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A critical analysis of the appropriateness of dismissal as an automatic sanction for dishonesty in the workplace.

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Firstly, all praise goes to Mother Saraswathie for making this possible. Jai Mata Di!

I would like to dedicate this dissertation to my dearest sister, Anush for her motivation and support. Gone too soon, but always in my heart.

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List of abbreviations

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)
LRA	Labour Relations Act 66 of 1995
ILJ	Industrial Law Journal
CCMA	Commission on Conciliation, Mediation, and Arbitration
SA Merc, LJ	South African Mercantile Law Journal
Stellenbosch L Rev	Stellenbosch Law Review

Abstract

Even though South Africa's Constitution and the LRA entrench the rights of employees not to be unfairly dismissed, employees are dismissed for what are arguably minor infractions. Numerous employees have lost their human dignity and livelihoods for a single act of irrationality. This dissertation focuses on analysing if automatic dismissal for dishonesty-related misconduct is appropriate. The emphasis is on the requirements for determining a fair sanction for dishonesty-related misconduct and the factors that commissioners and the courts need to take into consideration in determining an appropriate sanction.

Dismissals for misconduct are often not fair, reasonable, and just as required by our labour legislation. To analyse the appropriateness of dismissal as an automatic sanction for dismissal, articles, case law, and literature from various textbooks were considered. The results of the research indicate that not all acts of dishonesty should automatically result in the sanction of dismissal. The key question is whether the dishonesty is of such seriousness that it renders the continuation of the employment relationship intolerable. The importance and the impact of the breached rule on the employer's business as well as the employee's disciplinary record and length of service and the employee's circumstances must be considered in determining if the sanction of dismissal is appropriate. The recommendation made is that for minor cases of dishonesty, an employer should consider the employment relationship intact and therefore refrain from imposing the sanction of dismissal. A graduated system of discipline is suggested in these instances.

Contents

Chapter One

1.1 Introduction

"Dishonesty is generally regarded as behaviour that is untrustworthy, deceitful or insincere and intended to mislead another person."[1] Dishonest misconduct may include theft, unauthorised possession of company property, fraud, and misrepresentation. What should one do when someone steals from the goose that lays the golden egg? Workplace theft is synonymous with dishonesty. Theft by employees in the workplace is rife and is a contributor to the economic crises that prevail worldwide. In addition to losing profits due to shrinkage, an employer will be faced with additional costs. These costs could include legal expenses, loss of productivity, the possible implementation of new and improved security measures, the replacement of products, increasing insurance, loss of valuable staff, and the recruitment and training of new staff.[2] Industry placed shrinkage at between 5 and 7 percent as a result of dishonest staff.[3]

Despite some of the loss prevention strategies devised at employers' workplaces dishonesty remains high. To protect their business interests, some employers have adopted a zero-tolerance approach towards workplace dishonesty as a preventative measure. According to the Oxford English Dictionary, "a zero-tolerance approach imposes a punishment for every infraction of a stated rule."[4] Employers have always had to deal with the problem of dishonest employees even before our labour laws. As early as the 1940s, the courts have adopted the approach that dishonest conduct warrants dismissal.[5] This has resulted in many employees losing their livelihood. For many employees, a single act of irrationality has cost them their jobs. The employer's perspective that dishonesty in the workplace should not be tolerated is not incorrect. It would be very difficult for an employer to place trust in a dishonest employee. Mischke[6] has indicated "that trust is an issue in dishonesty related

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[1] K Newaj, "The Impact of Dishonesty on Employment: Edcon, Prior and beyond" (2016) 79 Thrhr 430.
[2] M.C Cant, E.C Nell. "Employee theft in the South African retail industry: Killing the goose that lays the golden egg*"* (2012) 10 (1-4) *Corporate Ownership & Control*, 444.
[3] Ibid.
[4] The Oxford English Dictionary, 2nd Ed. 1989.
[5] K Newaj, "The Impact of Dishonesty on Employment: Edcon, Prior and beyond" (2016) 9 *Thrhr* 430.
[6] Mischke "The breakdown of trust: Operational perspectives on the appropriate sanction" (2010) 19 *CLL* 71.

misconduct." An employer would be placed in a very pertinacious position to trust an employee "who is guilty of theft or fraud."[7]

This dissertation will analyse the issue of the appropriateness of dismissal as an automatic sanction where the employer has established that the employee is guilty of dishonesty in the workplace. The focus will be on Court decisions and the statutory guidelines for unfair dismissals. The question of whether or not our jurisprudence adequately assists employers and arbitrators to determine a fair sanction for acts of dishonesty in the workplace will be considered.

The importance of this study is to highlight that many employers have ignored the provision in the Code of Good Practice that states that the sanction must fit the misconduct.[8] Zero-tolerance policies do not talk to the principle of proportionality. In other words, the severity of the misconduct is not necessarily proportional to the sanction. The objective of this study is to identify deficiencies and to make recommendations thereafter.

1.2 Problem Statement

According to an old Afghan proverb, don't use your teeth when you can untie a knot with your fingers. The well-established principle of proportionality is highlighted in this metaphor. To this end, "legislative measures should not limit rights more than is necessary to accomplish the objectives of these measures."[9]
To date, many employees have been dismissed and their livelihoods have been taken away from them for what are arguably minor infractions of workplace rules.

The focus will be on the adoption of the zero-tolerance policy by employers to combat workplace dishonesty. The contribution of this dissertation is to inform policy.

In his article entitled "Dismissal for Misconduct Ghost of Justice: Past, Present, and Future" Van Niekerk has stated;

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[7] Ibid.
[8] Item 3(2) of Schedule 8 of the Code of Good Practice: Dismissal.
[9] D Jordaan, C Woodrow & M Pepper "Banning Private Stem Cell Banks: A Human Rights Analysis," (2009) 25:1 *South African Journal on Human Rights* 126.

> "The Labour Relations Act 66 of 1995 fails to articulate a normative foundation from which the right not to be unfairly deprived of work security might be derived. While the courts have established that the determination of a fair sanction for workplace misconduct necessarily entails a value judgment, they have failed to recognize that principled decision-making requires a coherent conception of justice."[10]

He endorses the principle that the conception of justice must be closely aligned with the constitutional value of dignity and that there must be a relationship of reasonable proportionality between the sanction and the misconduct. A person's dignity is dependent on job security. Having job security means that there is food, clothing, shelter, and other requirements for a good quality of life. Once a person is unable to sustain this, it will lead to his or her dignity becoming impaired.

The courts and commissioners take various factors into account when assessing whether to apply the policy of zero tolerance. In addition to the gravity of the misconduct, the courts and commissioners consider factors such as the employee's circumstances (length of service, disciplinary record, and personal circumstances), the nature of the job, and the circumstances surrounding the dishonesty. In many cases, the courts have emphasised that for an employment relationship to continue there must be mutual trust and confidence. The courts recognise the fact that both parties need each other in the employment relationship, therefore the interests of the employer and the employee must be taken into account. The decision by an employer to dismiss an employee for dishonesty-related misconduct must be linked to a legitimate business aim or an operational requirement. "A zero-tolerance approach would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise destined for the refuse bin."[11] The point here is that dismissal is not appropriate in all forms of dishonesty. Dismissal might be appropriate if the item was of high value and is a means of achieving the legitimate aims of an organisation. In the instance where an employee steals for example a

[10] Andre Van Niekerk, "Dismissal for Misconduct - Ghosts of Justice Past, Present and Future" (2012) 2012 *Acta Juridica* 102.
[11] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC) at para 18.

piece of bread that would have been thrown away, a zero-tolerance approach might not be appropriate.

The purpose of this research will be to critically analyse the appropriateness of dismissal as an automatic sanction for dishonesty in the South African workplace. It will take cognisance of the tests the courts have used in the past and look at the current test for the appropriateness of dismissal as an automatic sanction for dishonesty-related misconduct. This dissertation put forth the hypothesis that automatic dismissals for dishonesty as a result of a zero-tolerance policy are not one of the principles that are entrenched in the Constitution.

1.3 Research questions

- What are the statutory laws and guidelines that determine the fairness of a dismissal?
- What are the factors to be considered in determining an appropriate sanction?
- How have employers justified a zero-tolerance approach and to what extent is this justification fair?
- What is the court's approach to zero-tolerance policies?
- What are the alternatives to dismissal for dishonesty-related misconduct?

1.4 Methodology

The research was conducted using desktop research. Articles, case law, and literature from various textbooks were used to critically analyse the appropriateness of dismissal as an automatic sanction for dishonesty in the workplace. The research was conducted within our Constitutional and legislative framework. This research did not use any primary or empirical research methods.

1.5 Literature Review

In addition to examining the relevant case law and deducing the principles surrounding dishonesty in the workplace, it is important to consider the literature and legislation that impact this topic.

The following writers address this:

Van Niekerk argues that the LRA does not “expressly articulate any conception of justice that might inform the determination of the fairness of a particular dismissal.”[12] Section 185 of the LRA makes provision for the right of employees not to be unfairly dismissed.[13] Section 188 makes provision for unfair dismissal if the reason for the dismissal is not related to the employee's conduct, capacity, or based on the operational requirements of the employer.[14] The Code of Good Practice: Dismissal endorses the principle that not every act of misconduct warrants dismissal.[15] However, this framework does not provide a foundation for which the right not to be unfairly deprived of job security can be derived.[16] There is nothing in the framework from which the fairness of dismissal can be derived. Hence fairness is a value judgement. This then raises the questions of what values are important and how to exercise that value judgement?[17]The LRA goes as far as to suggest that not every act of dishonesty warrants dismissal and that dismissal is reserved for serious misconduct.[18]

Van Niekerk opines that rather than a zero-tolerance approach, employees should adopt a respect for employee dignity approach. One of the key principles of the code[19] is that there must be mutual respect between employers and employees. This respect-based approach will ensure that employers will stop treating employees as a means to an end in the employment relationship.[20] There must be some rational connection between the organization’s goals and the sanction of dismissal.[21] The concept of proportionality is examined in the article. He uses *Consani Engineering (PTY) Ltd v Commission for Conciliation Mediation and Arbitration*[22] to highlight this concept. Even if items of insignificant value are stolen by the employee, the onus is

[12] Andre Van Niekerk, "Dismissal for Misconduct - Ghosts of Justice Past, Present, and Future" (2012) 2012 *Acta Juridica* 102.
[13] S 185 of the LRA.
[14] S 188 of the LRA.
[15] Schedule 8 of the Code of Good Practice: Dismissal.
[16] Andre Van Niekerk, "Dismissal for Misconduct - Ghosts of Justice Past, Present, and Future" (2012) 2012 *Acta Juridica* 102.
[17] Ibid at 107.
[18] S 96 of the CCMA guidelines on Misconduct Arbitration.
[19] Item 1 (1) of Schedule 8 of the Code of Good Practice: Dismissal.
[20] Ibid 115.
[21] Ibid 116.
[22] *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 [BLLR] 995 (LC).

on the employer to establish a rational connection between avoiding shrinkage on the one hand and the penalty of dismissal on the other.[23]

The employer had been experiencing significant stock losses as a result of employee theft. To combat the problem a zero-tolerance policy to theft was introduced. Employees were notified that any unauthorised removal of company property would lead to disciplinary action and possible dismissal. The employee in question was found with a roll of tape concealed in his jacket as he was leaving the premises. He was charged and subsequently dismissed. The commissioner at the CCMA, although satisfied that the employee was guilty of dishonesty, felt that the penalty of dismissal was too harsh a sanction.

