DERRIVATIVE MISCONDUCT

AS A GROUND FOR DISMISSAL

DERRIVATIVE MISCONDUCT AS A GROUND FOR DISMISSAL

Skripsie voorgelê ter gedeeltelike nakoming van die vereistes vir die

graad

MAGISTER LEGUM
(Arbeidsreg)

aan die

Noordwes-Universiteit
(Potchefstroomkampus)

deur

Retha van der Vyver

Studieleier: Adv PH Myburgh
2005

Preface

South Africa's labour law is developing fast. We have to look at both the employer and the employees' rights to establish a happy and safe working environment for both. This dissertation taught me that there are two sides to a situation, and that we must try and help both the employer and employee.

I want to thank my supervisor Advocate Piet Myburgh, for advising me to write on this topic. It was very interesting. I learnt a lot from writing this dissertation. Further, I want to thank him for his help and advice. Thank you to Jane Murungi for helping me with the provision of the language I say thank you to my parents, Magda and Hannes van der Vyver, for giving me the opportunity to study law, and who stood by me all the way, as well as my grandparents Helgard and Rita van Vreden.

To my Father in heaven, thank you for protecting me and for all your mighty love and help through out my life.

This dissertation I dedicate to the four people in my life who stood by me throughout my law studies: Hannes and Magda van der Vyver; Helgard and Rita van Vreden.

OPSOMMING

ONTSLAG AS GEVOLG VAN AFGELEIDE WANGEDRAG

In die *Chauke & others v Lee Service Centre t/a Leeson Motors*[1] saak is al die personeel van die werkgewer ontslaan, alhoewel die werkgewer nie die skuldige kon identifiseer nie. Die vraag hier teenwoordig was: kan die werkgewer al die personeel ontslaan, omrede die werknermers nie die werkgewer met inligting wou voorsien om hom te help met die opsporing van die skuldige nie? Is dit regverdig om 'n werknemer te ontslaan as hy of sy nie die primêre wangedrag gepleeg het nie en op watter gronde kan hierdie ontslag gemotiveer word? Wat dit dus op neerkom is, kan die werkgewer sy werknemers ontslaan as gevolg van afgeleide wangedrag? En wat vorm hierdie regsgronde vir ontslag?

Die skripsie kyk veral na die vertrouensverhouding wat daar tussen 'n werkgewer en werknemer is, en hoe afgeleide wangedrag hierdie vertroue kan verbreek. En wat dit dan vir die werkgewer en sy onderneming beteken in die lig van dat die werkgewer nie met oneerlike en onbetroubare werknemers wil werk nie.

Daar word gekyk na wat wangedrag behels en wanneer is 'n werknemer skuldig daaraan. Asook wat dit vir die werkgewer beteken as daar 'n werknemer(s) skuldig is aan wangedrag en die skuldige(s) nie geïdentifiseer kan word nie. Daar is drie soorte konsepte wat vroeër gebruik is om hierdie wangedrag te definieer,naamlik: "the concept of collective misconduct, common purpose and collective guilt". Toe kom Grogan met die nuwe konsep van afgeleide wangedrag.

Daar is verder gekyk na die ooreenkomste tussen die strafreg en die arbeidsreg, en die gevolgtrekking wat gemaak is, is dat afgeleide wangedrag baie nou ooreenstem met die van 'n medepligtige, maar nog

---

1 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

meer in lyn is met die van begunstiging. Verder is daar gekyk na die delikte reg, om te bepaal of die werknemer vir 'n delik aanspreeklik gehou kan word. En wat is die sanksies wat daar bestaan en of dit nie ook in die arbeidsreg toegepas kan word nie. Daar is ook gekyk na die geval van aahoudende diefstal, byvoorbeeld voorraad wat konstant verminder, en hoe die werkgewer te werk moet gaan om hierdie problem om te los.

Die Engelse reg het nogal heelwat te sê oor die onderwerp van afgeleide wangedrag. Hulle maak gebruik van 'n ondersoekproses, wat die werkgewer dan bystaan met die probleem van afgeleide wangedrag. Hierdie proses sal ook baie goed werk in ons regsisteem, dit stem ook saam met ons bepalings van die *Grondwet*[2]. My gevolgtrekking is dat Suid- Afrika gebruik moet maak van die proses om afgeleide wangedrag te stop.

---

2 *Die Grondwet van die Republiek van Suid-Afrika,* 1996

Index: PG

1. Introduction 1

2. Misconduct 4

3. The concept of collective misconduct 6

4. Common purpose 11

5. The meaning of derivative misconduct 15
5.1. Derivative misconduct that was applied in case law 17

6. The link between our criminal law and labour law 30

7. The Law of Delict 35

8. Dismissal as a penalty for misconduct 38
8.1Dismissal based on operational requirements 42
8.2 Compensation as an alternative 43

9. The finale solution for shrinkage 44

10. The English Law 48
10.1 Conduct and reasonableness 48
10.2 Reasonable grounds for the employer's belief 51
10.3 The reasonable belief-suspicion of two or more employees 52
10.4 Reasonable investigation 54
10.5 Dismissal as a fair sanction 56

11. Conclusion 58

Bibliography 59

1 Introduction

Trust between an employer and employee is essential in building a high-performance organisation. It creates staff loyalty, builds relationships and motivates staff to perform their very best each day. Without trust, staff would be reluctant to do much without the employer's approval. The trust relationship between an employer and an employee is critical to a working environment. This relationship can be ruined when an employee breaches the employer's trust.

In the *De Beers Consolidated Mines Ltd v CCMA & others*[1] case the respondent employees were both truck drivers who were dismissed for fraudulently claiming overtime pay for work they had not performed. The second respondent, a CCMA commissioner, found that the dismissal was unfair because, *inter alia*, the respondent employees did not hold positions of trust and had served the appellant for many years without committing similar misconduct. Further, that there was a firm relationship of trust between the respondent employees and the applicant. Hence, the respondent employees were reinstated retrospectively and given a final warning.

In a review, the Labour Court declined to interfere with the commissioner's award. The applicant appealed against the decision. In the appeal court's view, the commissioner's conclusion was irrational and the Labour Court had erred by not setting the award aside. The Labour Appeal Court noted that the commissioner had found that the respondent employees had committed serious misconduct, but had erred in finding that the trust relationship between the respondent employees and their employer had not been destroyed. In fact since, the respondent employees had attempted to defend themselves by lying, the

---

1 *De Beers Consolidated Mines Ltd v CCMA & others* 2000 9 BLLR 995 (LAC) 995–996.

appellant had good reason not to trust them further. The appellant placed a high degree of trust in the respondent employees, who were responsible for valuable consignments. The second respondent's finding that the filling in of overtime claims did not fall within the respondent employees' core functions was incorrect. The Labour Appeal Court held that the employees were dismissed because the appellant was not prepared to run the risk of employing them because of their dishonesty. They had shown no remorse and the appellant had concluded that to retain them would be very risky.[2]

At common law an employee's duties go beyond just performing the work he has undertaken to perform.[3] These duties include: a duty to respect, maintain and in some respects promote, the employer's interests within the sphere of employment. These interests include the incorporeal as well as the corporeal. They extend to those interests, which although of value, fall beyond the purview of property rights. For example, interest in providing excellent customer-services and fostering amiable relations within the workplace.

Judge Hawkins captured the essence of this concept in *Robb v Green.*[4] He said:

> *that, in the absence of any stipulation the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect*

---

2 When an employer can no longer trust his or her employees, the working environment becomes intolerable and this will lead to low production for the employer and the employees would not give their very best, because they are not happy in the working environment.

3 In this dissertation he is used to refer to a male or a female person.

4 *Robb v Green* 1895 2 QB 1.

his master's interests in respect to matters confided to him in the course of his service.[5]

South African law employs different concepts of misconduct to appropriately sanction the employees who do not directly commit misconduct but are nevertheless indirectly involved. The concepts are collective misconduct, common purpose, collective guilt and lately the new concept of derivative misconduct.[6] Several cases have held that employees can be dismissed on the basis of derivative misconduct. The question is whether employees can be dismissed if they were not directly involved in the misconduct, and further, what the legal basis for such dismissals is?[7]

---

5 Brassey *Employment Law* Volume one (Juta Kenwyn regularly updated) D2:12.

6 Grogan revealed the new concept of derivative misconduct.

7 In this dissertation the different concepts of misconduct will be discussed and there will be looked at if an employer can dismiss his employees if they were not directly participating in the misconduct. While keeping in mind the concept of the trust relationship.

2 Misconduct

In the workplace, misconduct may be defined as behaviour, conduct or action which is contrary to rules and standards[8] set by an employer for his employees. These rules and standards must be very clear and known to the employee. They must also be lawful and reasonable and should be applied consistently. The employer is the custodian of the rules. Whenever they are contravened, the employer needs to institute disciplinary remedial action. Employers have a right to discipline their employees to ensure employees uphold codes of conduct that is set. The right to discipline is not unlimited. It must be based on the principle of fairness and comply with the statutory provisions of the *Labour Relations Act,*[9] *Basic Conditions of Employment Act,*[10] and any existing collective agreements.

Misconduct which terminates an employment relationship, or makes it intolerable or unworkable, or undermines trust and confidence between an employer and employee is seen as sufficient to justify a dismissal. The misconduct has to be serious enough to offset the importance to which courts and arbitrators attach to employment security of employees.

Misconduct is one of three grounds that are recognised by the *Labour Relations Act*[11] to justify the dismissal of an employee. The other two grounds are incapacity or poor work performance, and operational

---

8 Conducts or actions that are unacceptable to the employer are collectively defined in a disciplinary code or collective agreement and individual employee's contract of employment. Any breach of these rules is subjected to disciplinary measures, which will be applied to remedy the situation.

9 *Labour Relations Act* 66 of 1995.

10 *Basic Conditions of Employment Act* 75 of 1997.

11 *Labour Relations Act* of 66 of 1995.

requirements. The difference between these grounds of dismissal is that an employee who commits misconduct can be held accountable for his actions. However, those who fall ill or are injured, or are overtaken by technological development, or become redundant cannot be blamed for their predicament.

Before an employer can fairly dismiss an employee for an alleged misconduct, it is generally accepted that an employer must be able to prove on a balance of probabilities that the employee actually committed the offence he is being charged with. If it is not possible, the employer is obliged to wait for another opportunity. In certain situations this rule can place the employer in an acute dilemma. For example, where an employer knows that misconduct has been perpetrated by an employee of the company but cannot identify the person, the employer can also not afford not to take action.

.

3 The concept of collective misconduct

Misconduct can be committed individually or by a group. It is very difficult to prove collective involvement of a group of employees. The courts have given some direction through case law. It is, however, not at times easy to apply the principles because of the unique circumstances of some cases. It may also be that in the case of collective misconduct the degrees of individual guilt may differ.

