

# Employment Law update

## Less remorse more punishment

### **National Union of Mineworkers obo Vangile v Eskom Holdings SOC Ltd [2018] 5 BALR 534 (CCMA)**

What is an employer to do when it has (i) run an internal disciplinary hearing of one of its employees, (ii) found him/her guilty of the charges and, (iii) when it comes to sanction, is faced with a situation where said employee refuses to acknowledge any wrongdoing on his/her part and claims that he/she was acting under the instruction of his/her superior? Look no further than the decision of *NUM obo Vangile v Eskom Holdings SOC Ltd [2018] 5 BALR 534 (CCMA)*.



While on the clock, an employee at Eskom (“**the employee**”) was tasked with attending to an isolator at a substation. Unfortunately, upon his arrival at the substation, he found that the isolator to which he required access locked. The employee proceeded to contact his supervisor and apprised him of the situation. His supervisor then instructed him to cut the safety locks in order to gain access to the isolator. The employee complied with his supervisor’s instruction knowing that he was acting in contravention of Eskom’s safety regulations.

The employee and his supervisor operated on the incorrect assumption that cutting the locks posed no danger to anyone. However, what transpired as a result of this misconduct was that it disrupted the operations of a nearby car manufacturer, namely, Mercedes-Benz. A disciplinary enquiry into the employee’s misconduct was then conducted, pursuant to which the employee was dismissed. The employee subsequently referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”).

Ultimately, the Commissioner in this matter was required to determine whether dismissal was an appropriate sanction.

Throughout the employee’s disciplinary enquiry he refused to acknowledge that he had done anything wrong. There was not even a scintilla of remorse displayed by the employee for his misconduct and he repeatedly blamed his supervisor’s instruction for his action and its resulting consequences. To the employee’s mind, because he acted on his supervisor’s instruction, he could not be considered to have breached the regulation in question. The chairperson at the employee’s disciplinary enquiry considered this lack of remorse to be an aggravating factor when considering what sanction to impose. As a result, the chairperson determined dismissal to be appropriate.

In accordance with this approach, the Commissioner regarded the bare denials of wrongdoing by the employee as not making him a “*candidate for progressive discipline thereby having the effect of rendering dismissal to be the only appropriate sanction*”. While the employee had a clean disciplinary record, the Commissioner, on the strength of Labour Appeal Court authority, considered that the lack of remorse shown by the employee did not indicate that he would not repeat his misconduct in the future; conversely, “*his denial seem[ed] to strengthen the view that given a chance the employee [would] repeat the misconduct*”.

Importantly, and what factored into the Commissioner’s reasoning for his decision, was that the employee admitted that he did not have to obey his supervisor’s instruction.

Clearly, an employee when faced with a disciplinary enquiry for misconduct should acknowledge what they did wrong. Moreover, an employee is not required to obey an unlawful or unreasonable instruction. Furthermore, when employees are aware that their conduct is not permitted, it may not be a defence for them to rely on the fact that they did so acting under the instruction of a superior. If an employee shows remorse, there is a greater likelihood that progressive discipline will be a more appropriate course of action in respect of sanction rather than dismissal.

This CCMA decision is particularly insightful for employers who conduct and prosecute their own disciplinary enquiries as it illustrates that the chairperson presiding over the enquiry can take into account the employee’s attitude to his or her misconduct as an aggravating or mitigating factor in respect of sanction. Furthermore, it indicates that in the event that the employee refers a dispute to the CCMA, that the presiding commissioner can also consider what the employee’s attitude was/is towards his/her misconduct when determining whether the sanction imposed was appropriate.

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