 3(6) of Schedule 8 of the Code of Good Practice: Dismissal (Code) provides that:

"The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration".

The issue of consistency was at the heart of the recent case of *Government Printing Works v Mathala N.O. and Others* (JR583/14) [2016] ZALCJHB 358 (31 August 2016). In this case, the employee, Singh, alleged that his dismissal was substantively unfair on the basis that other employees had committed the same misconduct as he had, but were not dismissed whereas he was.

Singh applied for a position with the employer which required the applicant for the position to have a Matric qualification. After conducting a verification process, the employer discovered discrepancies with the Matric certificate that Singh had submitted. In particular, the name on the certificate was different, as were the symbols he received for various subjects. When questioned, Singh claimed that his original certificate was lost whilst he was relocating, and that the certified Matric certificate in the employer's possession had subsequently been given to him by the South African Qualifications Authority. The employer did not accept this explanation, and charged Singh with 'intentional misrepresentation' for submitting a

fraudulent Matric certificate with illegally altered passing symbols, and alternatively with 'forgery' for submitting a forged Matric certificate. Singh was dismissed on the first charge of "intentional misrepresentation" after a disciplinary hearing was held. He challenged the fairness of his dismissal.

At the arbitration proceedings, the commissioner was, amongst other things, required to decide on the issue of consistency. Singh alleged that he was treated inconsistently, and referred to another employee (namely a man named 'Moeketsi'), who he alleged had committed a similar misconduct but was not dismissed. If an employee alleges inconsistency, that employee bears the onus of proving the employer's inconsistent application of rules and/or sanctions. The employer's evidence was that Moeketsi had applied for a position which required a 'Standard 10' qualification. Moeketsi had filled in his application by hand, and had submitted that he had failed the Standard 10 examinations in 1993, but had passed two subjects in the Senior Certificate (or Matric) examinations in 1995. Moeketsi submitted documents in support of his application. The commissioner found that Singh's dismissal was procedurally fair but substantively unfair.

The employer took the award on review to the Labour Court (Court).

COMPARING APPLES TO ORANGES: CONSISTENCY AND WORKPLACE SANCTIONS

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Moeketsi had mistakenly and in good faith believed that passing the two subjects in 1995 meant that he had received his Matric qualification.



The Court found that Singh's and Moeketsi's situations were different. Moeketsi had mistakenly and in good faith believed that passing the two subjects in 1995 meant that he had received his Matric qualification. When the employer was uncertain as to whether he had in fact acquired it or not, and had asked for it but not received it, the employer discussed the situation with Moeketsi and demoted him to a position that required a Standard 8 qualification only. Further, Moeketsi had not submitted fraudulent or forged documentation. In contrast, Singh knowingly and intentionally submitted fraudulent and forged documentation in support of his application, and when questioned on it presented contradictory versions regarding the authenticity of the documents.

The Court held that Singh's own witness was unable to convincingly provide instances where the employer has behaved inconsistently, and, after having alleged the inconsistency, Singh was unable to prove inconsistency. The Court referred to previous authority, including the case of *Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others* [2009] 11 BLLR 1128 (LC), which stated:

"(An) inconsistency claim will fail where (the) Employer is able to differentiate between Employees who committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors".

The Court further held that:

"Even in cases that are similar, it must be expected that there will (i) always be some inherent variances that (ii) are random, (iii) affecting different employees, and (iv) will determine different assessment and outcomes. It is certain though, that the gravity of the offence is the grandest factor causing the variances, and must always be scrutinised with greater care".

The Court granted the review and Singh's dismissal was found to have been substantively fair in the circumstances.

The importance of this case is twofold: firstly, an employee who alleges inconsistency must lay a basis to support his allegation. He must for example provide the names of the employees as well as the circumstances of their situations. In this case Singh failed to prove inconsistency, and the Court reviewed the award. Secondly, the employee must use an adequate comparator when alleging inconsistency, which means that the situations must be the same or similar enough to warrant such comparison and that the sanction be the same.

***Reabetswe Mampane
and Michael Yeates***

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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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