In collective misconduct a group of employees contravene their employer's set of rules or standards. Collective discipline may follow because, often, employees are not prepared to name the perpetrators. An offence at the workplace has to be proven on a balance of probabilities. The employer must prove that employees broke an existing rule. To establish such proof can be problematic, because the number of employees involved in the collective misconduct complicates the issue. In cases like these before disciplinary action can be justifiably taken, it must be shown on a balance of probabilities that each individual was actually involved. *NSCAWU & others v Coin Security Group (Pty) Ltd*[12] illustrates the point. Dismissed employees had engaged in a strike during which various isolated acts of misconduct were perpetrated. The employer dismissed the employees because, in its view, the misconduct was committed in furtherance of a collective aim. The employer argued that the employees were associated, and equally guilty, by virtue of the doctrine of common purpose. The industrial court held that, although the employees concerned had acted collectively, there was nothing to show that any individual had been directly involved in any particular act of misconduct. The employer was in fact relying, not on the doctrine of common purpose, but on collective guilt. The latter doctrine, the court held was foreign to South Africa's legal system and repugnant to the principles of natural justice.

---

12 *NSCAWU & others v Coin Security Group (Pty) Ltd* 1997 1 BLLR 85 (IC).

Collective misconduct raises the same questions. For example: does the mere number of employees involved in the violation concerned excuse the employer from the requirements of procedural fairness? Should the hearings be conducted individually or in a group? In some cases the courts, in condoning the employer's failure to hold hearings, have taken the number of employees involved into consideration. In other cases the court has discounted the employer's attempt to rely on the practical difficulties of holding hearings for a very large number of employees. The question still remains whether an employer should reasonably be expected to hold hearings in circumstances like these.

The courts have stated that in certain situations it is not necessary to hear the employees individually. A mass disciplinary inquiry can be held in respect of the same incident. A mass disciplinary enquiry can only be justified on the circumstances and practicalities of each case. In principle, employees who are charged with the same misconduct should be tried together. Effort must be made to ensure that the employees are not intimidated by the presence of other employees, and that each and every employee is accorded a proper opportunity to state his case individually. In practice, another method in use gives employees an opportunity to appeal.

In the *Hardrodt (SA) (Pty) Ltd v Behardien & Others* [13] case the first respondent employee referred a dispute concerning his dismissal to the CCMA. The CCMA found that his dismissal was unfair and awarded him compensation. The applicant company wanted a review of the award. The application for review was about four and a half months late, and was accompanied by an application for condonation for the late filing. The Labour Court refused the application for condonation on the grounds

---

13 *Hardrodt (SA) (Pty) Ltd v Behardien & Others* 2002 23 ILJ 1229 (LAC) 1229-1230.

that, on the merits the case had no prospects of success. The company appealed the decision to the Labour Appeal Court.

The question in this case was whether the employer's approach was based on the concept of collective guilt? The arbitrator established that this was not the case. He drew a distinction between the concept of collective guilt, or collective responsibility, and collective misconduct. In the former being members of a specific group were all punished for the actions of some of their members. In collective misconduct the members of a particular group are disciplined precisely because they have all associated themselves with the misconduct of one or more of the employees. They all have acted with a common purpose. The arbitrator stated that in collective responsibility, all the members of a group are punished for actions of some of the members, while in collective misconduct a number of employees participate in a misconduct with a common purpose. The latter term is commonly used with reference to illegal work stoppages and stay-ways.

For example in the, *SACTWU & others v Novel Spinners* [14] case, the first applicant and the respondent had concluded wage negotiations and had an agreement covering most of the applicants' demands. The respondent implemented the conditions of service as had been agreed upon. The parties then agreed that the one outstanding matter on the implementation of an annual bonus would be dealt with at another meeting. After the first applicant's organiser had attempted, for nearly a year, but to no avail, to meet the management to discuss the outstanding issues, including the annual bonus, the individual applicants engaged in a work stoppage. The organiser persuaded them to return to work, but they were suspended without pay until the following day. It was agreed

---

14 *SACTWU & others v Novel Spinners (Pty) Ltd* 1999 11 BLLR 1157 (LC) 1157-1158.

that a disciplinary hearing would be held to investigate the conduct of the employees who had participated in the work stoppage. A date for a meeting to discuss the annual bonus was also agreed upon. After the disciplinary hearings, the individual applicants were dismissed for they had final written warnings for absenteeism. The remainder of the employees was given final written warnings. The applicants contended *inter alia* that their dismissal was unfair, because final warnings issued for individual misconduct should not have been taken into account, because their misconduct was collective.

The Court held that the work stoppage in which the individual applicants had engaged amounted to a strike. The parity principle requires that workers who engage in the same misconduct should be treated the same. The law acknowledged the distinction between individual and collective misconduct. It was accordingly unjustifiable for an employer to refuse to acknowledge that distinction when disciplining its employees. Where an individual employee breaks a workplace rule it was his personal decision. In a collective action, different pressures applied. Hence, it was inappropriate for an employer to take into account warnings given for individual misconduct when the sanction for collective action was considered. The dismissal of the individual applicants was, for that reason, unfair.

The court stated further that even if the fairness of the individual applicants' dismissals could not be decided on principle, the respondent had, in the circumstances, acted unfairly. The strike was for a short duration. The respondent had provoked the strike by failing to meet the union and sign the wage agreement. Further, the respondent had unfairly gone back on an agreement that the individual applicants could be represented at their disciplinary hearings by a union official.

Some of the individual applicants had, evidentially, accepted that their dismissals were fair. They would not be entitled to relief, because they could not be said to be in dispute with the respondent. The remaining applicants who sought reinstatement were reinstated retrospectively to a date six months after their dismissals. Those who sought compensation were awarded amounts equivalent to 12 months' remuneration.

In cases like these, although the individual members of the group acted in concert, they were liable for the consequences of their collective action because each was legally responsible. In this sense, the term collective misconduct is the contravening of an employer's set of rules or standards by a group of employees, is to be distinguished from the concept of collective guilt, which assumes that all members of a group are guilty simply, because the perpetrator belonged to the group.

4 Common purpose

The Industrial Court's confidence in the doctrine of common purpose is of some importance. In this doctrine, where two or more people agree to, or actively participate in a common unlawful enterprise, each will be responsible for the unlawful act.[15]

In *FAWU v Amalgamated Beverage Industries Ltd*[16] the applicant employees resisted the respondent employer's introduction of a new form which was part of a computerised delivery system. What followed were several work stoppages and agreements by the employees to return to work which had been ignored. After almost a year of 'anarchy management' as the respondent viewed it, a driver named Nthaba, who refused to comply with the will of his fellow employees, was assaulted in the clock room. The respondent, by a process of elimination and investigation, compiled a list of the employees who were allegedly in the clock room when the assault occurred. A mass inquiry was held. Charges against the employees, who were not in the clock room at the time of the assault, were withdrawn. None of the applicant employees denied their presence during the assault. The union and shop stewards refused to assist the inquiry to establish the identity of the employees actually involved in the assault. The applicant employees were dismissed pursuant to the inquiry, and refused to appeal. In section 43[17] proceedings the applicants' position was that they had no case to answer, the onus of proof had been wrongly placed on them, and the events preceding the assault were irrelevant.

---

15 Actively means participation in a particular sphere. Hence, to be actively associated means that one participates in a particular group, which people associate one with.

16 *FAWU v Amalgamated Beverage Industries Ltd* 1992 13 ILJ 1552 (IC) 1152-1153.

17 Section 43 of the *Labour Relations Act* 28 of 1956.

They alleged that the respondent had failed to comply with the disciplinary procedure agreed upon. The court held that substantial compliance, in given circumstances could validate deviation from the requirements set out in a disciplinary code. Further, the court felt the circumstances of the matter constituted substantial compliance. The court, accordingly, dismissed the application finding that the crewmen had gathered in the clock room with the intention of assaulting Nthaba, and those not actively assaulting had shouted encouragement to those who were. Thus a common purpose had been established.

The decision gives rise to four interlinked aspects which are of special relevance to group misconduct. The first would be that of onus of proof and evidential problems of establishing and identifying persons involved in, and who commit actions which give rise to disciplinary proceedings. The second is the question whether the court should as a matter of policy, in ensuring that justice is done, assist dismissed employees who *prima facie* have correct facts, but are not prepared to give evidence. The third aspect concerns the application of the doctrine of common purpose. In principle it seems there is no reason why it should not be applied to this type of situation, provided a common purpose can be established. The notion of collective guilt was not applicable to this case.[18] *FAWU v Amalgamated Beverage Industries Ltd*[19] is not about how the innocent employees get punished because they are simply members of a certain group. Here, the employees were liable because, they actively participated, in one way or another, in committing the offence. Finally one could argue that the employees' dismissal could have been justified on a more general ground. In some decisions, the industrial court has accepted that dismissal can be justified where the relationship of trust and confidence between the employer and the

---

18 *FAWU v Amalgamated Beverage Industries Ltd* 1992 13 ILJ 1552 (IC).

19 *FAWU v Amalgamated Beverage Industries Ltd* 1992 13 ILJ 1552 (IC).

employee has been destroyed, is very seriously damaged, or where the employees' conduct make the continuation of the employment relation impossible. [20]

In the *FAWU v Amalgamated Beverage Industries Ltd*[21] case it is arguable that a serious assault took place on the company's property against the background of what was described as anarchy management. Majority of the employees knew what occurred in the clock room but refused to help their employer resolve the problem.[22]

The doctrine of common purpose, which originates from criminal law, imputes liability for the act of the perpetrator to those who associate themselves with the act before, or during, the commission. In the *NSGAWU v Coin Security*[23]case the employer dismissed 74 employees for isolated incidents of misconduct during a strike. The doctrine of common purpose applies when two or more people associate in a course of conduct which results in a criminal act although they do not physically perform the actions which brought about the crime.[24] Where employees are found to have actively associated with the crime and shared the perpetrator's guilty state of mind, the guilt of the actual perpetrator extends to them by virtue of the doctrine of common purpose. It is not required to show that each party performed a specific act to achieve the

---

20 P A K Le Roux and A van Niekerk *The South African Law of unfair dismissal* (Juta Kelwyn 1994) 182.

21 *FAWU v Amalgamated Beverage Industries Ltd* 1992 13 ILJ 1552 (IC).

22 P A K Le Roux and A van Niekerk *The South African Law of unfair dismissal* (Juta Kelwyn 1994) 182.

23 *NSGAWU v Coin Security* 1997 1 BLLR 85 (IC).

