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For Business Owners



Consistency in dealing with theft

One would think that dismissing an employee for theft is always defensible at the CCMA. It is not quite that simple, though. An employer who has not been consistent in dealing with theft cases might just have to reinstate a thieving employee.

The Labour Court has been quite clear in its condemnation of theft, irrespective of the value of the item being stolen. The basis of this approach has in one case been stated as follows: "It is one of the fundamentals of the employment relationship that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it."

There are certain situations where an employer might consider making an exception due to the particular circumstances of the case. The employee might, for example, have been a loyal employee for many years and might be genuinely remorseful. The employer might feel that the employee deserves another chance. But what happens if another employee steals and expects to remain in employment, due to the leniency demonstrated towards the first employee? May the employer distinguish between two cases involving theft?

It is a well-established principle that an employer has to be consistent in the application of discipline. However, the employer also has an obligation to consider mitigating circumstances before dismissing an employee. This means that allowance can be made for an employer to exercise discretion in each individual case. But how much allowance is made for the employer to distinguish, at the risk of being found to have been inconsistent in the application of discipline?

The Labour Court has on occasion found that where two employees have committed the same wrong and there are no clear distinguishing circumstances, they ought generally to be treated in the same way. Employers are not necessarily legal experts and some grounds that an employer might use to distinguish between two matters may be regarded as invalid or irrelevant by the CCMA or Labour Court.

Exercising discretion becomes dangerous territory, particularly when one looks at some CCMA decisions where employees have been reinstated, even in situations where it was common cause that they had stolen. The reason for reinstatement in these cases was simply that the CCMA, perhaps correctly, differed from the employer about the reason for giving one dishonest employee a final warning and dismissing another.

Another vexing question is whether the employer may pardon an employee who participated in theft, but who has decided to come clean and assist the employer by providing evidence against his fellow transgressors in disciplinary hearings – much the same as the state does with criminals that become state witnesses. It might seem like a reasonable proposition to assist such an employee by keeping him in his job, but this can also be a minefield.

In view of the above, an employer would be setting a bad precedent if a thieving employee is pardoned or given a penalty short of dismissal. The best approach is to have a clear policy that any form of theft or other form of gross dishonesty is likely to lead to summary dismissal. This policy should be implemented consistently, except where there are compelling reasons not to do so.

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