On review, the Labour Court did acknowledge that the employee has stolen an item that was of little value and the item was destined for the rubbish bin, however, the employer was justified in adopting a zero-tolerance policy to protect the company from ongoing stock losses. This change to zero-tolerance for dishonesty was a legitimate operational modification. The dismissal was upheld, although one might argue that if this case had come to the fore some three years later, the plight of the employee, Mr. Shoko, might have been different. The reason for this is that three years later the Constitutional Court affirmed that in making a judgement a commissioner has to balance the interest of the employer and employee before deciding if the sanction of dismissal is fair. The evidence for this is in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others*.[24] The approach is taken in the *Consani*[25] case was very differential. The commissioner failed to balance the interest of the employer and the employee. Since the *Consani*[26] case, there have been many more cases that echo “zero-tolerance.” In *Consani* [27] the judge stated that the employer’s disciplinary code did permit some discretion by requiring each case to be dealt with on its merits, but this did not amount to “an absolute bar to the subsequent, legitimate adoption of a zero-tolerance policy.”[28]

[23] Andre Van Niekerk, "Dismissal for Misconduct - Ghosts of Justice Past, Present, and Future" (2012) 2012 *Acta Juridica* 102.
[24] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC).
[25] *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 [BLLR] 995 (LC)
[26] Ibid.
[27] Ibid.
[28] Ibid at 1715.

Employers retain the right to set standards and the employer's zero-tolerance policy cannot be ignored.

KK Newaj agrees with Van Niekerk that the prerogative to set standards of conduct for employees' rests with the employer. Workplace standards are written policies that serve as a guideline and ensure a respectable working environment for all. The employer also has the prerogative to determine the appropriate sanction if the standard is transgressed. [29] This is especially so when the trust relationship has irretrievably broken down as a result of dishonesty-related misconduct by the employee. Workplace standards differ according to the size and nature of the employer's business but must create "certainty and consistency" in the application of discipline.[30] Employees are required to abide by workplace standards as long as they are reasonable. These standards should be there to promote the operations of the organisation. In other words, they should have an economic rationale. An employer has two reasons for adopting a zero-tolerance policy. The first reason is to remove a dishonest employee from the organisation and the second reason is to send a message to all other employees that dishonest behaviour will not be tolerated. However, workplace standards are guidelines and not pre-emptory statutes.

Tamara Cohen also affirms that "employers retain the right to set standards of conduct for its employees, as long as these standards are reasonable and the employees are aware or could reasonably be expected to be aware of these standards."[31] Non- compliance with a standard provides employers with the right to determine an appropriate sanction.[32]

According to the Code of Good Practice: Dismissal,[33] acts of serious misconduct are likely to attract a penalty of dismissal as are repeated acts of less serious misconduct.[34] Acts of serious misconduct that are likely to attract a sanction of

[29] K Newaj, "The Impact of Dishonesty on Employment: Edcon, Prior and beyond" (2016) 79 *Thrhr* 433.
[30] LRA 66 of 1995.
[31] Tamara Cohen, "The Reasonable Employer Test - Creeping in Through the Back Door" (2003) 15 *S Afr Mercantile LJ* 192.
[32] Ibid 20.
[33] Item 3(3) of Schedule 8 of Code of Good Practice: Dismissal.
[34] Item 3(2) of Schedule 8 of Code of Good Practice: Dismissal.

dismissal as identified by the Code are, gross dishonesty, wilful damage to an employer's property, physical assault on an employer, a fellow employee, or a client, and gross insubordination.[35] It is important to take cognisance of the fact that the Code mentions "gross dishonesty" as a justification for dismissal, rather than all acts of dishonesty. The Code endorses the concept of progressive discipline with dismissal being a sanction of last resort. Progressive discipline will be discussed in Chapter 3 of this dissertation.

Maqutu is also in agreement when she refers "to a clear and legitimate economic rationale for the rule of zero-tolerance and the sanction of dismissal"[36] The rationale for zero-tolerance rule and the sanction of dismissal is that the rule exists so that employers can protect their business interests and curb dishonesty. Although her article talks about collective guilt, dismissal for collective guilt will not be examined in this dissertation.

The rationale for zero- tolerance and the sanction of dismissal is not always appropriate as the *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* case [37] indicates. Dr. John Grogan said the LAC found the sanction of dismissal to be unfair because the employer failed to prove that there was an operational need that was so compelling as to warrant the need for Mrs. Mtolo's dismissal.[38] Mrs. Mtolo was found in possession of a roll-on deodorant that she failed to declare. The court failed to appreciate how a single transgression of the employer's zero-tolerance policy with regards to an item of such small value could warrant dismissal.[39] Although Mrs. Mtolo was guilty of transgressing a rule by not declaring the item in her possession, her dismissal for a single transgression was found to be unfair. The Court distinguished between dishonesty and theft. The dishonest act of not declaring the deodorant amounted to a failure to follow procedures and the sanction of dismissal was therefore not appropriate. Grogan

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[35] Item 3(4) of Schedule 8 of Code of Good Practice: Dismissal.
[36] Lindiwe Maqutu, "Collective Misconduct in the Workplace: Is Team Misconduct Collective Guilt in Disguise" (2014) 25 *Stellenbosch L Rev* 566.
[37] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC).
[38] Grogan, J *"Zero Tolerance No "no go zone" for Commissioners" (2021) Employment Law Journal vol 37 part 2* 18.
[39] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC) para16.

stated, “Employers frequently seek to justify dismissing employees for what may seem like minor infractions because they claim an entitlement to adopt a zero-tolerance approach.” [40] The Court did recognise the importance of zero-tolerance policies and acknowledged that the employee’s dismissal might have been appropriate if she had stolen an item of high value. The act of not declaring a roll-on was in the Court’s view innocuous and therefore the employee should not have been dismissed.

1.6 Overview of the Chapters

Chapter one of the dissertation will include the introduction/background, research questions, and the methodology of the study. The introduction sets the scene for the impact that workplace dishonesty has on employers and employees. The literature review will also be included in this chapter. This chapter also provides an overview of all other chapters in this dissertation.

Chapter 2: This chapter focuses on the statutory laws governing the determination of fairness in cases of dismissal for misconduct. To this end, the chapter will deal with the LRA, the Code of Good Practice: Dismissal[41] and the CCMA guidelines.[42]

Chapter 3 focuses on the factors that have to be considered in determining an appropriate sanction for dishonesty-related misconduct.

Chapter 4 deals with how the employer has justified the zero-tolerance approach to dishonesty and the extent to which the justification is fair or not. This chapter will further discuss the alternative to the automatic sanction of dismissal for dishonesty-related misconduct which is based on the importance of the right to dignity.

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[40] Grogan, J *“Zero Tolerance No “no go zone” for Commissioners”* (2021) *Employment Law Journal* vol 37:2 18.
[41] Schedule 8 of the Code of Good Practice: Dismissals.
[42] CCMA guidelines on Misconduct Arbitrations .PUBLISHED BY THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION IN TERMS OF SECTION 115(2) (G) OF THE LABOUR RELATIONS ACT, 1995 (ACT NO. 66 OF 1995)

Chapter 5 deals with the conflicting Shoprite judgements[43] and the impact of these judgements in determining the appropriateness of dismissal as an automatic sanction for dishonesty.

Chapter 6 will comprise the conclusion to this dissertation and make recommendations.

1.7 Conclusion

The protection of employees in the South African workforce has undergone progressive stages of development. Unscrupulous employers should no longer dismiss employees for every minor incident of dishonesty and claim reliance on zero-tolerance policies. In *Consani*[44] the employee was dismissed for stealing a roll of tape that was of minimal value. The Labour Court found the dismissal to be appropriate. The Some three years later the Constitutional Court took the view that the interests of the employer and the employee must be taken into account with regards to dishonesty-related misconduct before a dismissal can be justified. The *Shoprite case*,[45] three years later is an indication that the courts will look beyond claims of zero-tolerance in certain circumstances. The court recognised that a single transgression for theft of an item of minimal value was inappropriate to warrant a sanction of dismissal. The Code of Good Practice: Dismissal[46] makes provision that all acts of dishonesty should not attract the sanction of dismissal, only those acts of dishonesty that are serious will likely attract the penalty of dismissal. The Code[47] states that "dismissal should be reserved for cases of serious misconduct or repeated offences." The present legislative framework does not provide for a foundation from which the concept of fairness can be derived and as a result, many employees have lost their source of income and dignity for what are arguably minor infractions. The constitutional value of dignity is paramount and cannot be ignored. "Everyone has inherent dignity and the right to have their dignity respected and protected."[48] Therefore, an employee's livelihood should not be snatched away for

[43] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
and *Shoprite Checkers (Pty) Ltd V CCMA* [2008] 9 [BLLR] 838 (LAC).
[44] *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 [BLLR] 995 (LC)
[45] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC).
[46] Schedule 8 of the Code of Good Practice: Dismissal.
[47] Item 3 (3) of Schedule 8 of the Code of Good Practice: Dismissal.
[48] Section 10 of the Constitution.

what are arguably minor acts of dishonesty. The totality of the circumstances must be considered in determining if the sanction of dismissal was fair and a blanket approach to all cases of dishonesty is not appropriate.

Chapter 2
The statutory laws and guidelines that determine the fairness of a dismissal

2.1 Introduction

This chapter will focus on the legislative framework that protects employees against any form of unfair dismissal. The Constitution is the supreme law of the land and all laws must be consistent with it. The purpose of labour legislation is to define the parameters for the conduct of the employment relationship. Our labour laws have to protect employees. The concept of fairness and equity is crucial in the employment relationship. This dissertation supports the view that fairness and equity cannot be achieved through legislation alone. The reason for this view is that the present labour legislation does not provide for a foundation from which the fairness of a dismissal can be derived. The Code[49] only states that dismissal should be an appropriate sanction. The achievement of fairness and equity also lies in the minds and hearts of those that impose sanctions and make decisions to dismiss. This is especially so in the determination of the appropriateness of dismissal as a sanction for dishonesty-related misconduct.

Section 23 of the Constitution, and the following Acts; the LRA 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, and the Employment Equity Act 55 of 1998, entrench the rights to fair labour practice. However, in cases where labour legislation fails to regulate, common law or workplace practices will take preference.[50]

2.2 The LRA

An employer may discipline an employee once misconduct has been committed, but dismissal will only be justified when an employee is guilty of serious misconduct or repeated acts of misconduct.[51] S185 of the Act deals with every employee's right not to be unfairly dismissed.

[49] Item 7(5) of Schedule 8 of the Code of Good Practice: Dismissal.
[50] E Du Toit…et al *"Labour Relations a Comprehensive Guide"* 6th ed (2014) 73.
[51] Item 3 (3) of Schedule 8 of the Code of Good Practice: Dismissal.

At the heart of every dismissal, lies the issue of fairness. There are various grounds that dismissal cannot be based on and the LRA identifies these grounds.

Section 188 of the LRA states:

"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for the dismissal is fair-

(I) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with fair procedure."[52]

An interpretation of the above section of the Act, emphasizes that whilst an employee may not be unfairly dismissed, employees may be dismissed for a fair reason relating to his/her conduct or capacity or for operational requirements. We can also infer that the fairness of a dismissal relates to substantive and procedural fairness.[53] The LRA provides that "a dismissal is unfair if it not effected for a fair reason and in accordance with fair procedure."[54] Once an employee has proven that he/she was dismissed the onus is on the employer to prove that the dismissal was fair.[55]

Item 7 of the code of good practice states:

> "(4). Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer, and gross insubordination. Whatever the merits

[52] S 188 of the LRA 66 of 1995.
[53] Item 2(1) of Schedule 8 of the Code of Good Practice: Dismissal.
[54] Ibid.
[55] Section 187 (1) (c) of the LRA.

of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.[56]

(5). When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record, and personal circumstances), the nature of the job and the circumstances of the infringement itself.[57]

(6). The employer should apply the penalty of dismissal consistently with how it has been applied to the same and other employees in the past."[58] The premise is that like cases should be treated the same.