24 *NSGAWU v Coin Security* 1997 1 BLLR 85 (IC) 1447H-I; John Grogan *Dismissal* (Juta Grahamstown 2004) 165.

joint object, or contributed causally to the outcome. Association in the common design renders the act of the main offenders, the act of all.[25]

In *NSGAWU v Coin Security,*[26] the Industrial Court warned that the doctrine of common purpose is not to be used as an excuse for imposing collective punishment, nor confused with the concept of collective guilt. Common purpose must still be proven. Thus, there must be evidence that all the accused employees actively associated with the conduct of the main offender(s). The court found that the mere fact that all the dismissed employees happened to be taking part in the same strike was insufficient to warrant the inference that all had actively associated with the few who, in isolated incidents, damaged the employer's property in the course of the strike.[27]

All the above cases illustrate that to justify a dismissal on the basis of common purpose, the employer must, at least, prove on a balance of probabilities that the employees concerned had in fact associated with the deeds of the main offenders.

---

25 John Grogan *Dismissal* (Juta Grahamstown 2004) 165.

26 *NSGAWU v Coin Security* 1997 1 BLLR 85 (IC).

27 *NSGAWU v Coin Security* 1997 1 BLLR 85 (IC) 90F-G; John Grogan *Dismissal* (Juta Grahamstown 2004) 166.

5 The meaning of *derivative misconduct*

In addition to the different concepts of collective misconduct, collective guilt, and common purpose, Grogan has introduced a brand new concept of derivative misconduct. It is applicable to an employee who has detailed information of an offence committed by a fellow employee, but does nothing to help the employer. The big question is whether such employee would also be guilty of the offence, even though he or she did not directly commit it?

Derivative misconduct describes an employee's refusal to reveal information which might help the employer identify the perpetrator. It is derivative because the employee is guilty of misconduct, not for involvement in the primary misconduct, but for refusing to assist his employer in the quest to apprehend and discipline the perpetrator(s) of the original offence.

The common-law duty to act in good faith owed by an employee to his employer has been utilised to develop the concept of derivative misconduct. An employee who refuses to assist his employer in investigations to find out precisely who committed a particular misconduct, or who fails to report instances of misconduct, breaches his common-law duty to act in good faith towards his employer, and is guilty of this form of misconduct.

The primary question in on all employers' minds is what he can do to employees who refuse to reveal information which could lead to the detection of their colleagues' misbehaviour. What should an employer do if he discovers serious misconduct which could only have been perpetrated by one or more of a specific group of employees, but the actual culprits cannot be identified? The obvious starting point is to ask all the employees in the group to identify the culprits. In most cases,

such a question is likely not to be answered. If the employer, however, has reason to suspect that the employees are aware of the identity of the culprit(s), the opportunity to pressing charges for "derivative misconduct" arises.

There is no general obligation on an employee to share information about his colleagues with the employer. But, at the very least the employee must disclose to the employer information of theft or other, misconduct by an employee which warrants a disciplinary action. Section 35 of the *Constitution*[28] states that arrested, detained and accused persons are entitled to remain silent and not incriminate themselves. The question is whether it is also applicable to an employee, who is in a group which is indirectly accused of a main offence. The only protection legislature gives an employee is through the *Protected Disclosures Act.*[29] This act only protects the employee's job. It does not protect him against victimization at home, nor against his family. This could be one of the main reasons why an employee would not inform his employer of co-employees misconduct. It is too risky because the employee could get victimized and endanger his family.

The solution would be an exceptional degree of trust between the employer and employee. The employee has to believe and trust that what he reports to the employer will stay confidential, and be confident the employer will use the information without revealing his source. This gives the employee the confidence to report to his employer any information relating to the perpetrator, without endangering his family.

---

28 *The Constitution of the Republic of South Africa*, 1996.

29 *The Protection Disclosures Act* 26 0f 2000.

5.1 Derivative misconduct as applied in case law

The idea of derivative misconduct appears to have originated in *FAWU & others v Amalgamated Beverage Industries*[30] case. The Labour Appeal Court held that in the field of industrial relations, it might be that policy considerations require more of an employee than mere passivity in certain circumstances. For instance, failure to assist an employer in an investigation to identify perpetrator(s) of an offence may itself justify disciplinary action.

In the *FAWU & others v Amalgamated Beverage Industries,*[31] case [32] the court noted that while a party's failure to provide evidence cannot in itself be a reason for accepting another's evidence against him, the failure to provide evidence to disprove a *prima facie* case may be weighed against the party who chooses not to give evidence. This rule of evidence does not mean that an employee would be punished for refusing to furnish an employer with information. It simply means that a court can accept the employer's version if the employee(s) fails to testify in court. Derivative misconduct is different because an employee commits this misconduct by refusing, in an investigation to provide an employer with information concerning a primary offence.

---

30 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

31 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

32 On that day the company's drivers and crewmen returned to work after an illegal strike, a scab driver was badly assaulted. There were crewmen seen leaving the room after the assault, but they could not be individually identified. However, the crewmen's clocking records showed which crewmen were on the premises at the time of the assault. A mass disciplinary inquiry followed, and the accused employees refused to reveal any evidence. Because of their refusal they were all dismissed. Their dismissals were upheld by the Industrial Court. In the Labour Appeal Court, it was argued on the employees' behalf that it was up to the employer to prove their involvement in the assault. They claimed that the employer did not prove their involvement in that assault.

In *FAWU & others v Amalgamated Beverage Industries*[33] the court did not find it necessary to apply the notion of derivative misconduct, because it found that, in all probability, all the dismissed workers were undoubtedly present when the assault took place. They either participated therein or lent their support. All were guilty of the primary misconduct because they either took part in the assault themselves or associated with the assailants.

Chauke & others v Lee Service Centre t/a Leeson Motors[34] faced a similar, if not a more frustrating problem than in *FAWU & others v Amalgamated Beverage Industries.*[35] It was discovered that new paintwork on panel beaten vehicles was being deliberately scratched. The employer asked the employees to identify the perpetrator(s). There was no response. Further incidents of damages occurred. The police were brought in to help identify the culprits but they did not succeed. Finally, in desperation, the employer assembled those employees in the paint shop and issued an ultimatum that any further similar incident would lead to instant dismissal. The ultimatum was sugar coated with an offer of a reward for information that would lead to the detection of the perpetrator(s). Both inducements proved to be unsuccessful. Two days later, new paint work on another vehicle was intentionally scratched. The workers in the paint shop area were re-assembled, and given 20 minutes[36] to reveal the names of the perpetrators. All chose to remain silent, and were dismissed. The employer was willing to re-employ the dismissed employees only if those responsible were identified within 48 hours.[37]

---

33 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

34 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

35 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

36 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 JOL 3624 (LAC) 6.

37 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 JOL 3624

The Labour Appeal Court held that the dismissal of a group of employees, whose colleagues were, without a doubt guilty of misconduct, but could not be identified, could be justified in two ways. First, a mass dismissal is necessary to save business from damage. This is an operational justification. The second justification is to show that the whole group of employees were involved in the misconduct. General involvement may be shown either by proving that each employee in the group was responsible for the primary misconduct by making common cause with the actual perpetrators either by actively assisting them, or by relating to them through their silence. This approach, which entails imputing liability for a crime to members of a group, is known as the doctrine of common purpose.

For the doctrine of common purpose to be applicable, members of a group must be found to have directed their wills and actions towards the accomplishment of a prohibited result. The concept of derivative misconduct is broader. It imposes liability for a separate and distinct offence – that of failing to notify the employer of the identity of the perpetrator(s) even if the offender did not associate him with the primary misconduct. The scenario, in *FAWU & others v Amalgamated Beverage Industries*[38] was that an employee could possibly have been guilty of derivative misconduct even if absent at the time of the assault, but afterward is learnt who the perpetrators were, but failed to disclose that information.

Unfortunately, the extent of the doctrine of derivative misconduct was neither fully explored in *Chauke & others v Lee Service Centre t/a Leeson Motors*[39] or in *FAWU & others v Amalgamated Beverage*

(LAC) 6.

38 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

39 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ

Industries.[40] In both cases the courts found that the circumstantial evidence was strong enough to prove that all the dismissed employees were guilty of the primary offences, either directly or by association.

Circumstantial evidence is evidence about a fact, or facts, from which an assumption could be made about the main fact. Circumstantial evidence is not necessarily weaker than direct evidence. In some instances it may be of more value than the direct evidence. Circumstantial means the logical surroundings of an action, an attendant fact, an accident or event. In the adjectival sense, when used in the phrase circumstantial evidence it is evidence which places an action in the logical context of its particular circumstances.

In *CWIU and Dladla v Total South Africa (Pty) Ltd,*[41] the following was the circumstantial evidence. A diesel tanker came into a customer's premises over a weighbridge. Its load weighed 42 460 kilograms. After the delivery of the diesel, it left using the same weighbridge and the printout showed that it had delivered 8 300 kilograms and its load now weighed 34 160 kilograms. The invoice produced by the printometer, a gizmo on the fuel delivery line, showed that the truck had delivered 14000 litres into two separate tanks on the premises. The wrinkle in the arithmetic is that 1 litre of diesel weighs 0.82 kilograms. So 8 300 kilograms of diesel was in fact 10 121,95 litres, and not 14 000 litres. In another way, if the printometer was correct, then the truck emerged from the delivery site weighing too much. If the weighbridge was correct, the printometer had over-read the delivery.

1441(LAC).

40 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

41 *CWIU and Dladla v Total South Africa (Pty) Ltd* (Unreported 11/2/11592 dated 6 June, 1994).

Dipstick readings in the tanks, which were designed to check the printometer and weighbridge, concurred with the printometer, which in turn supported the receiving clerk's word that he had signed for what he had received. Could it be that the weighbridge was wrong? The employer and his customer apparently overlooked this delicate nuance. But the court did not. The respondent and its customer argued that 4 000 litres fuel had probably been pumped back into the tanker after the delivery and had probably been disposed of elsewhere, or the printometer paper had been tampered with, and evidence of the printometer should be ignored.

The circumstantial evidence in this case was the printouts and readings generated by various gadgets and meters, the contractual relationship between the driver's employer and the purchaser of the fuel, the purpose of the trip, the nature of the fuel, and how the tanker works.

Now the question is whether circumstantial evidence is enough to justify a dismissal? In the *Chauke & others v Lee Service Centre t/a Leeson Motors*[42] case it was discovered that the new paintwork on the panel beaten vehicles was being deliberately scratched. Thus, the scratched vehicles in the workshop were the circumstantial evidence which led to the conclusion that one or more of the employees were responsible. In the *FAWU & others v Amalgamated Beverage Industries*[43] case the circumstantial evidence were that crewmen seen leaving the clock room after the assault, but they could not be identified individually. However, the crewmen's clocking records showed which crewmen were on the premises at the time of the assault.

---

42 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441(LAC).

43 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

In conclusion, it is observed that where circumstantial evidence of employees' misconduct is overwhelming, it could justify dismissal. Both *Chauke & others v Lee Service Centre t/a Leeson Motors*[44] and *FAWU & others v Amalgamated Beverage Industries*[45] support this view.

