



EMPLOYMENT ALERT

OFF DUTY MISCONDUCT

Can an employee be disciplined for a misconduct committed outside the employer's workplace?

The answer to whether an employer can discipline an employee for off duty misconduct or non-work related conduct depends on various factors. The employer must show that the impact and consequence of such conduct negatively affects the business or its reputation and employment relationship.

Previous examples before the courts include incidents where an employee attacked a colleague or disclosed the employer's confidential information. The courts have confirmed that an employer is then entitled to discipline, even dismiss, the employee.

In the recent case of *City of Cape Town v South African Local Government Bargaining Council (SALGBC) and Others [2011] JOL 26801 (LC)*, the Labour Court again considered the issue of a dismissal relating to an off duty misconduct.

The employee obtained a fake driver's license in Namibia. She then presented it to the South African licensing authorities for conversion to a South African driver's license. This constituted a criminal offence in terms of s68 of the National Road Traffic Act, No 93 of 1996. She was dismissed for misconduct when her employer eventually became aware of her actions.

The employee disputed the fairness of her dismissal. At arbitration, the Commissioner held that, although the misconduct was committed outside the workplace, there was "sufficient link" between the employer's business and the conduct of the employee to warrant interference by the employer into the otherwise private conduct of the employee. Moreover, the employee held a senior management position as Head of Contract Administration. She was responsible for managing contracts for the supply of goods and services within the City. The employer argued that this required a high degree of trust in her.

However, the Commissioner disagreed that the misconduct warranted dismissal and awarded the employee reinstatement (albeit without retrospectivity). According to the Commissioner, the sanction of dismissal was "too extreme" for the following reasons:

- The misconduct (fraud) was not committed within the workplace.
- The misconduct was not committed in relation to her duties.
- The City did not consider whether a sanction of dismissal was more appropriate particularly because the misconduct took place outside of the workplace.
- The misconduct took place nine years ago so it could not be said it had destroyed the trust relationship.

Dissatisfied with the Commissioner's reasoning, the City took the arbitration award on review at the Court. The Judge held that the Commissioner's decision was not one that a reasonable commissioner could reach. The Judge observed that:

- The misconduct constituted a criminal offence.
- The employee's behaviour involved gross dishonesty and corruption.
- Her behaviour destroyed the relationship of trust between the employee and the City as the employer.
- She had been dishonest during the arbitration.
- She held a position of trust as a senior managerial employee.

The Court reviewed and set aside the arbitration award.

Employees should appreciate that their after-hours conduct can negatively impact on the relationship with their employer. Employers faced with questionable conduct of employees should establish that there is a link between the conduct and the employment relationship before taking disciplinary action against the employee for otherwise private conduct.

Johan Botes and Ndumiso Zwane

CONTACT US

For more information about our Employment practice and services, please contact:



Aadil Patel
Director
National Practice Head
T + 27 (0)11 562 1107
E aadil.patel@dcladh.com



Gavin Stansfield
Director
T + 27 (0)21 481 6314
E gavin.stansfield@dcladh.com



Kirsten Caddy
Associate
T + 27 (0)11 562 1412
E kirsten.caddy@dcladh.com



Gillian Lumb
Director
Regional Practice Head
T + 27 (0)21 481 6315
E gillian.lumb@dcladh.com



Michael Yeates
Director
T + 27 (0)11 562 1184
E michael.yeates@dcladh.com



Mariam Jasset
Associate
T + 27 (0)11 562 1355
E mariam.jasset@dcladh.com



Johan Botes
Director
T + 27 (0)11 562 1124
E johan.botes@dcladh.com



Faan Coetzee
Consultant
T + 27 (0)11 562 1600
E faan.coetzee@dcladh.com



Mark Meyerowitz
Associate
T + 27 (0)11 562 1125
E mark.meyerowitz@dcladh.com



Melanie Hart
Director
T + 27 (0)11 562 1179
E melanie.hart@dcladh.com



Pranisha Maharaj
Senior Associate
T + 27 (0)21 481 6460
E pranisha.maharaj@dcladh.com



Lerato Phashe
Associate
T + 27 (0)11 562 1202
E lerato.phashe@dcladh.com



Fiona Leppan
Director
T + 27 (0)11 562 1152
E fiona.leppan@dcladh.com



Mabasa Sibanda
Senior Associate
T + 27 (0)11 562 1182
E mabasa.sibanda@dcladh.com



Ndumiso Zwane
Associate
T + 27 (0)11 562 1231
E ndumiso.zwane@dcladh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T + 27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dcladh.com

CAPETOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T + 27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dcladh.com