The Code of Good Practice: Dismissal requires that the rule (or an Instruction made under such a rule) is reasonable. It is not for the arbitrator to decide what the appropriate rules or standards should be. The arbitrator needs only to decide if the rules or standards are reasonable.[59] A determination of what is a reasonable rule may involve a consideration of sectoral norms and the approach of other employers.

For section 188 of the LRA, fairness must be considered in the light of the Code of Good Practice: Dismissal which is contained in schedule 8. The code consists of a set of guidelines. It is important to note that the code does not supersede disciplinary codes that are contained in collective agreements and employment contracts or the outcomes of joint decision-making by workplace forums. The key aspects of dismissal for misconduct and incapacity are covered by the Code. The Code also acknowledges that each case is unique and any departure from it may be justified. Certain circumstances, for example, the number of employees in an organisation may warrant a different approach.[60]

[56] Item 7(4) of Schedule 8 of the Code of Good Practice: Dismissal.
[57] Item 7(5) of Schedule 8 of the Code of Good Practice: Dismissal.
[58] LRA 66 of 1995.
[59] Ibid.
[60] Schedule 8 of the Code of Good Practice: Dismissal.

2.2.1 How is Substantive Fairness for Dismissal for Misconduct Established?
The other relevant guidelines in the Code, state that:[61]

> "Any person who is determining whether a dismissal for misconduct is unfair should consider-whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and if a rule or standard was contravened, whether or not the following applies."

i) The rule was a valid or reasonable rule or standard;

Once it has been established that there is a rule that was contravened by the employee, the focus shifts to the actual rule itself. A rule has to be reasonable. A reasonable rule is lawful and justifiable in terms of the nature of the employer's business. A rule that is unlawful or invalid will not form a basis for fair dismissal. Rules may differ from business to business. For example, many retail businesses, because of the high volume of shrinkage have a zero-tolerance policy for theft. Zero-tolerance in this context means that no matter the value of the item stolen the sanction would be dismissal.

ii) The employee was aware of could reasonably be expected to have been aware, of the rule or standard;

It would be grossly unfair if an employee was penalised for a rule he/she did not know existed. Often workplace rules are communicated through a disciplinary code. To ensure that employees are aware of these rules, employers may hold meetings with workers, send notices or pin notices on boards, or through the process of induction. There are, however, rules that are not formally communicated because an employee should know that disciplinary action will follow the contravention of such a rule. These rules include the rules against theft, intimidation, working under the influence of substances, insolence, and insubordination.

iii) The rule or standard has been consistently applied by the employer

[61] Item 7(5) of Schedule 8 of the Code of Good Practice: Dismissal.

Employers must be consistent when meting out discipline. As far as possible, an employer must treat employees similarly if they have committed similar offences. The principle of consistency is also found in the Code. The issue of consistency will be discussed further in Chapter 3.

iv) Is dismissal an appropriate sanction for the contravention of the rule or standard?"

This is perhaps the most difficult requirement to satisfy. Generally, it will not be appropriate to dismiss an employee for the first offence unless the employment relationship is rendered intolerable because of the misconduct.

2.3 Conclusion

The LRA provides, inter alia, for individual employment rights and obligations. S188 of the LRA[62] states that a dismissal may be unfair if it does not relate to the employee's conduct or capacity, the employer's operational requirement, or is not effected in accordance with fair procedure. Further, the LRA provides guidelines in the form of the Code of Good Practice: Dismissal[63] that employers, commissioners, and the courts can use when considering the fairness of a dismissal. An important principle of the Code is that it endorses the concept of progressive discipline.

[62] S188 of the Labour Relations Act 66 of 1995.
[63] Schedule 8 of the Code of Good Practice: Dismissal.

Chapter 3
Factors to be considered in determining the appropriateness of dismissal as an automatic sanction.

3.1 Introduction

Commissioners acting as arbitrators are appointed in terms of the LRA and are in this capacity required to ascertain if an employer's decision to dismiss an employee is fair.[64] To prove substantive and procedural fairness of a dismissal, the guidelines set in the Code of Good Practice: Dismissal [65] will have to be taken into account. Over and above the prescriptions of the Code, employers and arbitrators must also have due regard for the contract of employment, judicial precedent, collective agreements, and other codes as well as the severity of the misconduct, nature of the job, and the personal circumstances of the employee who transgressed.[66] As with all other dismissals, a dismissal for dishonesty-related misconduct has to be substantively and procedurally fair.

3.2 Procedural Fairness

Item 4 of the Code[67] provides the guidelines for procedural fairness.

A sanction of dismissal would be regarded as procedurally unfair in the following circumstances.

i) If there was no investigation conducted to determine whether there are grounds for dismissal. The Code suggests that this need not be a formal inquiry.[68]

ii) If the employee is not aware of the nature of the offence and the charges against him. The language used must be in line with what the employee understands.

iii) If the employee is not given sufficient time in terms of the disciplinary code to prepare for the hearing. The hearing should take place within a

[64] LRA 66 of 1995.
[65] Shaun Henman *Determining a Fair Sanction for Misconduct* (unpublished LLM thesis, University of Kwa-Zulu Natal, 2014) 8.
[66] Ibid 8.
[67] Item 4 of the Code of Good Practice: Dismissal.
[68] Ibid.

reasonable time once the allegations of the misconduct have been brought to the attention of the employer. Sufficient time to prepare for a hearing will depend on the complexity of the issues and the nature of the misconduct.

iv) If the employee was not given a fair hearing. The audi alteram partem principle means that the employee has a right to state his/her case. The nature of the hearing may be formal or informal. An example of an informal hearing could be if an employer sends a letter to striking workers or their trade union representatives asking them to make representations of why they should not be dismissed.

v) If the employee was denied the right to representation. In the same light, the employee should be allowed the right to an interpreter if they request one.

vi) If the employee is not fully informed of the reason for the dismissal.

The lack of procedural unfairness is highlighted in *Semenya v CCMA & others*.[69]The employee was called to a meeting and informed that her contract of employment had come to an end. She regarded this as a dismissal. She raised that proper procedure had not been followed. The employer realized the mistake and offered her a disciplinary hearing that "would be chaired by an independent person of her choice."[70] The employee refused this option. The Labour Appeal Court, contrary to the findings of the Labour Court, held that a hearing after a finding does meet the requirement of procedural fairness. Although the opportunity to be heard should be given before the dismissal, there are certain circumstances where the decision to be heard can be given after the dismissal.[71] The court took into consideration that the employer was a foreigner and did not fully understand South African labour laws. The Court held that the audi alterem partem rule had been complied with. I claim that Judge Zondo took the view that because the Code does not make provision for a hearing after the dismissal, it is not procedurally unfair to do so. I agree with the

[69] *Semenya and Others v Commission for Conciliation Mediation and Arbitration and Others* [2006] 6 [BLLR] 521 LAC.
[70] Ibid at para 7.
[71] Ibid at para 21.

commissioner and the Labour Court that proper procedure was not followed and therefore the dismissal was procedurally unfair. The Code states that the employee should be allowed an opportunity to respond to the allegations. [72]. There is no mention that the employee may respond to allegations after the finding. I disagree with the findings of the Labour Court and the Labour Appeal Court that a hearing held after dismissal in certain circumstances could meet the requirement for procedural fairness.

3.3 Substantive Fairness

Dismissal should be avoided if reasonably possible, and the alternatives put forward by the employee's representative should be taken seriously, even though the employer retains discretion in taking the final decision.[73] "If an employer concludes that an employee's breach of a rule of conduct justifies dismissal, the question for the arbitrator is whether or not the dismissal was an appropriate sanction."[74] To determine if the dismissal was an appropriate sanction, three inquiries must be carried out. Namely, an inquiry into the gravity of the misconduct, an inquiry into the consistency of the application of the rule, and an inquiry into the factors that might have justified a different sanction.[75]

The following paragraphs will discuss each of these three inquiries that are listed above in detail. This chapter aims to show that the determination of the appropriateness of dismissal as an automatic sanction for dishonesty involves careful consideration of these inquiries and careful consideration of mitigating factors

3.3.1 The gravity of the infringement

Item 3(4) of the Code of Good Practice: Dismissal[76] provides examples of gross misconduct namely, "gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer or gross insubordination." If

[72] Item 4 of Schedule 8 of the Code of Good Practice: Dismissal.
[73] Grogan, J. *Workplace Law* 12 ed. Juta (2017) 429.
[74] Grogan, J. *Workplace Law* 12 ed. Juta (2017) 339.
[75] Paragraph 94 of the CCMA guidelines on Misconduct Arbitrations. PUBLISHED BY THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION IN TERMS OF SECTION 115(2) (G) OF THE LABOUR RELATIONS ACT, 1995 (ACT NO. 66 OF 1995)
[76] Item 3(4) of Schedule 8 of Code of Good Practice: Dismissal.

misconduct falls into the category of gross misconduct, it does not necessarily mean that the employer can impose the sanction of dismissal automatically. Each case must be dealt with on its own merits and the facts of each case must be considered.[77] The degree or the seriousness of the dishonesty must also be considered.

In *Toyota South Africa Motors (Pty) Ltd v Radebe,*[78] the court deemed the employee's dishonesty as gross. The employee concerned had made a false claim that the company car was involved in a hijacking, when in fact he had damaged the vehicle in an accident. The commissioner found the dismissal to be unfair on the basis that dismissal was not the only sanction available to the employer. The court found this to be absurd. [79] The Code does not preclude dismissal as an appropriate sanction if the misconduct is of such a serious nature. The Court held that it is not an invariable rule that all offences involving dishonesty necessarily incur the supreme penalty of dismissal.[80] However, the court considered the conduct of the employee, in this case, to be grossly dishonest because it was "wilful and premeditated."[81] Gross dishonesty is the most serious forms of dishonesty. The Code of Good Practice on dismissals does mention serious offences for which dismissal in the first offence would be appropriate. Gross dishonesty is one of these offences. The lesson to be learned here is that there are some acts of dishonesty that are so great that no amount of long service can save a dishonest employee from dismissal in the first instance. (the employee in casu had thirteen years of unblemished service with the employer) and a clean disciplinary record. The employee cited his long service and clean disciplinary record in mitigation however, the Court placed a high premium on honesty. Dr. John Grogan opines that an employer must consider if the mitigating evidence will indicate that the employee will not repeat the offence. An employer should not consider mitigating evidence only because they invoke sympathy.[82]

[77] Ibid.
[78] *Toyota South Africa Motors (Pty) Ltd v Radebe* (2000) 21 *ILJ* 340 (LAC).
[79] Ibid at para 10.
[80] Ibid at para 44.
[81] Ibid at para 13.
[82] J Grogan *Dismissal* 2nd ed Juta (2014) 211.

The commissioner in *Komane v Fedsure Life*,[83] highlighted the principle that the dishonest conduct of an employee warrants dismissal irrespective of mitigating circumstances. In this case, the employee was dismissed for stealing a packet of powdered milk. The commissioner held that once an employee was found to be guilty of theft, irrespective of the value of the stolen item, dismissal would be justified. There is no need to inquire into whether the employment relationship had been rendered intolerable or if the misconduct was "gross." The commissioner took a very firm approach and despite the employee's 8 years of unblemished service found the dismissal to be fair. This reasoning indicates that no matter what the value of the stolen item is, dismissal is an appropriate sanction for workplace theft, even in instances of "petty pilfering." Sacrosanct to the employment relationship is honesty.