The doctrine of derivative misconduct surfaced again in a recent private arbitration: *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd.*[46] In this case, the company had dismissed almost the entire staff of one of its research laboratories. This mass dismissal arose because a large quantity of kimberlite was discovered down one of the boreholes on the site of a De Beers laboratory. Kimberlite is the material that is sent to the laboratory to be analysed from the mines in various parts of the world. If parts of a batch are not analysed, the laboratory's test results will be unclear. There was also an indication that kimberlite had been dumped elsewhere on site. Given the implications, of the removal of a sample, for the integrity of laboratory's test results, management took immediate action. They began by establishing that the kimberlite recovered from the borehole had been dumped there some time during the year. In the course of that year, a number of employees had agreed to work overtime to reduce a build up. After the kimberlite was found down the borehole, De Beers security staff interviewed the laboratory staff, and asked them if they were prepared to undergo polygraph tests. All agreed to do so. Later all but one withdrew his consent.

---

44 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441(LAC).

45 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

46 *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* 2004 1 BALR 1 (P).

The one employee who had admitted to some knowledge, Mr. C, was interviewed again. Mr. C told the investigators that he and a colleague, whom he named, had dumped a quantity of kimberlite down the borehole. When Mr. C underwent a polygraph test to determine the truth of his confession, the result indicated that he lied. Mr. C was then re-interviewed, and he named two other colleagues. This evidence provided some positive proof that four of the 20-odd employees at the laboratory were involved in the actual dumping of kimberlite. Management had received some information from an informer that the conspiracy was much deeper. The whole staff were then suspended and subjected to a disciplinary inquiry. All were charged, in the alternative, with actually removing the sample, failing to take steps to protect the sample, or with failing to identify the culprits who had removed sample. The presiding officer found that this net was wide enough to catch all the employees. All 15 employees who were charged were dismissed included were two female cleaners and a number of male workers who were not employed at the laboratory at the time the sample was removed.

The arbitrator began by rejecting inadmissible hearsay evidence. This was the company's evidence of what the informer had allegedly told the laboratory manager. This then left the company with the direct evidence of Mr. C, who had named three of his colleagues. Had Mr. C testified in the arbitration hearing and explained that he had falsely implicated his three colleagues, his evidence would not have been enough to establish their guilt. Neither would it have been possible, had his three colleagues come forward during the arbitration to offer some acceptable exculpatory evidence. Two of the three employees Mr. C named, that were also a party to the arbitration, chose not to testify and Mr. C was not called. The other two employees who had worked overtime during the concerned period were the supervisor and another worker who had agreed to work overtime to reduce the build up also refused to testify. Their silence, according to the arbitrator, was sufficient to find that on a balance of

probability they too had indeed participated directly or indirectly in the removal of kimberlite. It was held, that their dismissal was justified.

De Beers' problem was that there was no direct evidence to link the remaining employees to the dumping of the kimberlite. To overcome this problem, the company relied on the concept of derivative misconduct. The arbitrator held that there were two requirements for proof of this form of misconduct. The first was that an employee must have known, or could reasonably have acquired, knowledge of the offences. Secondly, an employee must have failed, without justification, to reveal the knowledge to an employer, or to take reasonable steps, to help an employer obtain the knowledge.

In the circumstances what is knowledge? Is it knowledge if a person saw the main offence, or heard it from another? Must all the knowledge that the employee obtain be revealed, first and second-hand knowledge? When must this knowledge be revealed? An employer cannot just tell his employees that when they know of an offence they must report it. The employer must stipulate what he regards as knowledge, and when this knowledge must be revealed.

The next question is what the extent of the first requirement for derivative misconduct is? Must an employee have known of the offence while it was being committed, or must the he also reveal knowledge acquired later? In *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd,*[47] the arbitrator drew the line at those employees who were not working at the laboratory when the dumping took place, because the company could not prove that the identity of the

47 *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* 2004 1 BALR 1 (P).

perpetrators had become common knowledge by the time the dumped material was discovered. In the absence of a statement from the informer, the only proof De Beers offered in that regard was that of employees who jointly declined to undergo polygraph tests although they all had agreed to do so earlier. This, coupled with a note requesting them to volunteer information over the company's anonymous "hotline", and this had been interpreted by management as an act of collective defiance.

According to the arbitrator, the employees' refusal to undergo polygraph tests, and the return of the "hotline" note, though certainly indicative of a collective resolve to protect the perpetrators was insufficient to prove that the whole staff was guilty of dumping samples, or that all the other employees had conspired with those who did, or that all had something to hide. The employees had agreed to undergo polygraph tests before they consulted with their union. They decided to withdraw their consent on the union's advice. This advice may have been unwise, said the arbitrator, but it proved no more than a determination to stand together. Something more was required to prove derivative misconduct.

De Beers relied on a number of uncontested facts to support their argument that the employees must have known about the dumping and those responsible. These were the huge quantity of discarded material, (more than 450kg was found down the borehole); the time span it must have taken to dump the sample, the fact that the laboratory staff operated as a "close knit team", and the closeness of the borehole to the laboratory windows and doorways. The company argued that these facts, together with the failure of all, but two, of the applicants to testify at the arbitration hearing, were enough to prove its case.

The arbitrator felt the matter was not that simple. He held that the evidence the company led supported the conclusion that some of the employees apart, from those Mr. C named, knew that the sample was being dumped. The evidence was the silence of employees Mr. C named. The silence was deafening: only they could have given an inclusive explanation of the duration of the dumping scheme, the extent of the involvement of the other staff members, or of their knowledge.

Then the arbitrator stated,

> *those employees who had an innocent explanation should also in these circumstances have come forward to tender it either at the disciplinary hearing or in these proceedings, or both. Their failure to do so must ... be weighed in the balance against them. However, whether the balance tilts to the point that it can be accepted that all possessed information that could have assisted the [company] to identify the perpetrators is another question.*[48]

The other question is a matter of evidence. The arbitrator noted that the general onus placed on employers to prove the fairness of their dismissals meant that De Beers had to prove, on a balance of probabilities, that

> *each and every one of the applicant employees was in possession of information that could have assisted the respondent in its inquiry, and that they had refused to disclose it.*[49]

The arbitrator found that De Beers had failed to discharge that onus in respect of those employees who were not employed at the laboratory at the time of the dumping, or in respect of the cleaners. The case against the others, although slightly stronger, was still unfounded and nothing more than a suspicion.

---

48 Juta Update 2004 Labour Law *Derivative misconduct;* 2004 1 BALR 1 (P) 11.

49 Juta Update 2004 Labour Law *Derivative misconduct;* 2004 1 BALR 1 (P) 11.

The difficulty that is created for employers in these cases involving misconduct in which the actual perpetrators cannot be identified is illustrated by the arbitrator's closing remarks.

> *I must emphasise that I am not without sympathy for the respondent. Its managers were faced with evidence of serious misconduct. They did what could reasonably be expected of them to establish the identity of the perpetrators when the scam was revealed. The informant was subjected to a polygraph test. Given that his knowledge enabled him to identify the boreholes down which the sample had been dumped, there was no reason for the respondent to disbelieve the other information supplied by him, which was partly confirmed by C, and which pointed to wider involvement. The respondent then sought to solicit the help of other employees in identifying the culprits. Apart from C, none came forward.*[50]

The arbitrator was required to determine whether there was a fair reason for the dismissal or not. In the end, all the employees except those against whom there was sufficient evidence of direct involvement were saved because it was impossible for De Beers to break through the wall of silence which the employees had collectively decided to put up.

NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd[51] is a good example of the difficulties confronting employers faced with evidence of misconduct in which perpetrators cannot be identified, but where it is known that, apart from those who identified, others were also involved. The first objective should be to obtain the assistance of the employees themselves. Had it not been for Mr. C's confession, De Beers would not have been able to identify any of the perpetrators. Mr. C's confession resulted in the identification of at least some other perpetrators. The arbitrator suggested, without actually ruling on the point, that the others could fairly have been dismissed for

---

50 Juta Update 2004 Labour Law *Derivative misconduct;* 2004 1 BALR 1 (P) 12.

51 *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* 2004 1 BALR 1 (P).

"derivative misconduct" had it been proved that they actually knew who had dumped the kimberlite down the borehole. The company could not prove that.

The next question which arises is whether the employees should have acquired knowledge of the primary misconduct at the time of its commission, or soon afterwards, or whether knowledge acquired at any stage should be shared with the employer at the time of dismissal for "derivative misconduct" if it was withheld? The ruling of the arbitrator concerning workers who were not employed at the laboratory at the time the kimberlite was removed, suggests that the duty of disclosure, upon which the concept of derivative misconduct rests, is restricted to those who received first hand knowledge of the primary misconduct. However, the development of the concept of derivative misconduct must await further cases. It is arguable from the *Leeson Motors* case[52] that employers may rely on operational reasons to justify dismissing a group of employees for misconduct perpetrated by one unidentifiable person.

Occasionally the roles are reversed. Employees inform on their superiors or on the employer itself, and the employer takes exception. Such cases deal with the reverse of the circumstances discussed in *Leeson*[53] and *Amalgamated Beverages Industries.*[54] An employer may take an employee to task for doing what the courts in both the above cases suggested, would result in an employees' dismissal if not done.

---

52 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

53 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

54 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

One such case was *Rand Water Staff Association obo Snyman v Rand Water*.[55] Ms Snyman, a human resources officer, used the company's "hotline" to report that certain managers and supervisors were receiving illegitimate favours, including paying only a fraction of the normal rental for company housing. Ms Snyman was charged with deliberately giving false and misleading information on the hotline, and that she failed to follow company procedures. Ms Snyman claimed that she was only trying to protect the company's interests. Ms Snyman argued that her conduct was covered by the Protected Disclosures Act 26 of 2000.

The arbitrator ruled:

> *The rationale behind the respondent's hotline is to afford employees an opportunity to report improprieties in a manner akin to that provided for in the PDA. It is incumbent that the employee bona fide has reason to believe that the information furnished is correct. If the employee knowingly provides false information to discredit the employer or another employee, such conduct would expose the employee to disciplinary action. There is no immunity against intentionally providing false and malicious information against an innocent individual or entity.*[56]

---

55 *Rand Water Staff Association obo Snyman v Rand Water* 2001 BALR 543 (P).

56 *Blowing the Whistle. anonymous*

6 The link between our criminal law and labour law

The South African law does not recognise the technical English law distinctions between the principals in the first and second degree, or between principals in the second degree and accessories.[57] A person who aids and abets, counsels, or assists in an offence is simply termed as *socius criminis* or accomplice (*medepligtige*). A *socius criminis* commits the same offence. This offence could be of a common-law nature or of statutory origin. As the principal perpetrator, he can be indicted and punished in the same manner as the actual perpetrator.

