

Dismissed for remaining silent

Much has been said of “the right to remain silent”. It may be raised by a defendant in criminal law, but does it mean anything in the employment relationship? How does it weigh up against the employee’s duty of good faith?

An employee’s duty of good faith is put to a tough test when a fellow employee perpetrates misconduct. What does an employee do if he or she witnesses, or becomes aware of, such misconduct? May he or she remain silent? Not reporting the wrongdoer could be a breach of the duty of good faith. And what if the employer specifically asks witnesses to come forward? In that case a refusal or failure to assist the employer could cause serious damage to the relationship of trust.

Requirements

In *Western Platinum Refinery Ltd v Hlebela & others (2015)* the Labour Appeal Court revisited and confirmed the principle of ‘derivative misconduct’ - a fancy word to describe a breach of good faith in circumstances where an employee withholds information.

Although the outcome did not go the employer’s way in this case, the court raised some useful requirements and guidelines, including:

- The employee must have actual knowledge of the wrongdoing.
- The non-disclosure must be deliberate.
- The gravity of the non-disclosure is proportionate to the gravity of the primary misconduct (e.g. not disclosing late-coming is not as bad as not disclosing theft).
- The ability of the employer to protect itself against the given wrongdoing may affect the gravity of the non-disclosure.
- The rank of the employee may affect the gravity of the non-disclosure.
- An employee’s refusal or failure to disclose information after being specifically requested to do so would be an aggravating factor.
- A disinclination to disclose the wrongdoing from a sentiment of solidarity with the wrongdoers is not a defence.
- An employee cannot be guilty of derivative misconduct for negligently failing to take steps to find out about the wrongdoing.

Depending on the facts in a particular case, there may be other requirements that become relevant.

Strike misconduct

Matters become very interesting when several employees are involved in misconduct – where intimidation is rife, the sense of solidarity is high and it is difficult to identify the perpetrators.

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In the Labour Court case of ***Dunlop Mixing and Technical Services (Pty) Ltd and others v NUMSA obo Nganezi and others (2016)*** the employer had dismissed 107 employees in the wake of a violent strike characterised by intimidation and damage to property. Of these, 29 had been found guilty of misconduct, but a further 78 employees who were present were dismissed although they did not actively participate in any unlawful activities. They were found guilty and dismissed for derivative misconduct. The CCMA commissioner reinstated 65 of the latter on the basis that, according to the commissioner, derivative misconduct was confined to those employees who “*knew who the perpetrators of the principal misconduct were and ... they (had) failed to disclose such information*”.

On review the Labour Court found that commissioner had erred. According to the court the employer had acted correctly in dismissing all 107 employees who were present, including the 65 who the commissioner had said should be reinstated. How come?

The right to remain silent?

Regarding the so-called right to main silent, the court had the following to say:

“The right to remain silent is sacrosanct in criminal matters where accused persons are presumed to innocent until found guilty. This is not a criminal investigation and the presumption of innocence does not apply.”

The court confirmed that “*...an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined.*”

The court concluded as follows:

“... the ‘essentials of trust and confidence’ demanded that they do more than simply remain silent. Their failure to come forward and provide an answer constituted derivative misconduct.”

On the facts it was found that all 107 employees had been present during the strike and had been present while the misconduct was being perpetrated. The non-perpetrators remained silent when repeatedly asked to identify the perpetrators. To remain silent was not an option in these circumstances. They had a duty (or ‘evidentiary burden’) to give evidence or provide some explanation – that explanation could serve either to identify the perpetrators, or to exonerate the employees who were not able to identify the perpetrators, or who were not present. Dismissal was found to be the appropriate outcome for all 107 employees.

The approach of our courts in cases of derivative misconduct is an encouraging recognition of the importance of an employee’s duty of good faith. However, employers should be mindful that derivative misconduct is not easy to prove and that every case will be judged on its own merits.

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