In contrast the Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v CCMA & Others* [84] held that theft should be treated like any other act of misconduct, and mitigating factors must be taken into account. The employee in this case was caught on camera eating the employer's food on three different occasions. He had 30 years of unblemished service with the employer. The outcome of this case was that the employee was reinstated, not retrospectively, and with a "severe warning."

With regards to the gravity of the misconduct Grogan has emphasised that "the more serious the offence, the more likely the employer will consider dismissal appropriate."[85] He supports the view that "the courts have made it clear that an employer should at least allow the employee to plead mitigation and the employer should at least consider the possibility of a lesser sanction."[86] There should be a reasonable degree of balance between the offence and the sanction.

In *Nel v Transnet Bargaining Council and Others,*[87] the applicant failed to disclose a gift that he had received from a client of the employer, thereby breaching the Code of Ethics. He then challenged his dismissal on the grounds of inconsistency. Another employee had been charged with a similar offence but was given a warning. The

[83] *Komane v Fedsure Life* [1998] 2 [BLLR] 215 (CCMA).
[84] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
[85] Grogan, J. *Workplace Law* 12 ed. Juta (2017) 284.
[86] Ibid.
[87] *Nel v Transnet Bargaining Council and Others* (2010) [BLLR] 61(LC).

employer's defence for the different sanctions was that the applicant occupied a more senior position than the other employee. The court then held that the position of seniority of the applicant (he was employed as a manager), elevated the gravity of the dishonesty.[88] The Code of Ethics specified that gifts and entertainment may not exceed R500.[89] The applicant accepted a gratuity in the form of a fully paid holiday to a Golf Estate. The Code further specified that a breach of the code would lead to dismissal or civil action by the employer. The applicant was subsequently dismissed. The Labour Court held that the gravity of the offence, in this case, outweighed the employee's long service history. The fact that the employee occupied a senior position meant that he ought to have known the impact his actions would have on the operations of the employer and the other stakeholders.[90] The Labour Court adopted the view that "the gravity of the offence is a vital factor in determining whether the employer was justified in imposing different sanctions for similar misconduct."[91]

The mere fact that a disciplinary policy might allow for the maximum penalty for dishonesty, does not rule out the fact that there are degrees to the dishonesty such that dismissal might not be justified in every case. This dissertation is of the view that there has to be a distinction between fraud, lies, white lies, theft, and petty pilfering. Further, to that, a distinction must be made to dishonesty that has a major negative impact, minor negative impact, or no impact at all on the employer's business. In *Computicket v Marcus N.O and Others,*[92] the employee was dismissed for issuing tickets to a friend without receiving payment. She had intended to pay in the money when she received her salary two days later. However, she fell ill before she could do so and the shortfall was discovered. The commissioner agreed that the degree of her dishonesty was not so great that it warranted an automatic dismissal.[93] The harm or loss caused to the employer was not so great as the employer could have

[88] Ibid at para 33.
[89] Ibid at para 4.
[90] Ibid at para 31.
[91] Ibid at para 34.
[92] *Computicket v Marcus No and Others* (1999) 20 *ILJ* 342 LAC.
[93] Ibid at para 10.

cancelled the tickets and not incurred any loss at all. Therefore, dismissal was found to be an inappropriate sanction in this case.

3.3.2 The Application of Consistency in Dismissals for Misconduct

The application of consistency implies that all employees be treated alike for similar infractions.

The fundamental principles regarding the consistent application of dismissal as a sanction are discussed below.

The Code of Good Practice states:

> "The employer should apply the penalty of dismissal consistently with how it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration." [94]

Where the element of inconsistency is raised, an employer must be able to differentiate between the differential sanctions between the employees. The employer must be able to provide a legitimate reason for the disparity otherwise the disparity will be regarded as unfair.[95] Historical inconsistency means that the employer should apply the sanction of dismissal consistently as it was applied in the past. Contemporaneous inconsistency means that where employees commit the same disciplinary offence, they should receive the same sanction. Where employees commit the same misconduct contemporaneously and receive different sanctions, this may amount to unfairness.

To arrive at its findings in *Westonaria v SALBC,*[96] the Labour Court had to focus on the historical background of the employer. The employee in question was dismissed some three years after her appointment because she did not have the prerequisite grade 12 qualification for her post. Another employee that misrepresented her qualifications was not dismissed because she agreed to a plea-bargaining agreement to testify in a case of corruption against another employee. The Labour Court found a zero-tolerance policy was not applied to all acts of dishonesty-related misconduct. The

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[94] Item 3 (6) of Schedule 8 of the Code of Good Practice: Dismissal.
[95] A Myberg "*Determining and -Reviewing the Sanction after Sidumo*" (2010) (31) *ILJ* 11.
[96] *Westonaria Local Municipality v SALGBC* [2010] 3 [BLLR] 342 (LC).

Court held that a consistent standard was not employed to determine the present employee's sanction of dismissal.[97] The employer in its defence, argued that both cases were different in that the employee in the present case misrepresented her qualification and in the other case the employee, although guilty of falsifying her qualification, has agreed to testify against another corrupt employee. The court held that the employer viewed lying about qualification as more serious than falsifying a certificate. The Court did acknowledge that an employer has the right to set standards in the workplace. Failure to apply these standards consistently implies that non-compliance would not be serious to warrant dismissal.[98]
This inconsistency is what lead the court to make a deduction that the misconduct did not break down the trust relationship. The court accepted that the misconduct of dishonesty does render the employment relationship intolerable but not every act of dishonesty will justify dismissal.[99]

The Courts are less likely to find inconsistency if an employer informs employees about a new policy that is not consistent with previous sanctions. The findings in *Consani Engineering v CCMA*[100] are indicative of this. *Consani* [101] management had implemented a zero-tolerance approach as an attempt to curb shrinkage. Employees were informed that unauthorised removal of company property would lead to dismissal. The employee that misconducted himself was found with a roll of tape that was destined for the trash. The commissioner found that although the employee was guilty of dishonesty, dismissal was too harsh a sanction. Murphy AJ, in his judgement, held the commissioner "failed to give due and proper consideration to the employer's zero-tolerance policy."[102] And therefore found the dismissal to be fair.

The Labour Court did acknowledge that the employee was an underprivileged member of society trying to protect his family from the harsh Cape Town weather but also held that the Court was required to assess the justifiability of the sanction in the light of the

[97] Ibid at para 28.
[98] Ibid at para 10.
[99] Ibid at para 25.
[100] *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 [BLLR] 995 (LC).
[101] Ibid.
[102] Ibid at para 18.

employer's entitlement to set its standards of conduct in the context of that business.[103] The Court upheld the dismissal. The employee also challenged his dismissal based on inconsistency and the Labour Court noted that the issue of inconsistency is not a hard and fast rule because of the changing environment such as an increase in shrinkage. The employer was faced with ongoing stock losses and to curb shrinkage, introduced the zero-tolerance policy. The employer is entitled to introduce shifts in policy that are not consistent with past practices due to operational reasons.[104] The discretion to introduce policy changes lies primarily with the employer. To circumvent historical inconsistency, an employer has the burden of informing employees of the new rule or standard that is not consistent with past policies.[105] I claim that if one weighs up the gravity of the misconduct and the mitigating factors in this case, one can conclude that the sanction of dismissal was too harsh in this case.

3.3.3 Factors that may justify using a Sanction other than Dismissal

The following paragraphs will focus on the factors that may impact the severity of the sanction imposed for dishonesty. These factors have absolutely no relevance in proving whether the employee is guilty of dishonesty or not. They play a role in aggravating or mitigating the penalty.

i) Nature of the job and the tasks that are undertaken by the employee

An employee who occupies a managerial role is more likely to face dismissal for dishonesty because of the prominence of the post than an employee in the lower ranks. The nature of the job that the employee performs must also be taken into account. In *De Beers Consolidated Mines Ltd v CCMA & Others*,[106] (hereafter referred to as the *De Beers* case), the honorable judge held that dismissal is not an act of vengeance or moral outrage. What dismissal is, is actually about an employer's responsibility to protect the company's assets and respond to managing risk. He then went on to use the example of supermarket packers that are "routinely dismissed" for stealing items of relatively small value and claimed that " their

[103] Ibid at para 17.
[104] Ibid at para 17.
[105] Brenda Grant "*The application of consistency of treatment in dismissals for misconduct."* (2012) 33.1 *Obiter* 145.
[106] *De Beers Consolidated Mines Ltd v CCMA & Others* [2009] [BLLR] (995) (LAC) at para 22.

dismissal has little to do with society's moral opprobrium of minor theft" instead " it has everything to do with the operational requirements of the employer's enterprise."[107] It is evident from this case that the position of trust and the nature of the job is imperative in determining if the employment relationship can continue further keeping in mind the operations of the employer and if the employee is likely to engage in future acts of misconduct.

ii) Remorse

The facts of the *De Beers* case involve two employees who were dismissed for fraudulently claiming overtime. Judge Conradie held that "it would be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation."[108] An employee who fails to recommit to the employer's workplace values cannot re-establish the trust that he has broken down.[109] An employee who admits to the misconduct, and in turn tenders a feasible explanation is more than likely capable of rehabilitation.[110]In the *De Beers* case, the employees falsely denied any act of dishonesty. A lack of remorse may lead to the presupposition that the employee is likely to repeat the misconduct in the future and rightfully so. The employees concerned did not indicate that they would not conduct such acts of dishonesty in the future and had shown no remorse for their actions. Therefore, in Judge Conradie's s view, the sanction of dismissal was fair.

There is, however, a fine line between remorse and regret. Many employees" when charged with dishonesty start showing regret for their conduct and that regret does not genuinely translate to remorse. Genuine remorse involves the employee feeling the plight of the employer and the impact of the misconduct on the employer's business. The difficulty lies in distinguishing genuine remorse or if the accused employee is simply feeling sorry for himself/herself. An employee that has engaged in workplace dishonesty must be able to show genuine remorse and that he/she can recommit themselves to the workplace values. Most employees will deny any

[107] Ibid para 22.
[108] Ibid at para 25.
[109] Ibid at para 25.
[110] Alan Rycroft, "Is Evidence of the Breakdown in the Trust Relationship Always Necessary" (2016) 37 *ILJ* 2260.

wrongdoing and will only show remorse once they have been found guilty of dishonesty.