This principle is based on the moral truth that he who shares with the actual perpetrator of a crime a common purpose to commit it, and who aids and abets its commission, is as much guilty of the crime as his partner. Although the accomplice is, in principle, as guilty as the perpetrator, he is liable in his capacity as an accomplice and not as a perpetrator. The accomplice's liability is separate and distinct from that of the main offender which is governed by the rules of the common-law. In statutory offences, the relevant statute need not expressly refer to accomplices for one to be liable.[58]

According to the criminal law, an accomplice is someone who does not perpetrate the main offence but assists the perpetrator in some way in the commission of the offence. An accomplice, in contrast to the perpetrator, does not fulfil all the requirements of the main offence in which he renders assistance.[59] Derivative misconduct in labour law is when an employee refuses to disclose information which might help his

---

57 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 138; *R v Longone* 1938 AD 532 537.

58 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 139; *R v Clark* 1933 TPD 18 20.

59 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 139; *S v Williams* 1980 1 SA 60 (A) 63B.

employer to identify the perpetrator. It is termed derivative not because the employee is guilty of involvement in the primary misconduct, but for refusing to assist his employer in the quest to apprehend and discipline the perpetrator(s) of an offence.

Could it be said that an accomplice in criminal law is, in a sense, similar to derivative misconduct in the labour law? In both, persons helped the perpetrator of the main offence: an accomplice assists a perpetrator whereas an employee guilty of derivative misconduct assists the perpetrator, in a passive way, by refusing to reveal information concerning the perpetrator to his employer.

Accessories after the fact in the criminal law, and derivative misconduct in the labour law, are closely linked, because a person is an accessory after the fact to a crime if, after its commission he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or accomplice in, the crime to evade liability for his or her crime, or to facilitate such a person's evasion of liability. [60]

Before a person can be liable as an accomplice, there must be proof that he participated, or assisted, the perpetrator in the commission of the main offence. It is very difficult to say in abstract what type of conduct would amount to such assistance. It has been generally stated that everyone who, in the judges' opinion, does something to further the purpose of a criminal promotes the crime. Thus an employee, who refuses to disclose information relating to the perpetrator liable of the main offence, aids the crime.[61]

---

60 CR Snyman *Criminal Law* 4th ed (Butterworths Durban 2002) 274.

61 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 142.

Where a person voluntarily and deliberately witnesses the commission of an offence and does not oppose it, though he might reasonably be expected to prevent it, and has the power to do so or, at least, power to express his dissent, it might under certain circumstances afford adequate proof of participation.[62] Similarly, so where an employee voluntarily and deliberately witnesses the commission of an offence and does nothing to stop it. For instance where the employee has the power to give the information to his employer to stop this crime. Although presence at the scene of an offence can be evidence of participation, a person can also be liable as an accomplice even though he was absent from the scene of the offence.

It is clear that the requisite *mens rea* for liability as an accomplice is intention, and that mere knowledge that an offence is about to be committed or is being committed, is not sufficient in itself to establish liability as an accomplice. It is not very clear what this intention must relate to. It has generally been stated that the accomplice must know that his assistance related to the offence that has been committed, or is being committed, or that he knew he was contributing to the commission of a crime, or that he knew the perpetrator's criminal purpose. It has also been stated that an accomplice's *mens rea* need not necessarily be the same as the principal's intention, but that it is sufficient if the accomplice in his collaboration realises that what he is doing is wrong in the sense that he is doing something which helps the perpetrator achieve his unlawful object.[63]

---

62 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 142.

63 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996) 146.

In *FAWU v Amalgamated Beverage Industries Ltd*[64] it can be said that the employees had the same intention as the perpetrator of the main offence. The crewmen had gathered in the clock room intending to harm Nthaba. Those who did not actually assault him had shouted encouragement to those who did. Therefore it can be said that the crewman who shouted had the same purpose as those who assaulted him.

Chauke & others v Lee Service Centre t/a Leeson Motors[65] was confronted with a similar problem to that in *FAWU & others v Amalgamated Beverage Industries,*[66] but probably much more frustrating. The employer discovered that the new paintwork on the panel beaten vehicles was being intentionally scratched and none of his employees wanted to give him information to help to catch the perpetrators. Thus, it can be said that the employees who did not actually committed the main offence but did not want to reveal their information, had the same intention as the perpetrator who scratched and damaged the vehicles, or had a different intention, for instance, to harm the employer or its property. These employees had a direct or indirect intention which relates to the main offence.

Since an accomplice is punishable just as if he had committed the offence himself, he may be sentenced to the same punishment, whether in terms of common-law or statutory offences. This is also the case even if the offence is one which the accomplice cannot commit as a perpetrator. Certain circumstances justify a different punishment for the different persons who participated in the commission of a common offence. The degree of participation is a prominent consideration.

---

64 *FAWU v Amalgamated Beverage Industries Ltd* 1992 13 ILJ 1552 (IC).

65 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

66 *FAWU & others v Amalgamated Beverage Industries* 1994 12 BLLR (LAC).

The fact that an accused is a socius and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness, and the principal factor to be taken into account here is the extent to which the socius makes common cause with the principal offender, as there is a very wide range of moral blameworthiness in cases of this short. The position of the socius might be that he played a very unimportant part in the actual commission of the crime but was nonetheless a socius. In such a case the moral blameworthiness of the socius would be very much less than that of the principle offender. In another case the part he played in the offence might be so great as to identify him completely with the principle offender, in which case his moral blameworthiness could be considered to be as great as that of the principle offender.[67]

A lighter sentence has accordingly been imposed upon an accomplice where circumstances justified this. But the mere fact that an accused is an accomplice, does not of course justify the imposition of a less severe sentence than that meted against the perpetrator. In our labour law the same punishment of dismissal should be applied, because the trust relationship between the employer and the employee is broken. For instance, where a perpetrator and employees refuse to divulge their information.

In conclusion, in labour law an employee who is guilty of derivative misconduct is treated in the same way as an accomplice in the criminal law. But derivative misconduct is more in line with accessories after the fact in criminal law.

---

67 W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996); *S v X* 1974 1 SA 344 (RA) 348D-G.

7 The Law of Delict

Can an employee commit a delict when he or she does not reveal the information to his or her employer, and can the employee be punished under the law of delict?

The first requirement for a delict is that there has to be an act. This act must be performed by a person out of arbitrariness. This act can consist of a *commissio* or an *omissio*. The arbitrariness means that the person must be mentally capable of controlling his body functions. A person can raise the defence of automatism, where he then claims that the act was not one of arbitrariness, because he was under constraint, or was asleep, unconscious, had an epileptic attack, was under the influence of alcohol; or had a black-out.

According to van der Walt and Midgley [68]the difference between *commisio* and *ommissio* is the following:

> *In general the legal nature of conduct is determined by the particular context in which it occurs. An 'omission' to take certain measures in the course of some activity is therefore not necessarily a form of conduct but may well indicate that the action was negligently performed. Inaction as a part or a stage of some positively activity can therefore constitute or indicate negligence on the part of the actor; negligence is ex definitione a failure to take reasonable precautions. Many 'omissions' are therefore merely indications of legally deficient positive conduct, viz the diving of a car.*[69]

It can be said that an employee complies with the first requirement of a delict, by acting in an arbitrary way. An employee would know what he

---

68 Neetling, Potgieter and Visser *Deliktereg* 4th ed (Butterworths Durban 2002) 36.

69 Neetling, Potgieter and Visser *Deliktereg* 4th ed (Butterworths Durban 2002) 36.

was doing, and the act is one of *commisio,* because he failed to inform the employer. An employer expects an employee to inform him of the misconduct of the other employee(s). Thus, there is a duty on an employee to inform an employer. The employee could also raise the defence of automatism. He could say that the other employees threatened him; that the act was done under constraint.

The second requirement is unlawfulness. To determine this, two aspects have to be looked at. The first is to determine if a legally recognised individual interest was affected. Were there any losses or damages to the individual interest? Secondly, on the basis of legal norms it has to be determined if it happened unlawfully or in an unreasonable manner. An employee's withholding of information cause a loss to individual interest. For example, in the *Chauke & others v Lee Service Centre t/a Leeson Motors*[70] case the employer discovered that the new paintwork on the panel beaten vehicles was deliberately scratched and none of his employees wanted to give him information to help to catch the perpetrators. The employer suffered damages. He lost a lot of money, and his reputation was being affected. People would not want to take their vehicles, knowing that one of the employees could deliberately scratch it. The withholding of information was unreasonable, with the knowledge that it would lead to a financial loss for the employer.

The third requirement is guilt. Guilt takes two forms: *dolus*[71] and *culpa*[72]. An employee may withhold information intentionally, well aware that an unlawful misconduct is taking place and does nothing to help prevent it.

---

70 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

71 Intentionally.

72 Negligence.

In *Chauke & others v Lee Service Centre t/a Leeson Motors*[73] the employer in all desperation assembled those employees in the paint shop and gave them an ultimatum that any further similar incidents would lead to instant dismissal. Thus, they knew they had to reveal the information, but intentionally decided not the help the employer.

The fourth element is that of causation. There must be a connection between the act or conduct and the loss suffered. In *Chauke & others v Lee Service Centre t/a Leeson Motors*[74] there is a connection. Because the employees did not inform the employer of the misconduct being committed by a fellow employee, the employer suffered a loss; which could have been prevented.

According to the law of delict the person must compensate the party who suffers a loss. Compensation is to be paid in the form of money. The question raised at the beginning was: whether an employee commits a delict when he does not reveal the information to his employer? It is felt, because all the requirements of a delict are met, the employee does commit a delict when he does not reveal the information to the employer.

---

73 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

74 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

8 Dismissal as a penalty for misconduct

In the mid-1980's, the Industrial Court adopted and applied the English reasonable employer test to determine both the reality of the misconduct committed by an employee, and a suitable penalty for the misconduct. This approach did not survive past the turn of the decade. Distinctions were drawn between the two concepts of reasonableness and fairness. It was considered that the application of a test for reasonableness limited the discretion of the Industrial Court to determine alleged unfair labour practices.

In *Tubecon (Pty) Ltd and National Union of Metal Workers of SA,*[75] arbitrator, John Brand, stated that, in his view, the reasonable employer approach is not what is required by the standard IMSSA terms of reference which required him to determine whether the discipline meted out by the company was fair. For discipline to be fair the rule or norm which is breached must be fair. It must have been breached and the sanction applied a fair one. Unless the terms of reference distinctively state otherwise there did not seem to be any justification in equity why a sanction should be looked at exclusively through the eyes of an employer. The correct approach, according to him, was to consider whether the sanction was fair in relation to existing industrial relations, common law and norms.

When applying this to the present case it was common cause that the rules were fair. John Brand then had to determine whether the grievance had been proved on the basis of evidence before him, further whether guilty could be inferred and whether a dismissal was an appropriate sanction.

---

75 *Tubecon (Pty) Ltd and National Union of Metal Workers of SA* 1991 12 ILJ 437 (ARB).

