

The duty to tell on a fellow employee

The employee's duty to demonstrate good faith is one of the cornerstones of the employment relationship. This implies that the employee may not do anything that is dishonest or clashes with the interests of the employer. But what if a fellow employee does something that causes the employer harm - is there an obligation on the employee to report this to the employer?

The issue of an employee failing to report the wrongdoing of a fellow employee came up in a recent case before the National Bargaining Council for the Chemical Industry in **CEPPWAWU obo Lewack vs. Aspen Pharmacare**. The company was alerted by a reliable internal source to the fact that there was large scale consumption by employees of Guronsan C, a product manufactured by the employer. There was a strict prohibition on the consumption of company products and employees were aware that it constituted a dismissible offence. Employees were not even allowed to drink water in certain areas. There were also procedures in place to enable employees to report wrongdoing without the fear of being compromised.

After an investigation in the specific laboratory where the product was being manufactured and tested, several employees were charged and dismissed for consuming the product. Video footage showed the employee, Ms. Lewack, playing computer games while another employee was consuming the product by drinking it from a blue bucket which was in close proximity to Ms. Lewack. On the evidence the commissioner found that she had been aware of the other employee consuming the product and that she had done nothing about it. Ms. Lewack was dismissed as a result.

The commissioner in the **Aspen Pharmacare** case relied on the doctrine of "derivative misconduct". Reference was made to the case of **Chauke & others vs. Lee Service Center CC t/a Leeson Motors**, where the Labour Appeal Court stated that an employee may be found guilty of derivative misconduct if the employee ". . . has or may reasonably be supposed to have information concerning the guilty, (and) his or her failure to come forward with the information may (therefore) itself amount to misconduct."

In the finding the court explained that "*The relationship between employer and employee is in its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment ... Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.*"

The court concluded that the derived justification is wide enough "*to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence*".

A case of derivative misconduct is to be distinguished from a situation where an employee not merely fails, but refuses to co-operate in an investigation into misconduct or refuses to provide information that can assist in identifying the culprits. In the latter case an employee may be found guilty of the principal misconduct. Derivative misconduct is also to be distinguished from a situation where disciplinary action is taken against a group of employees collectively for failing to adhere to certain agreed standards, resulting in unacceptable levels of shrinkage or stock loss.

While the dismissal of the employee for derivative misconduct was found to be justified in the **Aspen Pharmacare** case, it does not mean that dismissal will always be appropriate. While the seriousness of the principal misconduct is an important consideration, the question is whether the employee's failure to report a fellow employee's misconduct is in itself a serious enough violation of trust in the circumstances. Every case will have to be judged on its merits.

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