Whilst, this dissertation acknowledges that CCMA cases do not create a binding precedent, nevertheless, the following case is important in setting out that the lack of remorse in certain instances indicates that the employee cannot be trusted not to repeat the misconduct in the future. In *FGWU obo Ndeya v Pritchard Cleaning ,*[111] two employees were dismissed for drinking wine that belonged to a client of the employer. One of the dismissed wrote to the employer immediately after the dismissal expressing his remorse and apologizing for his dishonesty. He was subsequently re-employed on a new contract that provided for a three-month probation period. The second employee referred the matter to the CCMA and only apologized for his dishonesty at conciliation. However, he was not re-employed. The issue before the commissioner was whether the secondary dismissal was fair. The justification for this selective treatment was that the first employee had shown genuine remorse and was also more valuable to the employer given his experience and clean disciplinary record. [112] The lack of remorse by the second employee was a significant factor in denying him re-employment. The employee only expressed remorse at conciliation, in an attempt to get re-employed. The employer doubted the sincerity of the remorse.[113] The fact that the apology was tendered only at conciliation cast serious doubts on the employer about the sincerity of the apology. The conclusion that the commissioner arrived at was that the second employee, given that he had been unemployed for several months, only showed remorse because he was concerned about losing his job, and not because he was showing genuine concern for the plight of the employer. This lack of sincerity is indicative that the employee is likely to repeat the dishonesty in the future and therefore cannot be trusted. The commissioner accepted that the lack of remorse shown by the second employee indicated that he was more of a risk than the first employee and therefore supported the employer's decision not to re-employ the second employee.[114]

[111] *FGWU obo Ndeya v Pritchard Cleaning* [1997] 11 [BLLR] 1510 (CCMA).
[112] Ibid page 1511.
[113] Ibid page 1512.
[114] Ibid page 1513.

iii) The loss suffered by the employer

In the *De Beers case*[115], it was held that "the seriousness of dishonesty… depends not only, or even mainly, on the act of dishonesty itself but on how it impacts on the employer's business."[116] The sanction of dismissal will depend on the greatness of the loss suffered by the employer. The greater the loss suffered by the employer, the greater the chances are that the sanction of dismissal will be imposed for dishonesty-related misconduct.

iv) The totality of the circumstances

In *Sidumo & Another v Rustenberg Platinium Mines & Others*,[117] the court held that a commissioner has to take the totality of the circumstances into account when he/she considers a dismissal dispute. The reason for the employee's challenge to the sanction of dismissal must also be considered as well as the personal circumstances of the employee.[118] In summary, all relevant factors need to be taken into account in a dismissal dispute. In addition to the gravity of the misconduct, other factors to be considered are the length of service, previous disciplinary record, personal circumstances, the loss suffered by the employer, the seriousness of the offence, and the extent to which the employee shows remorse for the wrongdoing.

In *Sidumo v Rustenberg Mines* [119] the Constitutional Court listed the factors that a commissioner should consider in determining the appropriateness of dismissal. "The factors are:

- The importance of the rule that was breached.
- The reason that the employer imposed the sanction of dismissal.
- The basis of the employee's challenge to the dismissal.
- The harm caused by the employee's conduct.

[115] *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) *ILJ* 1051 (LAC).
[116] Ibid para 23.
[117] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 [BLLR] (CC).
[118] Ibid para 78-79.
[119] Ibid.

- Whether additional training and instruction may result in the employee not repeating the misconduct.
- The effect of dismissal on the employee.
- The long service record of the employee."

v) Length of service

In the matter of *Leonard Dingler (Pty) Ltd V Ngwana*,[120] Judge Kroon took into account the employee's length of service and clean disciplinary record. However, he found that the dismissal was justifiable as a result of the employer's experience of theft by its employees. Much greater weight was attached to the gravity of the dishonesty than the personal circumstances of the employee. Even though the employee had over 7 years of service and a clean disciplinary record, the Labour Appeal Court found the sanction of dismissal to be appropriate. The employee had removed a few boards that cost approximately R8.50 each. The Court accepted that the employer was experiencing shrinkage on a large scale and the theft had been premeditated. A consideration of these factors in their totality lead the Court to conclude that "no viable employer-employee relationship remained."[121]

In *De Beers Consolidated Mines (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* Judge Conradie held that long service " is relevant in determining whether an employee is likely to repeat his misdemeanor."[122] One of the employees had a service of 18 years and the other had 13 years. If an employee does not commit to reform, the employee will be dismissed for dishonesty, regardless of long service.[123]

A longer serving employee may receive a more lenient sanction for dishonesty than one that has just joined the organisation. Although in the above-mentioned case the employees' long service history was not enough to save them from dismissal. The rationale is that the employer might be able to accept the continuation of the employment relationship based on the long service and loyalty of the employee. However, whilst long service might be a mitigating factor, if the dishonesty is so

[120] *Leonard Dingler (Pty) Ltd v Ngwenya* [1999] 5 [BLLR] 431 (LAC).
[121] Ibid para 78.
[122] *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) I*LJ* 1051 (LAC) at para 24.
[123] Ibid.

gross, it would not be sufficient to render the dismissal unfair. There are other cases where long service can be an aggravating factor because the employee ought to have known the rules of the employer and should have been setting an example for other employees. In *Toyota SA Motors (Pty) Ltd v Radebe & others*,[124]the court held, that some acts of dishonesty are so gross that no amount of long service can save an employee from dismissal.

This dissertation supports the view that a long-serving employee will have an understanding of the nature of the employer's business by knowing the rules, values, and objectives of the business.

3.4 Progressive discipline.

Employers reserve a right to maintain discipline in the workplace. The employee has to obey the rules of the employer. The purpose of discipline in the workplace is to correct undesirable behavior and discipline is not a punitive measure or a means to an end to the employment relationship. According to Grogan discipline is there to ensure that employees contribute effectively to the goals of the enterprise.[125] Employers have the right to enforce sanctions against those employees who transgress. During the era of the Master and Servant laws, those employees who transgressed were subject to fines, imprisonment and in some cases corporal punishment. Our modern-day labour legislation allows employers to impose rules and standards to ensure operational efficiency, but these rules and standards must be applied consistently and fairly. An integral part of fairness in discipline is progressive discipline - the process of using increasingly severe steps or measures when an employee fails to correct a problem after being given a reasonable opportunity to do so.[126] Employees should be given an opportunity through a graduated system of penalties to absorb the employer's rules.

The principle of progressive discipline suggests that the employer can progressively issue harsher sanctions should the employee repeatedly fail to meet the employer's expectations. Another benefit of progressive discipline is that the employee has

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[124] *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000)21 *ILJ* 340 (LAC) at 344C-F.
[125] J Grogan *Workplace Law* 11th ed (2014) 152-3.
[126] K Bassuday "Disciplinary sanctions in the alternative" (2016) 37:10 *ILJ* 2251-2259.

ample time to recognize the wrongdoing and correct the undesirable behavior. Item 3 of the Code provides for disciplinary procedures that are short of dismissal.

> "3(2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees" behaviour through a system of graduated disciplinary measures such as counselling and warnings. [127]
>
> (3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences."[128]

The sanctions that flow from a corrective approach to discipline as opposed to dismissal as an automatic sanction for dishonesty are discussed in the following paragraphs.

3.4.1 General Warnings

There are general and specific warnings. Employers use general warnings to inform employees of the rules that the employer has resolved to apply in the workplace. Usually, these rules are communicated to employees in many ways including at induction programs. These warnings are there to ensure that the employees are aware that the employer has workplace rules and will take disciplinary action against all forms of misconduct that the employer might have condoned in the past. General warnings are there to ensure that the employee cannot claim inconsistency or ignorance of the rule and differ from specific warnings because they address the workforce as a whole whereas specific warnings are given to individual employees for acts of misconduct.

[127] Item 3(2) of the Code of Good Practice: Dismissal.
[128] Item 3(3) of the Code of Good Practice: Dismissal.

3.4.2 Informal Warnings

These are oral warnings that may be given to individual employees for acts of misconduct. They serve to remind the employee that should he/she persist in the prohibited conduct, more serious disciplinary action will follow. It is important to note that although this type of warning may be informal, it is, however, the first stage of disciplinary action. In a broader sense, the purpose of informal warnings serves as a reminder to the employer that he/she has now breached a rule and "has placed a foot in the lowest rung of sanctions."[129] Informal warnings fall into the category of specific warnings because they are given to individual employees.

3.4.3 Written Warnings

These warnings are more formal than oral warnings. An employee will have to sign a written warning to acknowledge that the warning was received. By acknowledging receipt, it does not mean that the employee is guilty of the misconduct. In instances where an employee refuses to acknowledge receipt of a written warning, the employer must note it. Disciplinary codes usually specify that warnings remain in force for a specific period. Lapsed or expired warnings cannot be used to justify dismissal. An expired or lapsed warning might be useful to the employer in proving that the employee was aware of the rule and show a pattern in the employee's behaviour. Even if a warning has lapsed, it remains in the employee's file.

3.4.4 Final Written Warnings

This warning is the final warning an employee may receive before dismissal for the type of misconduct for which the warning has been issued. The purpose of the final written warning is to give the employee one final chance to correct his/her behaviour. More serious disciplinary action may only be taken for an offence that is similar to the one that the final written warning was issued for. For example, an employee may

[129] J Grogan Workplace Law (2014) 156.

not be dismissed for absenteeism if he/ she received a final written warning for use of abusive language.

3.4.5 Denial of Privileges

Item 3 (3) of the Code [130] states that "other action short of dismissal" may be used for the transgression of a workplace rule. This means that an employer may impose a range of possible sanctions such as denial of long service leave or discretionary bonuses or other special privileges that an employer may grant.

3.4.6 Suspension

Suspension may take two forms. The first is that it might be used as a precautionary measure pending a disciplinary inquiry. The second is that it can be used as an alternative to dismissal if the employee agrees. The Labour Courts accept that suspension without pay is acceptable in certain situations. In *Wahl v AECI Ltd* [131] it was held that the sanction of suspension without pay for one month was appropriate as an alternative to dismissal.[132]

3.4.7 Demotion

According to Grogan, the Courts have accepted that demotion may be considered as an alternative sanction to dismissal.[133] Demotion is when the employee's status is lowered, he/she gets fewer responsibilities and receives less pay than the post he/she occupied before the dismissal.

3.5. The Current Test in Determining if Dismissal is the Appropriate Sanction

The current test in determining if dismissal is appropriate is: can the employer be reasonably expected to continue with the employment relationship. The issue of the breakdown in the trust relationship will be discussed in Chapter 4 of this dissertation.

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[130] Item 3(3) of the Code of Good Practice: Dismissal.
[131] *Wahl v AECI Ltd* (1983) 4 *ILJ* 298 (IC).
[132] Ibid page 99.
[133] J Grogan Workplace Law (2014) 162.

The landmark case for the notion of substantive fairness and the role of the commissioner in determining the fairness of a sanction is the Constitutional Court case of *Sidumo v Rustenburg Platinum Mines Ltd.*[134]

> "In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal …the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on his or her long-service record."[135]

The commissioner needs to make a moral judgement based on all the facts before him/her. Hence all relevant circumstances must be taken into account. Determining the fairness of a dismissal involves findings of fact and law, and a value judgement.[136] In *Nampac Corrugated Wadeville v Khoza*,[137] Judge Ngcobo held that whilst the determination of an appropriate sanction lies solely at the discretion of the employer, this discretion must be applied fairly. A court or commissioner can only interfere with a sanction if the employer acted unfairly in imposing the sanction. "The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable." [138] We need to take cognisance of the fact that we are dealing with a moral judgement that is informed by an individual's life experiences, socialisation process, and cultural beliefs. There is no absolute test for the determination of the appropriateness of dismissal as a sanction.

The appropriateness of a sanction is the most difficult requirement of the Code[139] that the employer has to satisfy because there are varying degrees of seriousness of dishonesty. The employer after finding an employee guilty of dishonesty can impose several potential sanctions that range from warnings to dismissal. Hence the

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[134] *Sidumo v Rustenberg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).
[135] Ibid at para 78.
[136] *Rustenberg Platinum Mines Ltd v CCMA* [2006] 11 [BLLR] 1021 (SCA) at para 32.
[137] *Wadeville v Khoza* (1999) 20 *ILJ* 578 (LAC).
[138] Ibid at para 33.
[139] Schedule 8 of the Code of Good Practice: Dismissal.

appropriateness of the sanction depends on the seriousness of the misconduct and the impact it has on the employment relationship.[140]

3.6 Conclusion

Consistency is an element of fairness. If, however, there is a fair basis for an employer to deviate from consistently applying a particular sanction, then the inconsistency will be justified. [141] It is evident from paragraph 3.3.2 that employers are not compelled to apply the same sanction consistently provided that they have a fair reason for not doing so. The parity principle does not apply in these instances. The above factors indicate that dismissal should not be an automatic sanction for every act of dishonesty in the workplace. Each case will have to be dealt with on its own merits. No single factor gives employers the definitive right to automatically dismiss employees. From the above analysis, it is evident that although the courts take mitigating factors into account, however, there are limitations to the extent that mitigating factors such as long service, remorse, and length of service will warrant a sanction less than dismissal. The limitations are the impact that the dishonesty has on the operational requirements of the business and the extent to which the trust relationship has been damaged.