The statutory test for fairness of a dismissal in the United Kingdom is contained in section 98(4) of the *Employment Rights Act* 1996. It states:

> *the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer:*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*[76]

Patrick Elias had pointed out that the only clear and uncontroversial principle to arise from this formulation is that it is not for a tribunal simply to substitute its own decision for that of the employer. In *Union of Construction, Allied Trade & Technicians v Brain*[77] the test was formulated in the following way. The approach was that the tribunals had to put themselves in the position of the employer, to inform themselves of what the employer knew at that moment, and to imagine them in the position of the employer and, would a reasonable employer in those circumstances dismiss his employees? This seems a very sensible approach but is subject to one qualification alone. They must be careful not to fall into the error of asking: would we dismiss? Because a person may sometimes have a situation in which one reasonable employer would dismiss while the other one would not.

The first appearance of the reasonable employer approach in South Africa was in the *Computicket v Marcus NO & others*[78] case. In the course of the review of the commissioner's award to the effect that while misconduct had been established it did not justify a dismissal, Brassey

---

76 John Myburgh SC and Andre van Niekerk *Dismissal as a penalty for misconduct: the reasonable employer and other approaches* 2000 21 ILJ 2145 2147; the reasonable employer test was rejected in the *Toyota SA Motors (Pty) Ltd v Radebe & others* 2000 21 ILJ 340 (LAC).

77 *Union of Construction, Allied Trade & Technicians* v *Brain* 1981 IRLR 224.

78 *Computicket v Marcus NO & others* 1999 20 ILJ 342 (CC).

AJ decided that, in his view, the commissioner had come to the incorrect decision, but that he should not interfere with it. He stated that when approaching this question he had to ask himself whether a reasonable person in the position of the first respondent might have come to the same conclusion. In his view, he considered that the respondent could have come to such a conclusion as a reasonable person.

The question of a sanction for misconduct is one on which reasonable people can easily differ. One person may believe that a dismissal is an appropriate sanction, while another may feel that something less, such as a warning, would be appropriate. Clearly, there are circumstances in which a reasonable person would naturally conclude that dismissal is the appropriate sanction. For example, where a significant amount of money is stolen, fraud or other dishonest conduct on the part of the third respondent. There are also obvious circumstances in which dismissal would be unreasonable. For instance, where an employee is five minutes late for work in circumstances in which such misconduct has no harmful consequences for the employee. Between those two poles there is a range of possible circumstances in which one person might take a different view from another without either of them properly being castigated as unreasonable.

The question of determining the appropriate sanction and the requirements of consistency also assumes much importance in the situation of group misconduct. Must all employees found committing the same offence receive the same disciplinary sanction? The first argument is that consistency demands that all employees be treated equally when they commit the same offence, and therefore the same disciplinary sanction must be imposed on all the employees. This will definitely be

the case where employees are acting in concert, or are pursuing a common goal. [79]

The second argument is that fairness requires a consideration of the circumstances of each individual. Differing sanctions may be imposed on the basis of factors as length of service and employees' disciplinary records. In other contexts, the tension between the requirement for consistency and the requirement that the personal circumstances of an employee be taken into account when determining sanctions, has led to conflicting approaches. In light of the decisions of the Industrial Court and the Labour Appeal Court, the importance of the proper consideration of imposing appropriate sanctions is emphasized. It seems that the courts would probably require an individual approach to the imposition of sanctions, and require the employer to consider the appropriate sanction applicable to each individual employee separately, and then differentiate where deemed necessary. [80]

The normal rules of procedural fairness are applicable when an employer has to discipline a group for misconduct. A problem may arise when employees in the group request a joint inquiry instead of being dealt with on an individual basis. In principle nothing prevents such an approach and a request to this effect should be considered. Where such an approach is impracticable, the court will probably not regard its rejection by the employer as unfair.

---

79 P A K Le Roux and A van Niekerk *The South African Law of unfair dismissal* (Juta Kelwyn 1994) 183.

80 P A K Le Roux and A van Niekerk *The South African Law of unfair dismissal* (Juta Kelwyn 1994) 183; *Durban Confectionery Works (Pty) Ltd t/a Beacon Sweets v Majangaza* 1993 14 ILJ 663 (LAC).

8.1 Dismissal based on operational requirements

The Labour Relations Act[81] permits employers to dismiss employees for operational requirements. These requirements are defined as requirements which are based on economic, technological, structural or similar needs.[82] An expansive definition is reconcilable with the approach taken by the labour courts that a retrenchment is bona fide if it is designed not only to stem losses but also to increase profits. While the legislature clearly does not intend to force employers to keep redundant workers on their books, sections 189 and 189A of the *Labour Relations Act*[83] are designed to guarantee that retrenchment is not resorted to when it can conceivably be avoided. In the past, the courts have been wary of declaring retrenchments unfair solely because the employer could, objectively, have afforded to retain all or some of the retrenched employees. All that has generally been required is a *bona fide* economic rationale. The retrenchment must be aimed at effecting savings. That the losses are caused by mismanagement does not preclude an employer from retrenching. Employees may indirectly contribute to employer's losses. Dismissal for operational requirements was designed to stem losses and increase profit. If an employee is dismissed the losses would end and the employer's profit will increase.

In the *Chauke & others v Lee Service Centre t/a Leeson Motors*[84] case the new paintwork on the panel beaten vehicles was being deliberately scratched. The employer was suffering a loss because he could not find the perpetrator, and the employees refused to give him information which could lead to the detection of the perpetrator. The employer could not

---

81 *Labour Relations Act* 66 of 1995.

82 Section 213 of the *Labour Relations Act* 66 of 1995.

83 *Labour Relations Act* 66 of 1995.

84 *Chauke & others v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC).

afford the loss. Thus, on the grounds of operation requirements the employer was justified to dismiss his employees who refused assist him.

8.2 Compensation as an alternative

As seen, there must be consistency. Employees must be treated in the same way. Thus employees must be given the same punishment for the same misconduct. Is it really fair to dismiss employees who did not actively take part in the primary misconduct? Is it fair to give the perpetrator who committed the primary misconduct and the employees who did not reveal the information about the perpetrator, the same punishment of dismissal? Can we not look at the law of delict and incorporate it into the labour law? Employees who refuse to provide the employer with information should pay compensation as an alternative to dismissal to the employer for the losses that he suffered, for the employees refusal to help their employer. This again shows that an employer employee relationship cannot function properly without trust.

9 The finale solution for shrinkage

Judge Adolph Landman examined a recent arbitration award where, in a desperate attempt to fight shrinkage, some employers resort to dismissing groups of employees who are unable to explain how stock losses occurred.

Shrinkage is an inside jobs of theft by employees. Employers classically approach the problem in two ways. First, some employers accept that loss is foreseeable, and then the employer budget for it. Secondly they try to catch the thieves. The latter is difficult, if not impossible to achieve. Employers have devised more innovative measures to fight shrinkage.

In *FEDCRAW / Snip Trading (Pty) Ltd*[85] the respondent was a general retailer company with many small stores in the lower end of the market. This company had a policy that all employees at a store would be held accountable for stock losses. The aggrieved union objected, and threatened with industrial action. The parties then entered into an agreement that only the store managers would be held accountable for stock losses.

The union was still dissatisfied and the matter was referred to private arbitration. The arbitrator had to decide whether stock losses constitute misconduct, whether employees other than the managers could be held accountable for stock loss, and whether stock loss constituted collective misconduct for all store employees. The union argued that the policy was unfair because it was based on the collective guilt principle. The employer stated that the policy was necessary if the company wants to survive in a competitive market.

---

85 *FEDCRAW / Snip Trading (Pty) Ltd* 2001 7 BALR 669 (P).

The arbitrator held that the provision in each employee's contract of employment in terms of which he accepted responsibility for stock loss was not conclusive because an innocent breach of contract would not amount to misconduct. Where it can be proven that stock loss was directly attributed to an employee, he could be disciplined. Store managers could be held accountable for stock loss because it was part of their job to guard the stock. Employees other than managers could only share this responsibility if they did not properly perform duties related to stock loss.

As to whether stock loss can be seen as collective misconduct, the arbitrator stated that while the concept of collective guilt is repugnant to the principle of natural justice, the term collective misconduct refers to a situation in which a number of employees participate in a common purpose. In a situation like that, the employees are held individually liable. The company's stock loss policy was not based on the concept of collective guilt[86] which implies that all employees of a group could be punished for the misconduct of some employees of the group. The employees had to account for stock losses individually. Team liability is not unfair because the responsibility of the employee who is part of a team tasked to accomplish the standard is indivisible. The concept of team misconduct, was upheld which was the basis of dismissal of an entire staff at a store at which shrinkage had occurred. The argument of the union that only managers should be disciplined for stock losses entailed an accepting the principle that when team failure occurs the captain should be dismissed. The company's case was that all the employees of a team shared a responsibility for the team's failure. This was acceptable if each employee of the team was given an opportunity to deny individual guilt. If the employees could not do so, their guilt in the

86 The term collective guilt assumes that all members of a group are guilty simply, because a perpetrator belonged to that group.

final analysis would be based on individual failure to reach the standard set by their employer.

The commissioner held that acts or omissions contributing to stock losses can constitute misconduct for which all employees from store manager down, can be held liable on a collective basis, unless an employee can prove that he did not personally contribute, or could not have prevented the loss. The conclusion reached was as follows. Stock loss, being a fact, could not in itself constitute misconduct. The question to be addressed was:

"Can an employee be said to have committed misconduct solely because a stock loss has occurred at the store where he or she is employed?" [87]

The arbitrator then observed, correctly, that for purposes of establishing whether stock losses amount to misconduct, the contract of employment is not definite. The arbitrator did so because the company sought to rely, in part, on an undertaking by Snip employees that they were accountable for stock losses. He said that this was not definitive. A contract may not conflict with the provisions of the *Labour Relations* Act[88]. In any event, Snip defined stock losses in its disciplinary code as:

"[a]ny action whereby an employee, through negligence or on purpose, cannot account satisfactorily for stock entrusted to that employee". [89]

The importance of proving fault was therefore recognised.

---

87 J Landman *Team misconduct- The final solution to shrinkage* Employment Law Journal 2001 October 2; John Grogan *Dismissal* (Juta Grahamstown 2004) 168.

88 *Labour Relations Act* 66 of 1995.

89 J Landman *Team misconduct- The final solution to shrinkage* Employment Law Journal 2001 October 2; John Grogan *Dismissal* (Juta Grahamstown 2004) 168.

