Anton Bakker
ATTORNEYS · PROKUREURS

Tel: (012) 460 9789
info@bakkerlaw.co.za
Justice House, 842 Justice Mahomed Street
Brooklyn, Pretoria, 0181 · PO Box 90280, Garsfontein, 0042

Directors: A Bakker BProc LLB LLM [Labour] · H Lee BComm LLB **Assisted by:** L Mafuna LLB · N Shamase LLB

7 June 2021

IS DISMISSAL AN APPROPRIATE SANCTION?

Chairpersons of disciplinary enquiries, arbitrators and Judges are invariably confronted with this issue. Schedule 8 Item 7(b)(iv) of the *Labour Relations Act's* Code of Good Practice: Dismissal enjoins that 'any person who is determining whether a dismissal for misconduct is unfair, must consider if dismissal is an appropriate sanction for the contravention of the rule or standard'. So, when is a dismissal appropriate?

Although it remains the employer's prerogative to decide on sanction, an arbitrator must always perform a value judgment and decide if dismissal was appropriate. The employer must exercise its discretion fairly. An arbitrator will only intervene in the decision of sanction when an employer acted unfairly. The Labour Appeal Court held that arbitrators should not interfere with the sanction merely because they do not like it, or would have arrived at a different sanction. There must be a measure of deference to the sanction imposed by the employer, provided it is not unfair.

With fairness as the benchmark, a disciplinary code is an important consideration. To this end, chairpersons are well advised to apply sanctions imposed by the code, according to the standard of conduct to be observed by employees in that workplace.

The test is whether the misconduct renders continuation of the employment relationship intolerable. Although this may be apparent from the nature of the offence – like dishonesty and the risk of a recurrence – it is advisable for employers to lead evidence and demonstrate that the employment relationship has irretrievable broken down. What is required is a supervisor or person in a position of authority to explain to the chairperson of the disciplinary enquiry why, on the basis of the misconduct, the trust relationship has broken down and continued employment has become intolerable, therefore necessitating dismissal, as opposed to corrective discipline like a final written warning.

Judging by the numerous decisions of the Labour Court on this issue, it is no simple judicial exercise to determine the appropriateness of the sanction of

dismissal and the controversy will no doubt continue. Employers are invited to take legal counsel during disciplinary enquiries in order to limit the risk of adverse findings by the CCMA.

ANTON BAKKER INC.