The procedural and substantive aspects of the Code of Good Practice: Dismissal serves as a guide to ensure good practice and to promote the principles of natural justice. The main principles of the Code are that if an employee is alleged to have committed misconduct, then the employee has a right to be heard and the decision-maker has to keep an open mind before a dismissal can be effected because not every committed misconduct will break the trust relationship, e.g. late coming.

[140] A van Niekerk …et al *Law at work* 4th ed (2017) 309.
[141] Tamara Natalie Naidoo *Fair Dismissals: A critical analysis of the "appropriateness of sanction" in light of recent developments (*unpublished LLM thesis, University of Kwa-Zulu Natal, (2012) 57.

Chapter 4

The Irretrievable Breakdown of the Trust Relationship.

Many employers have relied on the breakdown in the trust relationship as a justification for automatic dismissal for dishonesty. This then raises the question of, whether every act of dishonesty leads to a breakdown in the trust relationship. According to Rycroft the breakdown in trust is not a factor to be considered for every act of misconduct committed, but the code uses the requirement that the misconduct must be so serious that it makes the continued employment relationship intolerable.[142] Intolerability may be defined as the situation whereby the employment relationship between the employer and employee is irretrievably destroyed. It is very easy for a witness to say that the trust relationship has broken down but much more difficult to explain in what ways the employment relationship has become intolerable or irreparable. The following paragraphs of this chapter will analyse if every act of dishonesty leads to an irretrievable breakdown in the trust relationship and therefore justify dismissal for dishonesty-related misconduct.

4.1 Cases that Endorse the Approach that Dishonest Conduct Warrants Dismissal

In *AutoZone v Dispute Resolution Centre of Motor Industry and others* [143], the employee was instructed to draw R150 from petty cash to pay three casual workers. He drew R180 but only paid the three workers R150 keeping the R30. When confronted by the employer he claimed that he had kept the R30 because the casual workers had not completed the tasks. He was subsequently dismissed for gross dishonesty. Murphy AJA held that dishonest conduct by an employee inevitably poses an operational challenge to an employer. The employer would not find it easy to place trust in a deceitful employee. The operational requirements of the employer may be sufficient to justify a dismissal for dishonesty-related misconduct.[144]

> "The nature of the offence and, the manner of its commission support a conclusion that the continuation of the relationship had become intolerable. The employer cannot reasonably be expected to retain Mr. Sikhakhane in its

[142] Alan Rycroft, "Is Evidence of the Breakdown in the Trust Relationship Always Necessary" (2016). 37 *ILJ* 2260.
[143] *AutoZone v Dispute Resolution Centre of Motor Industry and others* [2019] 6 [BLLR] 551 (LAC).
[144] Ibid at para 13.

employ." [145]

Despite the low value of the theft, the Labour Appeal Court placed a high premium on honesty and found the dismissal to be fair. Dishonesty-related misconduct is a breach of the trust relationship and is destructive of the employment relationship. The standpoint of Grogan is,[146]

> "An employer has two reasons for wanting to rid itself of a dishonest employee. One is that the employee can no longer be trusted. The other, less frequently acknowledged but no less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deference theory of punishment. The question to be asked is whether a repetition of the misconduct, either by the same employee or by others, will adversely affect the employer's business, the safety of the workforce, and/or the employer's reputation."

It is no easy task for an employer to trust a dishonest employee. Many employers have used dismissal as an automatic sanction for dishonesty-related misconduct in an attempt to send a message to all other employees to say that dishonesty will not be tolerated.

In the case of *Rainbow Farms (Pty) Ltd v CCMA & others*,[147] the employee, Mr. Ngubane had a litre of milk as he was leaving the company's premises. The company had stringent rules that stated that "free items" were to be consumed on company premises and could only be removed on written authority. Following a disciplinary hearing, the employee was dismissed. The commissioner found that the employee had infringed a rule by removing the milk from the employer's premises. However, the commissioner felt that the employee genuinely believed that he could remove the milk from the employer's premises, therefore the sanction of dismissal was unfair. The Labour Court held that the dismissal was unfair because the employee was apprehended before he could leave the employer's premises. Therefore, the employee was not guilty of unauthorised removal of the company's property as he had not left the employer's premises. The LAC held that the mere act of removing the employer's property without authorisation constitutes theft and warrants dismissal. The mere act of removing a litre of milk, despite the employer's strict rules had led to the destruction

[145] Ibid.
[146] J Grogan *Dismissal* (2002) Cape Town Juta 99.
[147] *Rainbow Farms (Pty) Ltd v CCMA* & others [2011] 5 [BLLR] 451 *(LAC)*.

of the trust relationship and hence dismissal was an appropriate sanction. An act of dishonesty, no matter how small, has the potential to damage the employment relationship as the above-mentioned case has indicated. Judge Davis had emphasised the issue in *Shoprite Checkers (Pty) Ltd v CCMA & others*,[148] when he held that the foundation of any employment relationship is the ability of the employer to place trust in its employees. The reason for this is that "a breach of this trust in the form of conduct involving dishonesty goes to the heart of the employment relationship and is destructive of it…"[149] Employers need to have faith in the knowledge that employees will protect the operational interest of the business at all times by not engaging in theft, petty pilfering, or any other act of dishonesty. A healthy employment relationship can only exist if the employer is confident that it can place the utmost trust in its employees. An employer need not "be looking over his shoulder to see whether this employee is being honest."[150]A careful analysis of the above cases supports the view that in cases of dishonesty the attitude of the Courts has been that dismissal is the appropriate sanction.

There are cases where the Courts have considered mitigating factors in cases of dishonesty, however dismissal was still found to be an appropriate sanction. An example of such a case is *Hoch v Mustek Electronics*.[151] The employee was dismissed for misrepresentation of her qualifications that were not irrelevant to her position as debtor's clerk. Even though she had seven years of service and had been loyal and trustworthy to her employer, the Court held that her actions had irreparably damaged the employment relationship. The emphasis had been on the gravity of the misconduct, rather than on the personal circumstances of the employee as this case illustrated. Initially, the company was satisfied with her performance and did not question her qualifications. Her lack of expertise was only discovered seven years later when the company was listed on the stock exchange [152]and the company had grown considerably. Her co-workers started complaining about her lack of expertise and poor performance. The court held that although the employee had seven years of

[148] *Shoprite Checkers (Pty) Ltd v CCMA & others* (2008) 29 *ILJ* 2581 (LAC) at para 16. See also *Standard Bank SA Limited v CCMA and others* [1998] 6 [BLLR] 622 *(LC)* at paras 38-41.
[149] Ibid.
[150] *Anglo American Farms t/a Boshendal Restaurant* (1992) 13 *ILJ* 573 (LAC).
[151] *Hoch v Mustek Electronics* [1999] 12 [BLLR] 1287 (LC).
[152] Ibid page 365 I.

service and had been a trustworthy employee at that time, the gravity of her misrepresenting her qualifications was sufficient to warrant dismissal because the misconduct was serious enough to damage the employment relationship.[153] This case also highlights the rights of employers to set standards in the workplace and to decide on an appropriate sanction if those standards are transgressed. [154]

4.2 Cases that Support the Notion that all Acts of Dishonesty do not Lead to a Breakdown of the Trust Relationship.

In contrast, Rycroft has stated that "there will be many instances where misconduct, whilst shaking the employer's confidence, will not result in a situation where a functional working relationship is impossible."[155] The word functional is interchangeable with tolerable. In cases whereby an employee had before the misconduct, be competent and trustworthy, a single act of misconduct might not be sufficient to render the employment relationship intolerable.[156]

The instance whereby a single act of misconduct does not justify dismissal is highlighted in *Edcon Ltd v Pillemer NO and Other.* [157] The employee, Mrs. Reddy was a member of *Edson's* car scheme and was therefore entitled to use the company vehicle. There was a motor vehicle collision involving the company vehicle and it was discovered that Mrs. Reddy's son was driving the company vehicle when the collision occurred. Subsequently, Mrs. Reddy arranged to have the vehicle repaired at her own cost by her husband's panel beating company. She did not report the incident to her employer as per the company policy. The employer at some stage became aware of the incident. On confrontation, she lied to the manager by denying that the vehicle was involved in a collision but later admitted to it. She then lied that she was driving the vehicle at the time of the incident but later admitted that her son was the driver at the time of the incident. Mrs. Reddy was charged and subsequently dismissed from her employment. The commissioner took Mrs. Reddy's 43 years unblemished service record as a mitigating factor and found the dismissal to be unfair. The Labour Court

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[153] Ibid 366 A.
[154] Ibid.
[155] Alan Rycroft, "The Intolerable Relationship" (2012) 33 *ILJ* 2271.
[156] Ibid.
[157] *Edcon Ltd v Pillemer NO and Other* [2010] 1 [BLLR] 1 (SCA).

and Labour Appeal Court also declined to set the award aside. Judge Mlambo (Supreme Court of Appeal) concluded that despite her deceitful behaviour, the employer had failed to show that the trust relationship had broken down. In addition, two managers testified at the disciplinary hearing that they could still work with Mrs. Reddy.

The Supreme Court of Appeal took the approach that the employer was intolerant of dishonest behaviour and that honesty was a core value of the employer hence employees were generally dismissed for dishonest acts. The dismissal, in this case however, was found to be unfair. It is interesting to note that the court did not take into account the issue of how the employer could reinstate this employee after conducting such a gross act of dishonesty based on the reasoning that no direct evidence was led to show the breakdown in trust. Following the *Edcon* case[158] the courts have repeatedly indicated that in cases of gross dishonesty, an employer does not necessarily have to lead evidence about the breakdown of the trust relationship because an employer cannot be expected to retain an employee who has proved to be delinquent. The inability of the employer to place trust and confidence in its employees does entitle the employer to end the employment relationship. The lesson learned from this case is that not all lies are sufficient to warrant dismissal and the determination of an appropriate sanction depends on the merits of each case.

This dissertation does not favour the approach of the Supreme Court of Appeal because in cases of gross dishonesty an inference can be drawn as to the breakdown of the trust relationship. There is no need for the employer to lead evidence in this regard. The mere fact the employee was a quality control officer is indicative that she held a position of trust in the organisation and her dishonesty was so gross that it warranted a dismissal. The courts relied on the opinion evidence of two witnesses that testified that they could still work with the employee. It is also evident that the decision-makers did not consider the jurisprudence of earlier cases[159] implying the breakdown of the trust relationship.

[158] *Edcon Ltd v Pillemer NO and Other* [2010] 1 [BLLR] 1 (SCA).
[159] *Hoch v Mustek Electronics* [1999] 12 [BLLR] 1287 (LC),

In *Woolworths (Pty) Ltd v Mabija and others*,[160] the court held that even if an employer does not lead any evidence to prove the breakdown of the trust relationship, the conduct of the employee does not warrant dismissal without taking into account the impact of the misconduct. The employee in this case had failed to offload a truck containing perishable goods, thereby resulting in a loss of R3675 to his employer. The Labour Appeal Court found the dismissal to be unfair and held that even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others to determine whether the sanction of dismissal was fair.[161] The other factors include, "the industry the appellant operates in; the nature of the misconduct and its effect on the parties, and whether training and progressive discipline cannot prevent recurrence of the misconduct."[162] The court also held that the trust relationship does not break down every time an employee conducts misconduct.[163] For these reasons we cannot deduce that the breakdown of the trust relationship is an automatic consequence of dishonesty.