The arbitrator stated that the parties were *ad idem* that store managers can properly be held accountable for stock losses, and that managers can be dismissed if stock losses took place. The only defence available to managers in stock loss cases was to prove that stock went missing through circumstances beyond their control. When a manager raised such defence, the onus rested on him to prove it. If the managers could not prove it, the only possible inference was that they had failed to exercise the attentiveness and care required of them.[90]

The focus of the arbitration was whether employees other than managers could be held accountable when stock losses occurred. May employees be held accountable for stock losses without proof that they actually had a hand in the disappearance of the stock? This will depend on whether the employee's work entailed activities which, if not properly performed, would result in stock loss. The arbitrator stated that the extent of employees' responsibilities reduced down the organisational ladder. The mere fact that a superior has greater responsibility is not enough to shield employees from disciplinary action if they did not succeed to perform tasks falling within their job descriptions. On the other hand, a subordinate cannot be held responsible for the acts or omissions of a superior merely because the situation created by the superior's default causes the employer loss. This was the balance that had to be struck by a fair stock loss policy.[91]

---

90 J Landman *Team misconduct- The final solution to shrinkage* Employment Law Journal 2001 October 3; John Grogan *Dismissal* (Juta Grahamstown 2004) 169.

91 J Landman *Team misconduct- The final solution to shrinkage* Employment Law Journal 2001 October 3; John Grogan *Dismissal* (Juta Grahamstown 2004) 169.

10 The English law on misconduct

A dismissal relating to the conduct of the employee covers a very wide scope of potential wrongs. They can be classified in a number of ways, but perhaps it is most useful to consider them in three distinctive categories. The first is a refusal to obey a lawful and reasonable order of the employer. Second is a violation of the employer's disciplinary standards. This may constitute conduct which is either contrary to the organisation's disciplinary rules or contravenes the standards of behaviour commonly required by the employer. Thirdly the commission of criminal offences outside the place of work may also, in particular circumstances, justify the employer dismissing the employee. There are some limits to the range of conduct which can be relied upon to justify a dismissal. In *Thomson v Alloa Motor Co Ltd*[92] the Scottish EAT described such conduct as:

> *"actings (sic) of such a nature whether done in the course of the employment or outwith it that reflect in some way on the employer-employee relationship."*[93]

10.1 Conduct and reasonableness

To determine whether a dismissal for misconduct is fair in a situation where an employer suspects that a particular employee has committed the misconduct in question, the following standards, enunciated by Arnord J, giving judgment for the EAT, in *British Home Stores Ltd v Burchell,*[94] provides some valuable guidelines

> *What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those*

---

92 *Thompson v Alloa Motor Co Ltd* 1983 IRLR 403.

93 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) DI/851 at par 1352.

94 *British Home Stores Ltd v Burchell* 1978 IRLR 379, 1980 ICR 303.

grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters.[95]

It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way though, is reasonable and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion.[96]

Two important qualifications need to be made to this test. The first is, because of a change in the *Burchell* decision concerning the burden of proof, the onus is not on the employer to establish the last two elements, though it still remains on him or her to satisfy the tribunal that he or she genuinely did dismiss the employee for misconduct.

Secondly the test is inapplicable in circumstances where the employer believes that the misconduct is the work of one of two employees, and a possibility that it could be both the employees. This qualification is supported by a Court of Appeal decision in the *Monie v Carol Racing Ltd*[97] case. It is also important to emphasise the position of each employee and that it should be considered separately and not dealt with together.

---

95 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) DI/851 at par 1453.

96 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) DI/851 at par 1453.

97 *Monie v Carol Racing Ltd* 1980 IRLR 464, 1981 ICR 109 at par 1467.

The restrictions to these qualifications, and the guidelines have now been specifically approved by the Court of Appeal in the *Weddel*[98] and in the *Monie*[99] case. Another division of the Court of Appeal emphasised that the *British Home Stores* test was not intended to be of universal application. However, the court did not deny its applicability to situations where a single employee is suspected of dishonesty.

In the *Weddel* case the facts were as follows. A meat salesman was dismissed for dishonesty. There was a strong suspicion that he had sold meat and dishonestly retained the money. He was also informed by the manager that he was going to be dismissed for gross misconduct, and was asked if he had any thing to say about this. The employee said nothing, except that he did nothing wrong. He was dismissed and charged with an offence, but was acquitted at his trial. The employment tribunal, with the legal chairman dissenting, considered the dismissal unfair on the grounds that the employee had not been given a sufficient opportunity to explain what had happened. The EAT refused to interfere with this finding particularly because the tribunal had heard evidence over a three day period. The Court of Appeal dismissed the employer's appeal.

Two matters were emphasised. The first was that the employer did not put the precise allegation to the employee. It was not very clear to the employee that he was going to be dismissed for dishonesty rather than administrative incompetence. The second was that the employee was not given an opportunity to defend his good reputation or explain his answer. In the course of their judgements, all members of the Court of Appeal considered the proper test submitted by Sir Hugh Griffiths in *St Anne's Board Mill.*[100] There the question was whether the employer has

---

98 *W Weddel & Co Ltd v Tepper* 1980 IRLR 96, 1980 ICR 286.

99 *Monie v Carol Racing Ltd* 1980 IRLR 464, 1981 ICR 109 at par 1467.

100 *St Anne's Board Mills Co Ltd v Brien* 1973 IRLR 309, 1973 ICR 444.

acted reasonably and whether this should depend not only on the circumstances known to the employer at the moment of dismissal but also on circumstances which he ought reasonably to have known at that time

10.2 Reasonable grounds for the employer's belief

The requirement to hold an investigation as is reasonable in all the circumstances is only applicable where there is a suspicion of misconduct. When the employee admits that he or she has committed the misconduct, there is very little purpose in carrying out the investigations. The employer will then be acting reasonably in believing that the misconduct has been committed.

It is very important for an employer to be clear precisely to what the employee pleads guilty to. In the *McLaren*[101] case the employee was charged with assault. He stroked a miner who disagreed with a working miner during the miner's strike. The NCD decided it would dismiss only if he was found guilty. The employee pleaded guilty on technical grounds. For instance, he accepted that he had threatened violence but denied physical contact. He was dismissed. The Court of Appeal held that the employee should have been given the opportunity to explain his conduct, and that the tribunal had erred in holding that this was not necessary, because of the miner's strike. Because of the uncertainty of the precise basis on which the decision was taken, the case was remitted.

10.3 The reasonable belief-suspicion of two or more employees

The requirement that the employer must reasonably believe in the employee's guilt is inapplicable where the employer reasonably suspects one or more employees are guilty of misconduct, but the employer

---

101 *McLarren v National Coal Board* 1988 ICR 370.

cannot identify which one. In circumstances like these, the employer may be justified in dismissing all, notwithstanding that he does not have reasonable grounds to believe all are guilty. Provided he reasonably believes that one of them has committed the misconduct, this may be sufficient. This was the view in the *Monie*[102] case. In this case, money had disappeared from the employer's safe. There were strong grounds to believe that either the appellant or his assistant had taken it. But since the company did not know who it was, it dismissed both of them. One of them claimed that it was an unfair dismissal and the Court of Appeal upheld the tribunal's finding that the dismissal was fair and rejected the EAT's view that the *British Home Store* test should apply. In the course of his judgment, Stephenson L J, who had been a member of the court in the *Weddel's*[103] case when it had affirmed the *British Home Store* test, commented the following

> *To treat belief in the guilty of the particular employee as applicable to a situation in which an employer finds himself reasonably believing in the guilty of one or more of two or more employees but unable in fairness to decide which of them is guilty is to pervert a valuable guideline to interpreting and applying the statute in a way which turns justice into an inflexible rule which constrains tribunals to deicide cases contrary to justice and equity and to the letter and spirit of the statute.*[104]

Obviously this case does not support the proposition that an employer will always be able to dismiss both men, irrespective of the nature of misconduct. Essentially, the dismissals were held to be fair, because the employer had to take action to protect his own interests. He could not be expected to retain a senior employee whom he could reasonably suspect of dishonesty. The principle is not limited to dishonesty. In *McPine and McDermott*[105] two company fitters were dismissed because

---

102 *Monie v Carol Racing Ltd* 1980 IRLR 464, 1981 ICR 109.

103 *W Weddel & Co Ltd v Tepper* 1980 IRLR 96, 1980 ICR 286.

104 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) D1/880. at par 1467

105 *McPine and McDermott v Wimpey Waste Management Ltd* 1981 IRLR 316.

they had failed to top up a gear box with oil and it subsequently seized up. It was not clear which of the fitters had been negligent. Both had signed the inspection report. The EAT accepted that the principle in the *Monie*[106] case could apply. However, the tribunal did add that the principle should not be stretched too far in cases other than suspected dishonesty.

Both the *Monie*[107] and *McPine*[108] cases concerned two suspects. But as Stephenson I J quote indicates, the same test in principle could apply where more than two employees are involved. It will become more difficult for an employer to justify the dismissal as the number of suspects' increases. To dismiss two suspects is obviously more justifiable than dismissing all six employees. The business interests would have to be overwhelming to permit the latter.

In *Whitbread & Co plc v Thomas*[109] the principle was applied to a case where one of three persons was suspected of stock losses, and, despite extensive investigations, the company could still not determine which one was responsible. All three were dismissed. The employment tribunal held that since the case did not involve dishonesty there was no justification for the employer's action and that the dismissals were unfair. The EAT upheld the employer's appeal. Popplewell J concluded that the *Monie* principle was capable of being applied to cases of conduct or capability, whilst recognising that such cases would be exceptional. In *Parr v Whitbread plc*[110] the principle was applied where the applicants was one of four employees dismissed. The EAT set out the principles to be applied in cases of this kind.

---

106 *Monie v Carol Racing Ltd* 1980 IRLR 464, 1981 ICR 109.

107 *Monie v Carol Racing Ltd* 1980 IRLR 464, 1981 ICR 109.

108 *McPine and McDermott v Wimpey Waste Management Ltd* 1981 IRLR 316.

109 *Whitbread & Co plc v Thomas* 1988 IRLR 43, 1988 ICR 135.

110 *Parr v Whitbread plc (t/a Threshers Wine Merchants)* 1990 IRLR 39.

In an attempt to analyse the *Monie* principles where dishonesty is involved together with the *Thomas* principle where mere incapacity was involved, the EAT suggested that a possible approach as follows:

> *...If a Tribunal is able to find on the evidence before it : (1) that an act had been committed which if committed by an individual would justify dismissal; (2) that the employer had made a reasonable -a sufficiently thorough- investigation into the matter and with appropriate procedures; (3) that as a result of that investigation the employer reasonably believed that more than one person could have committed the act; (4) that he employer had acted reasonably identify the individual perpetrator, then provided that the beliefs were held on solid and sensible grounds at the date of dismissal, an employer is entitled to dismiss each member of that group.*[111]

Where there are a potential number of suspects, but the employer can justifiable conclude after the investigation that one or more of the employees could not be guilty of the offence, the employer is not obliged to dismiss such individual. The *Frame Snooker Centre*[112] case stated that if there are solid and sensible grounds for differentiating between the members of the group, it will not be unfair to dismiss those employees who still remain under suspicion after the investigation.

