

EMPLOYMENT

THE FAIRNESS OF DISMISSALS BASED ON ZERO TOLERANCE POLICIES

In the recent decision of *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others (JA 49/14) [2015] ZALAC 23*, the Labour Appeal Court (LAC) considered the reasonableness of an award made by a commissioner where the dismissal of an employee was said to be fair based on the employer's zero tolerance policy.

Ms Ntombenhle Mzolo (Employee) was employed by Shoprite Checkers (Pty) Ltd (Shoprite). In 2009, upon leaving the store one day she was found in possession of an uncancelled roll-on deodorant. Shoprite had a strict policy designed to counter shrinkage which required all employees to declare any personal belongings upon entering the store. Any property not declared was considered uncancelled goods. The penalty of being found with uncancelled goods was dismissal unless one could provide a receipt for the goods, in which case the sanction would be a warning.

The Employee was aware of this policy but alleged that she had forgotten to declare the deodorant. She was unable to provide proof of purchase and Shoprite dismissed her. The Employee referred the dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA declared the dismissal an appropriate sanction and it was found to be substantively fair. The Employee then applied to the Labour Court to have the award set aside. The Labour Court held that the dismissal was not a fair sanction and set the award aside.

On appeal, the Labour Appeal Court (LAC) held that while Shoprite's policy of declaring goods was a measure to counter theft, it did not create the offence of theft. The continued breach of this rule may be dismissible, not because it constituted theft but because it allows a wilful refusal to co-operate with the rule to counter shrinkage and it points to untrustworthiness. A single transgression of this rule, unless it involves high value goods, is not sufficient to warrant dismissal.

The LAC held that employers will not be able to adopt a zero tolerance policy for just any breach. One must look at how appropriate the policy is to the offence. Adopting a zero tolerance policy does not preclude a commissioner from making a ruling that a dismissal was not an appropriate sanction in the circumstances and to replace it with an appropriate one. A dismissal must be substantively and procedurally fair. An employer cannot contract out of the law dictating fairness of dismissals. The LAC held that the award made by the commissioner was unreasonable in the circumstances.

It is thus important to note that even if an employer has a zero tolerance policy, this will not prevent a commissioner from making a ruling that the dismissal was not an appropriate sanction. Prior to adopting any zero tolerance policy, an employer must first evaluate whether or not a sanction of dismissal would be appropriate in the circumstances. An employer will not be able to apply an inflexible policy without being able to justify it.

Lauren Salt and Batool Hayath



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