In *Fairway at Randpark Operations (Pty) Ltd v CCMA & others,*[164] the commissioner held that there was no proof of a breakdown in the trust relationship despite the employer's insistence that it could no longer trust the employees to work with cash. The LC however held that the commissioner "handed down an award which is not justifiable concerning the reasons given for it and is not an outcome which a reasonable commissioner could or should have come to."[165] The assumption by many employers is that having proved a serious act of misconduct is enough and there is no additional need to show that the employment relationship has now become intolerable.[166] However, it would be more beneficial to the employer to lead evidence to testify to the breakdown. Alan Rycroft believes that the employer /employee relationship starts with minimal or no trust. [167] It is accepted that trust is not guaranteed as the relationship continues.[168] "It is not an overstatement to say

[160] *Woolworths (Pty) Ltd v Mabija and others* [2016] 5 [BLLR] 454 (LAC) at para 21.
[161] Ibid at para 21.
[162] Ibid at para 19.
[163] Ibid at para 11.
[164] *Fairway at Randpark Operations (Pty) Ltd v CCMA & others* (2016) 37 *ILJ* 675 (LC).
[165] Ibid at para 30.
[166] Alan Rycroft, "The Intolerable Relationship" (2012) 33 *ILJ* 2271.
[167] Alan Rycroft "Is evidence of the breakdown in the trust relationship always necessary?" (2016) 37(10) *ILJ* 2260-2266.
[168] Ibid 1275.

that in many cases the employment relationship persists despite a lack of trust."[169] The employment relationship may continue in the absence of trust even after a violent strike although strikes and dishonesty-related misconduct are hardly comparable. This dissertation acknowledges this but, "there are work environments where a functional relationship" exists even though there is distrust, wariness, suspicion or dislike" between employers and employees.[170]

4.3 Conclusion

It is evident from the above analysis that every case of dishonesty does not imply a breakdown in the trust relationship. Damage to the trust relationship does not necessarily mean that the employment relationship has irretrievably broken down and therefore merits an automatic dismissal. Consideration must be given to whether the failure to lead evidence of the breakdown outweighs other evidence of the gravity of the misconduct, the importance of the rule, the reason that the employer imposed the sanction of dismissal, and the harm caused by the employee's misconduct. An interpretation of the Code of Good Practice is that a dismissal for gross dishonesty may be justifiable as an automatic sanction in the first offence and not every single act of dishonesty will lead to dismissal. The cases that were reviewed for dishonesty post *Edcon*[171] show that the courts have approached dishonesty with considerable leniency towards employees. Therefore, employers cannot claim reliance on the breakdown in the trust relationship for every act of dishonesty and automatically dismiss employees that have misconducted themselves. However, in cases whereby the employment relationship has been rendered intolerable due to dishonesty, it would indeed be inappropriate to reinstate the employee. An employer that relies on the intolerable employment relationship and the irreparable damages caused by the dishonesty, to justify dismissal, should lead evidence in this regard. However, there are instances where it can be concluded due to the offence and the circumstances of the events that the trust relationship has irretrievably broken down, therefore the sanction of dismissal would be appropriate.

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[169] Ibid.
[170] Ibid.
[171] *Edcon Ltd v Pillemer NO and Other* [2010] 1 [BLLR] 1 (SCA).

In numerous cases, the courts have emphasised the importance of mutual trust in the employment relationship. Dismissal was the appropriate sanction even when the dishonesty involved relatively minor items. In *Anglo American Farms t/a Boshendal Restaurant,* [172] an employee was dismissed for stealing a can of cold drink. Another employee was dismissed for stealing cooked meatballs in *Rustenberg Platinum Mines Ltd v National Union of Mineworkers*.[173] In *Shoprite Checkers (Pty) Ltd v CCMA*[174], an employee was dismissed for eating the employer's food that could not have cost more than R20. In *Consani Engineering (Pty) Ltd v CCMA* [175] Mr. Shoko was dismissed for stealing a roll of tape that was meant for the rubbish bin. The courts in all these cases found the dismissal to be fair. These cases are indicative of the common trend that the courts place a high value on honesty and any dishonest acts will not be condoned. Brenda Grant opines that in cases of dishonesty, the courts are more likely to adopt a stricter approach and dismissal is most often t the appropriate sanction.[176] She holds the view that far greater weight has been attached to the gravity of the infringement than the personal circumstances of the employee.[177]

Whilst it is acknowledged that dishonest behaviour is deceitful and intended to mislead, there are instances whereby a single act of irrationality has cost employees to lose their livelihood and dignity. It is indeed difficult for an employee to place trust in a dishonest employee, especially those that are guilty of theft, however, in some instances the degree of dishonesty is not enough to warrant dismissal as John Grogan has emphasised that "a single incident" is not sufficient for a reasonable employer to reach a conclusion "that the employment relationship cannot be revived or sustained."[178] In some instances, the dishonest conduct of the employee is of such a nature that an inference can be drawn that the trust relationship has irretrievably broken down.

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[172] *Anglo American Farms t/a Boshendal Restaurant* v Komjwayo (1992) 13 *ILJ* 573 (LAC).
[173] *Rustenberg Platinum Mines Ltd v National Union of Mineworkers* (2001) 22 *ILJ* 658 (LAC).
[174] *Shoprite Checkers (Pty) Ltd v CCMA* (2008) 29 *ILJ* 2581 (LAC).
[175] *Consani Engineering (Pty) Ltd v CCMA* [2004] 10 [BLLR] 995 (LC)
[176] https://journals.co.za/doi/abs/10.10520/EJC85322 Accessed 24/11/2021
[177] Ibid.
[178] J Grogan *Dismissal* Cape Town Juta (2010) 70

Chapter 5

Conflicting Judgements of the Courts

The previous chapters have examined and discussed the principles surrounding the automatic sanction of dismissal for dishonesty in the workplace, however, in 2008 the LAC handed down two conflicting judgements. These judgements will be discussed in great detail. Both these judgements involve the same employer (Shoprite Checkers). The judgements in question, both emanating from the Labour Appeal Court (LAC), are *Shoprite Checkers (Pty) Ltd v CCMA & others* (the Zondo judgment) and *Shoprite Checkers (Pty) Ltd v CCMA & others* (the Davies judgment)".[179] Interestingly enough is the fact that both judgements involve Shoprite Checkers, both misconducts occurred in the same month of the same year and involved employees eating the employer's food. However, despite these similarities of these cases both judgements take on very different approaches. The following paragraphs will critically analyse these two judgements and the impact of these judgements in cases of dishonesty-related misconduct.

5.1 The Zondo Judgement

In *Shoprite Checkers (Pty) Ltd v CCMA* the employee in question was dismissed for "inappropriate consumption."[180] He had 30 years of unblemished service with the employer and was employed as a supervisor. The commissioner found the sanction of dismissal to be too harsh and reinstated the employee with a "severe warning"[181] and without back pay. The Labour Court set aside the award as a result of the missing transcripts. In the Labour Appeal Court, Judge Zondo, stated the award did not meet the test for reasonableness and the dismissal was not fair.

In summation, Judge Zondo held that the dismissal from the employer's point of view was not about the monetary value of the food that the employee ate. Instead, it was about the problem of shrinkage that the employer was experiencing. In this case, the employee's clean disciplinary record and 30 years of service did not warrant a sanction of dismissal. It is important to note that the employer did not lead any

[179] https://www.labourguide.co.za/coma-informations/247 Accessed 10 June 2021.
[180] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
[181] Ibid at para 23.

evidence in the breakdown of the trust relationship. There was also no evidence lead about the issue of the consistency of the application of the rule that was breached.[182]

He stated,

> "in addition to getting a "severe final warning" for this type of conduct forfeit about R33000 for eating food that could well have cost less than R20, I do not think that a reasonable decision–maker could have sought to impose any penalty in addition to the severe final warning"[183]

He then made an order for retrospective reinstatement of the employee from the date of the dismissal.

5.2 The Davies Judgement

In another case *Shoprite Checkers*[184] dismissed an employer for a similar offence but Judge Davies arrived at a different conclusion. In this case, the dismissal was found to be fair. The justification was that the employee in the second case had consumed more produce than the employee in the above case, had less service than the employee in the first case, and had fabricated evidence. The court stated that in the previous judgement the court," appears to adopt a different approach to the body of jurisprudence as analysed in this judgement."[185] The court did not attach importance to the fact that the employee had been employed by Shoprite for nine years with a clean disciplinary record and had eaten the food of negligible value. One of the reasons for the dismissal was that the employee worked in a specialised area (food preparation) and the employer could no longer trust the employee. In summary Judge Davis held that the business interests of the employer far outweighed the personal circumstances of the employee. These awards are distinguishable from each other in that in the first case there was no evidence led to the break-down of the trust relationship. However, in the second case the employer lead evidence that due to the high shrinkage rate, they could not afford to have the

[182] DJ Meyer, “Comparing Apples with Pears: Shoprite Checkers (Pty) Ltd v CCMA and Others and Shoprite Checkers (Pty) Ltd v CCMA” (2010) 43 De Jure 349.
[183] Ibid at para 26.
[184] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC).
[185] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC) at para 24.

employee reinstated. The problem of shrinkage was commonplace and impacting the operations of the employer. The issue was not about the monetary value of the stolen item in this case.

5.3 The Impact of both judgements

A study by Magill affirms that before the two *Shoprite* judgements[186] the approach to theft in the workplace was very straightforward. Workplace theft was always synonymous with dismissal.[187] The LAC has changed the approach that workplace theft is not always synonymous with dismissal. "The Labour Appeal Court has created a situation where all of a sudden the importance of mitigating factors (such as the length of service and the clean disciplinary record of an employee), and the value of the stolen items are now required to be taken into account when determining a fair and appropriate sanction for theft in the workplace."[188]

However, one might argue that despite the Zondo judgement,[189] theft is theft regardless of its value and constitutes dishonesty in its true form. In *Hullett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others*[190] the court held that "the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline, are likely to have minimal impact on the sanction to be imposed."[191] In *Metcash Trading Limited t/a Metro Cash and Carry & Another* [192] an employee was dismissed for consuming a 250 ml bottle of juice. The court held that "… theft is theft and does not become less because of the size of the article stolen or misappropriated." The dismissal was found to be fair. [193] These cases provide insights into the appropriateness of dismissal for relatively small items. It follows that the monetary

[186] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC) and *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC).
[187] Magill KJ *Does theft in the workplace always justify dismissal?* (unpublished LLM thesis, University of Cape Town 2009) 33.
[188] Ibid at 31.
[189] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC)
[190] *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and others* [2008] 3 [BLLR] 241 (LC).
[191] Ibid para 42
[192] *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Others* [1998] 11 [BLLR] 1136 (LC).
[193] *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Others* [1998] 11 [BLLR] 1136 (LC) at para 16-17.

value of the stolen items must be considered in mitigation but it does not necessarily mean that the employee will be saved from dismissal if the monetary value is low.