10.4 Reasonable investigation

The investigation process is very important for the following three reasons. It enables the employer to discover the relevant facts to enable him or her to reach a decision as to whether or not an offence has been committed. Secondly if an investigation is properly conducted it gives an employee a secure opportunity to respond to the allegations of unfairness. Thirdly, even if misconduct is established, it provides an opportunity for any factors to be put forward, which might mitigate the offence, and give effect to the proper sanction. Failure to comply with the essential standard of fairness will render a dismissal unfair.

---

111 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) D1/881 at par 1470 -1480.

112 *Frame Snooker Centre v Boyce* 1992 IRLR 472.

Section 1 paragraph 9 of the ACAS Code of Practise highlights the following elements of disciplinary procedures which are relevant to the investigations employers carry out.

> *Consequently good disciplinary procedures should:*
>
> *(viii) provide for workers to be informed of the complaints against them and where possible all relevant evidence before any hearing; (ix) provide workers with an opportunity to state their case before decisions are reached; (x) provide workers with the right to be accompanied...(xi) ensure that, except for gross misconduct, no worker is dismissed for a first breach of discipline; (xii) ensure that disciplinary action is not taken until the case has been carefully investigated; (xiii) ensure that workers are given explanation for any penalty imposed; (xiv) provide a right of appeal – normally to a more senior manager – and specify the procedure to be followed.*[113]

This provides the framework of a sensible procedure. It is very difficult to state in the abstract how detailed the procedure should be. In *ILAE v Gravett,*[114] the EAT commented that it all depends on the extent of the evidence available to the employers. Wood J puts it as follows,

> *...at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase.*[115]

10.5 Dismissal as a fair sanction

When determining whether or not dismissal is a fair sanction, it is not for the tribunal to substitute its own view of what the appropriate penalty for the employer would be. Judge Philips stated in the *Trust Houses Forte*[116] case that:

> *It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well*

---

113 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) D1/883.at par 1485

114 *ILAE v Gravett* 1988 IRLR 497.

115 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) D1/883.at par 1486

116 *Trust Houses Forte Leisure Ltd v Aquilar* 1976 IRLR 251.

> *be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.*[117]

Management has a discretion to decide on a range of penalties, all of which can be considered reasonable. It is not for the tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was reasonable. In misconduct cases the employee's length of service and the need for consistency by the employer will be considered.

The ACAS Code of Practise emphasises the importance of warnings as the normal sanction to impose for acts of misconduct. It states that except for gross misconduct, no employees are dismissed for the first breach of discipline. Warnings give an employee an opportunity to change and improve. In the *Retarded Children's Aid Society v Day* case Lord Denning said that it is good sense and reasonable that for the first offence one should not dismiss a person on the instant without any warning or to give him a chance to change.

The Code itself suggests that the warnings should be oral, for relatively minor offences, but written for more serious offences. The courts have tended to be relatively unconcerned about the particular form which a warning has taken, provided it has achieved its purpose of clearly communicating to the employee that his job is in jeopardy. Moreover occasionally even past practice will be such that an employee will then know that a particular misconduct can lead to a dismissal.

---

117 *Harvey on Industrial Relations and Employment* (Butterworths UK 2005) D1/917at par 1534.

11 Conclusion

As seen at the beginning of this dissertation, trust between an employer and employee is very important. Trust is the basis of solving derivative misconduct.

An employer has a very big problem when it comes to receiving information from an employee to help find the perpetrator of the misconduct. Usually, an employee(s) refuses to reveal any information to his employer to help find the perpetrator. However, if there is a trust relationship between the employer and the employee, it may help to overcome the problem. The employee can go to his employer without fear, knowing the information he will give to his employer, is in confidence, and his or her identity would not be revealed. The employer can also trust what the employee say is true. The employee must feel that he is also part of the business and if anyone harms the business, it also harms him as an employee.

In the situation where it is said that everyone must be treated the same for the same misconduct, I personally do not think it is fair to give the employee who committed the primary misconduct, and the employee who that saw the misconduct but did nothing, the same punishment. If it is possible to separate the one from the other, it would be reasonable. The employee, who saw the misconduct being committed and did nothing to stop it, must get a different sanction from the employee who committed the primary misconduct. This sanction must be less harsh than that of the primary misconduct, because this employee broke the trust relationship between him and the employer, and did not commit the primary misconduct.

But now the big question still remains. What must the employer do when he cannot establish the perpetrator at all? Is dismissal of all the employees, of that group the only answer, and is this reasonable?

I think is it reasonable, because the employer must do something to protect his interests. If the real perpetrator cannot be identified, the employer may dismiss the group of the employees suspected of the misconduct. English law uses an investigation process. The investigation process tries to find the perpetrator responsible for the misconduct. It also absolves employees who could not have been responsible for the misconduct. This process is very sufficient, because it also looks at the interest and rights of the employee. It gives the employee the opportunity to state his case concerning the charges against him.

This investigation process would work perfectly in South Africa's legal system. It gives the employee the right to state his or her case concerning the charges against. This is in line with the right everyone has to a fair trail. It also abides by the *Constitution*,[118] that everyone is equal before the law. Thus, suspects are all treated in the same way though the investigation.

Thus, if South Africa could make use of an investigation process similar to the English law, it would definitely help the employer with the problem of derivative misconduct.

---

118 Section 9 of the *Constitution of the Republic of South Africa*, 1996.

Bibliography

Articles:

B:

Blowing the whistle Employment Law anonymous

C:

Juta Update 2004 *Cracking the code. The code of Good Practice: Dismissal*

D:

PAK Le Roux *Dismissal for misconduct: some reflections* 2004 25 ILJ 868

John Myburgh and Andre van Niekerk *Dismissal as a penalty for misconduct: the reasonable employer and other approaches* 2000 21 ILJ 2145

Juta Update 2004 Labour Law *Derivative misconduct;* 2004 1 BALR 1 (P)

Employment Law Journal *Dismissal of the innocents –Derivative misconduct* March 1999

E:

Employee's Duty of Care anonymous

F:

H.W Shaw *Fair Employment Practice Dishonesty – Is suspicion enough to warrant dismissal?*

G:

Group misconduct anonymous

T:

Employment Law Journal Judge Adolph Landmann *Team misconduct – The solution to shrinkage?* October 2001

Trusting employees to do the right things Employment Law anonymous

W:

Employment Law Journal *Workplace crime – Must employers leave it to the police?* 2001 17(5) 14

Books:

C:

CR Snyman *Criminal Law* 4th ed (Butterworths Durban 2002)

D:

Neetling, Potgieter and Visser *Deliktereg* 4th ed (Butterworths Durban 2002)

John Grogan *Dismissal* (Juta Grahamstown 2004)

E:

Brassey *Employment Law* Volume one (Juta Kenwyn regularly updated)

H:

Harvey on Industrial Relations and Employment (Butterworths UK 2005)

L:

W.A Joubert *The Law of South Africa* First Reissue volume 6 (Butterworths Durban 1996)

S:

Snyman *Strafreg* 4th ed (Butterworths Durban 1999)

U:

PAK Le Roux and André van Niekerk *The South African Law of unfair dismissal* (Juta Kenwyn 1994)

W:

Grogan J *Workplace Law* 7th ed (Juta Cape Town 2003)

Case Law:

B:

British Home Stores Ltd v Burchell 1978 IRLR 379, 1980 ICR 303

C:

Chauke & others v Lee Service Centre t/a Leeson Motors 1998 19 ILJ 1441(LAC)

Chauke & others v Lee Service Centre t/a Leeson Motors 1998 JOL 3624 (LAC)

Computicket v Marcus NO & others 1999 20 ILJ 342 (LC)

CWIU and Dladla v Total South Africa (Pty) Ltd (Unreported 11/2/11592 dated 6 June, 1994)

D:

De Beers Consolidated Mines Ltd v CCMA & others 2000 9 BLLR 995 (LAC)

F:

FAWU & others v Amalgamated Beverage Industries 1994 12 BLLR (LAC)

FEDCRAW / Snip Trading (Pty) Ltd 2001 7 BALR 669 (P)

Frame Snooker Centre v Boyce 1992 IRLR 472

H:

Hardrodt (SA) (Pty) Ltd v Behardien & Others 2002 23 ILJ 1229 (LAC)

I:

ILAE v Gravett 1988 IRLR 497

M:

McLarren v National Coal Board 1988 ICR 370

McPine and McDermott v Wimpey Waste Management Ltd 1981 IRLR 316

Monie v Carol Racing Ltd 1980 IRLR 464, 1981 ICR 109

N:

NSCAWU & others v Coin Security Group (Pty) Ltd 1997 1 BLLR 85 (IC)

NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd 2004 1 BALR 1 (P)

P:

Parr v Whitbread plc (t/a Threshers Wine Merchants) 1990 IRLR 39

Q:

Queenstown Fuel Distributors CC v Labuschagne NO & others 2000 21 ILJ 166 (LAC)

R:

Rand Water Staff Association obo Snyman v Rand Water 2001 BALR 543 (P)

Robb v Green 1895 2 QB 1

S:

SACTWU & others v Novel Spinners (Pty) Ltd 1999 11 BLLR 1157 (LC)

St Anne's Board Mills Co Ltd v Brien 1973 IRLR 309, 1973 ICR 444

T:

Thompson v Alloa Motor Co Ltd 1983 IRLR 403

Toyota SA Motors (Pty) Ltd v Radebe & others 21 ILJ 340 (LAC)

Trust Houses Forte Leisure Ltd v Aquilar 1976 IRLR 251

Tubecon (Pty) and National Union of Metal Workers of SA 1991 12 ILJ 437 (ARB)

U:

Union of Construction, Allied Trade & Technicians v Brain 1981 IRLR 224

W:

W Weddel & Co Ltd v Tepper 1980 IRLR 96, 1980 ICR 286

Whitbread & Co plc v Thomas 1988 IRLR 43, 1988 ICR 135

Internet addresses:

http://www.int.co.za [date used 19 May 2005]

http://www.hrfocus.co.za [date used 19 May 2005]

http://www.iol.co.za [date used 19 May 2005]

http://www.labourprotect.co.za [date used 19 May 2005]

http://www.workplace.co.za [date used 19 May 2005]

http://legalbrief.wnd.co.za [date used 19 May 2005]

http://www.roylaw.co.za [date used 19 May 2005]

http://www.bwasa.co.za [date used 19 May 2005]

http://www.sitemanager.co.za [date used 19 May 2005]

http://www.gilesfiles.co.za [date used 19 May 2005]

Legislation:

B:

Basic Conditions of Employment Act 75 of 1997

C:

The Constitution of the Republic of South Africa, 1996

L:

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

P:

Protected Disclosures Act 26 of 2000.