The Zondo award indicates that an employer that is considering dismissing an employee for dishonesty must consider what a reasonable-decision maker would do. Mitigating evidence such as a clean disciplinary record and long service history must be taken into account before a dismissal can be effected. I acknowledge these factors, but it is important to note that the Zondo judgement[194] makes no reference to previous case law whilst the Davies judgement does.[195] Seemingly the honourable judge did not take into account the position that the employee held at the time of his dismissal. He was a supervisor. It is accepted that any reasonable employer will lose trust in an employee that is dishonest more especially by an employee that holds a supervisory position in the company. Because of the employee's dishonesty, he had demonstrated a degree of untrustworthiness. I claim that this should have been enough to render him unreliable, therefore the employment relationship would be intolerable if one takes into account the operational requirements of the employer. In contrast, the Davies[196] case indicates that the break-down in the trust relationship far outweighs any mitigating factors for dishonesty in the workplace and dismissal would be justified.

For employers the impact of the *Shoprite* judgements[197] is the following:

i) The employer must carefully consider mitigating factors and be able to show how other factors can outweigh mitigating factors.
ii) The employer must be able to justify the dismissal by proving that the employee's dishonesty has rendered the continued employment relationship intolerable and
iii) The employer must be able to show the commissioner how the dishonesty has destroyed the employment relationship.

[194] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
[195] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC).
[196] Ibid.
[197] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC) and *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC).

The cases following the above *Shoprite* judgements[198] have shown that the courts have become more lenient towards dishonesty in the workplace. In criticism of the Zondo judgement[199] one can deduce that the courts are now sending out a message that a long serving employee can steal from the employer and not be dismissed for dishonesty.

It is my view that both judges interpret the law differently based on the similarities of the cases and the differing judgements. These two cases indicate that the real problem is what criteria take precedence in determining the appropriateness of dismissal for dishonesty-related misconduct. A deduction can be made that the overall standard is indeed fairness. Fairness is a value judgement based on an individual's perception. I base this statement on the evidence that in both cases, all factors were taken into account, yet the judgements were different. More weight was given to some factors than others in both cases. This demonstrates that the appropriateness of dismissal for dishonesty related misconduct depends on the preference of the decision-makers and the weight that they attach to the various factors. The Zondo judgement[200] is more of a moral judgement based on the circumstances.

5.4 Conclusion

The two conflicting judgements of the *Shoprite*[201] cases are indicative that Item 7 of the Code of Good Practice is not as straightforward as it seems. The Zondo judgement suggests that principles that have been at play for many years have now been amended. One of those principles is that workplace theft will always justify dismissal. Before this judgement, employers the approach to theft was very straightforward. The employee that committed the dishonesty-related misconduct would be dismissed, irrespective of the employee's mitigating circumstances. The

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[198] *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 [BLLR] 887 (LAC); where the court held that "the law does not allow an employer to adopt a zero-tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence."
[199] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
[200] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC).
[201] *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 [BLLR] 1211 (LAC) and *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] *9 [BLLR] 838* (LAC).

employer simply relied on item 3(4) of the Code in that the misconduct was of such a serious nature to render the employment relationship intolerable.

However, after a careful analysis of the Zondo judgement and the Davies Judgement consideration must be given to various mitigating factors before an employee can be automatically dismissed for dishonesty.

Chapter Six

Conclusion

6.1 Introduction

In the employment context, dishonesty can take on various forms. These forms include fraud, theft, failure to disclose information and, other underhand conduct on the part of the employee. Whilst theft is regarded as the most serious form of dishonesty by the Labour Courts, and usually, a dismissal for the first offence is justifiable, there are instances whereby the Courts have made a distinction between theft and petty pilfering. Employers are entitled to dismiss employees who commit acts of dishonesty in the workplace, however, the nature of the misconduct must be serious or repetitive in nature.[202]

6.2 Main issues and the findings

The purpose of zero-tolerance policies is to communicate to employees that dishonest behaviour will automatically result in dismissal. I suggest that if employers have to have a zero-tolerance policy, then firstly there must be clear communication that all acts of dishonesty will be thoroughly investigated, and secondly, if the employee is found guilty of dishonesty the sanction will depend on the severity of the misconduct, the totality of the circumstances and other factors discussed in the previous chapters. By doing this, it would circumvent the notion that zero-tolerance means dismissal for dishonesty-related misconduct.

This dissertation put forth the hypothesis that automatic dismissals for dishonesty as a result of a zero-tolerance policy are not one of the principles that are entrenched in the Constitution. The Constitution is the Supreme Law of the land and all laws emanate from it. In *Sidumo & Another v Rustenberg Platinum Mines, Ltd and Others,*[203] the Constitutional Court held that when determining the fairness of a dismissal, the Commissioner cannot approach the matter only from the perspective of the employer because there is nothing in the Constitution or in the Statutes to

[202] Item 3(3) of Schedule 8, Code of Good Practice: Dismissal
[203] *Rustenberg Platinum Mines Ltd v CCMA & others* [2003] 12 [BLLR] 676 *(LAC).*

suggest this.[204] The Court held that it "would go against Constitutional norms to give pre-eminence to the views of either party in a dispute."[205] Various pieces of literature have been reviewed and various cases have been used to test this hypothesis and to arrive at the findings. The findings are that dismissal for all acts of dishonesty as a form of misconduct is not appropriate.

The conundrum that employers are faced with is having their decision to dismiss a dishonest employee be interfered with at CCMA. “Even if employers have satisfied Item 7 of the Code of Good Practice: Dismissal, there is still the likelihood that the commissioner might find the dismissal inappropriate and therefore unfair.”[206] In addition to the gravity of the misconduct, commissioners will consider the employee's circumstances (such as the service record, the disciplinary record, and other personal circumstances), the nature of the job, and the circumstances surrounding the dishonesty.[207] Employers are left in a precarious position in trying to second guess what decision the commissioner or the court might make if they dismiss an employee for dishonesty.

The findings of this research indicate that there are many cases where dismissal is not necessarily an appropriate sanction for the first offence of dishonesty. The effect of the employee’s dishonesty on the employer’s business must be weighed against the effect of the dismissal on the employee. Careful consideration must be given to the impact of dishonesty on the trust relationship and all other factors that may indicate that the trust relationship can be repaired. After analysing the various literature and case law, it is evident that the break-down of the trust relationship justifies an automatic dismissal for dishonesty-related misconduct. There has been a lot of controversy about the extent of the employer’s obligation to prove a breakdown in the trust relationship. The Labour Appeal Court in *Autozone v Dispute Resolution Centre of the Motor Industry & Others,*[208] held that the employer would have to lead evidence in this regard unless it can be concluded by the nature of the offence, “and/or the circumstances of the dismissal” that the trust relationship has irretrievably

[204] Ibid at para 61.
[205] Ibid para 74.
[206] D du Toit …et al. *Labour Relations Law: A Comprehensive Guide* 4 ed. (1999) 352.
[207] Item 5 of Schedule 8 of the Code of Good Practice: Dismissal
[208] *Autozone v Dispute Resolution Centre of the Motor Industry & Others* (2019)

broken down.[209] This dissertation does acknowledge that dishonest employees are a threat to the operations of the employer's business, however, there are instances whereby the dishonesty is not of such a gross nature that can render the employment relationship intolerable. The employment relationship can still be functional after certain instances of dishonesty if such acts do not pose an operational risk to the employer. For example, if an employee steals an item that was destined for the rubbish bin and no longer holds any economic value for the employer.

Smith also maintains that the Code of Good Practice: Dismissal, item 7,[210] has proven to be problematic and is not as straightforward as it seems.[211] The current legislative framework does not balance the interest of the employer and the employee in dismissals for dishonesty. I suggest that a proper framework must be introduced that will guide decision-makers in determining an appropriate sanction for dishonesty. There should be an exact formula for determining which acts of dishonesty will call for which sanction. The reason for this suggestion is that the appropriateness of a sanction must be determined by the nature of the misconduct. Presently the issue of the appropriateness of dismissal is based on a value judgment. There is no invariable rule that states "offences involving dishonesty should incur the supreme penalty of dismissal."[212] Fairness is an elusive concept with no universal application. An individual's interpretation of fairness is guided by one's values, upbringing, religion, culture, and the like. From this perspective, we can deduce that what might seem appropriate to one person, might not be so to another. The requirement for a substantively fair dismissal is that there must be a fair reason for the finding that the employee has transgressed a rule and the sanction for the transgression must also be fair. By introducing a proper framework that will guide decision-makers, a balancing act between the employer's operational requirements and an employee's human dignity can be maintained.

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[209] Ibid para 12
[210] Item 7 of the Code of Good Practice: Dismissal.
[211] N Smit *"How Do You Determine a Fair Sanction - Dismissal as Appropriate Sanction in Cases of Dismissal for (Mis)Conduct"* (2011) 44 De Jure 49 64 .
[212] N Smit *"How Do You Determine a Fair Sanction - Dismissal as Appropriate Sanction in Cases of Dismissal for (Mis)Conduct"* (2011) 44 De Jure 49 64.

As an alternative to dismissing employees for theft, employers need to create a working environment that is conducive to loyalty and honesty. A study was done by M.C Cant and C Nell,[213]indicated that underpayment is one of the main reasons that employees steal. A second reason is that the economic climate does not make it easy for employees to keep up. The escalating cost of living is proving to be challenging for employees to "make ends meet." In addition, the climate of the organisation makes it very easy for an employee to steal. The writers have recommended that "stricter and more advanced security systems are installed." I agree with this recommendation because employers would not end up having to deal with so many dismissals for dishonesty if stricter security measures are enforced. It would be a case of employers dealing with the problem rather than the symptoms.

Discipline should not be viewed as a punitive measure or as a means to an end of the employment relationship. Instead, discipline should be viewed as a means to correct undesirable behaviour. The Code of Good Practice: Dismissal[214] endorses the concept of progressive discipline. The main aim of progressive discipline is to ensure that the employee can be rehabilitated into the organisation and to ensure that the misconduct stops.[215] Furthermore, the employment relationship can be restored to the status before the dismissal. A progression of transgressions could lead to dismissal. Grogan opined that the system of progressive discipline would ensure that dismissal should not be applied if a lesser sanction can serve the purpose.[216] Mechanisms to deal with different situations need to be put into place. For example, certain transgressions must be grouped and the sanction for each group must be identified. To simply adopt a blanket approach to all forms of dishonesty and dismiss employees for minor infractions is not appropriate. An example of progressive discipline could be counselling and advice for minor acts of

[213] M.C Cant E.C Nell "*Employee theft in the South African retail industry: Killing the goose that lays the golden egg"* (2012) 10:1-4 Corporate Ownership & Control 444-454.
[214] Item 3(2) of Schedule 8 of the Code of Good Practice: Dismissal.
[215] Item 3(3) of Schedule 8 of the Code of Good Practice: Dismissal.
[216] J Grogan *Dismissal* (2010) 165.

dishonesty, written warnings for consistent acts of dishonesty, and a final written warning if the dishonesty persists. Other progressive disciplinary measures could be demotion and suspension without pay. This system of graduated discipline measures could be sufficient to correct dishonest behaviour. Dismissal should be the ultimate final resort if all other attempts fail. The benefit of progressive discipline for the employer is that the employer can issue harsher sanctions if the employee fails to meet the employer's standards. The benefit of progressive discipline for the employee is that the employee can correct the undesirable behaviour.

The message for all employers is "Don't untie a knot with your teeth when you can use your fingers."

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Mrs Nirvashnee Maharaj (218085678)
School Of Law
Howard College

Dear Mrs Nirvashnee Maharaj,

Original application number: 00012828
Project title: Zero tolerance for dishonesty: A critical analysis of the appropriateness of dismissal as a sanction for theft in the workplace.
Amended title: A critical analysis of the appropriateness of dismissal as an automatic sanction for dishonesty in the workplace.

Exemption from Ethics Review

In response to your **amendment** application received on11 October 2021 , your school has indicated that the amendment has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law