

***Sidumo v Rustenburg Platinum: Impact on disciplinary hearings in the  
workplace***

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## ***Sidumo v Rustenburg Platinum: Impact on disciplinary hearings in the workplace***

### **Summary**

Prior to the Constitutional Court's decision in the *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) ZACC 22 the Commission for Conciliation Mediation and Arbitration applied the "reasonable employer"-test to determine whether a specific sanction, issued by an employer, was fair. The "reasonable employer"-test provided a lot of flexibility to employers to dismiss employees for misconduct, as employers' decisions to dismiss were "protected" from scrutiny by the CCMA.

The Constitutional Court replaced the "reasonable employer"-test, which required a measure of deference to the decision of the employer, with that of the "reasonable decision maker"-test, which required an answer to the question whether the decision reached by the commissioner was one that a reasonable decision maker could not reach? This meant that in the event that the decision reached by the commissioner was one that a reasonable decision maker could not reach, that the decision of the commissioner will be overturned on review.

The change in test from a "reasonable employer" to that of a "reasonable decision maker" had significant implications for employers who are instituting disciplinary action against their employees and subsequently imposing the sanction of dismissal, as commissioners are no longer allowed to "defer" to the decision imposed by employers. The *Sidumo* test also have implications for employers who are seeking to take decisions of the CCMA on review, as Zondo JP held in *Fidelity Cash Management Service v CCMA* 2008 29 ILJ 964 (LAC) that it will not be often that an arbitration award is found to be one that a reasonable decision maker could not have made.

## **Key words**

sanction; reasonable employer-test; reasonable decision maker-test; disciplinary hearings; substantive fairness; procedural fairness; discipline; employment relationship; defer(ence); review

## ***Sidumo v Rustenburg Platinum: Impak op dissiplinêre verhore in die werksplek***

### **Opsomming**

Voor die Konstitusionele Hof se beslissing in *Sidumo en 'n ander v Rustenburg Platinum Mines Ltd en andere* (2007) ZACC 22 het die Kommissie vir Versoening, Bemiddeling en Arbitrasie die “redelike werkgewer”-toets gebruik om te bepaal of 'n spesifieke sanksie, soos toegepas deur 'n werkgewer in 'n dissiplinêre verhoor, billik was. Die “redelike werkgewer”-toets het baie vryheid aan werkgewers verleen om werknemers te ontslaan weens wangedrag, omdat hul besluit grotendeels “beskerm” was teen inmenging van die KVBA.

Die KH het die “redelike werkgewer”-toets, wat 'n mate van respek vir die beslissing van die werkgewer vereis het, vervang met die “redelike besluitnemer”-toets wat 'n antwoord op die vraag: “was die besluit van die kommissaris, een wat 'n redelike besluitnemer kon gemaak het?”, vereis het. Dit beteken dat as die besluit wat deur 'n kommissaris geneem is, nie een is wat deur 'n redelike besluitnemer geneem kon word nie, die besluit op hersiening omgekeer sou word.

Die “redelike besluitnemer”-toets wat nou deur die hof toegepas word, het 'n groot impak op werkgewers wat dissiplinêre aksie teen hul werknemers wil neem, omdat kommissarisse nie meer gebonde is of respek moet betoon aan die besluite van werkgewers nie. Die *Sidumo*-toets het ook implikasies vir werkgewers wat graag die besluite van die KVBA op hersiening sou wou neem omdat, soos Zondo RP tereg opgemerk het in *Fidelity Cash Management Service v CCMA* 2008 29 ILJ 964 (AH), dit nie gereeld sal gebeur dat 'n beslissing deur die KVBA een sal wees wat nie deur 'n redelike besluitnemer geneem kon gewees het nie.

## LIST OF ABBREVIATIONS

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	<i>Labour Relations Act</i> 66 of 1995
SA Merc LJ	South African Mercantile Law Journal
SASLAW	South African Society for Labour Law
SCA	Supreme Court of Appeal

## Chapter 1

### 1.1 Introduction

Prior to *Sidumo v Rustenburg Platinum Mines Ltd*<sup>1</sup> the Commission for Conciliation, Mediation and Arbitration<sup>2</sup> applied the "reasonable employer"-test to determine whether a specific sanction, which was issued by an employer, was fair. In *Nampak Corrugated Wadeville v Khoza*<sup>3</sup> the Labour Appeal Court<sup>4</sup> held that the determination of a fair sanction lies largely within the discretion of the employer, that this discretion should be exercised fairly and that a court should not lightly interfere with the sanction imposed by the employer.<sup>5</sup>

In *Country Fair Foods (Pty) Ltd v CCMA*<sup>6</sup> the LAC went so far as to find that there should even be a measure of deference<sup>7</sup> to the sanction imposed by the employer.<sup>8</sup> In other words, the arbitrator has to consider the matter from the perspective of the employer. According to Landman, one of the explanations for deference to a decision maker's decision was that "the decision maker under review has more expertise about the subject matter than courts of law".<sup>9</sup> In such a case, the employment tribunal is best equipped to make a decision based on its employment experience and knowledge of prevailing conditions.<sup>10</sup>

Interference with the sanction imposed by the employer should only be justified when the sanction imposed was unfair or when the employer acted unfairly when imposing the sanction.<sup>11</sup> The commissioner would however have a duty to interfere with the

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1 2007 ZACC 22 (hereafter the *Sidumo*-case).

2 Hereafter CCMA.

3 1999 20 ILJ 578 (LAC) (hereafter the *Nampak*- case).

4 Hereafter LAC.

5 1999 20 ILJ 578 (LAC) 32A-33B.

6 1999 20 ILJ 1707 (LAC) 28A-28B (hereafter the *Country Fair Foods*-case).

7 For a study on the term "deference", see Landman 2008 ILJ 1613-1618.

8 1999 20 ILJ 1707 (LAC) 28A-28B; Cohen 2003 SA Merc LJ 205; Grant 2009 *Obiter* 760.

9 Landman 2008 ILJ 1615.

10 Smit 2008 ILJ 1637.

11 1999 20 ILJ 1707 (LAC) 30A.

sanction imposed by the employer, if the sanction is so excessive to "shock one's sense of fairness".<sup>12</sup>

However, this line of thinking was rejected by the Constitutional Court in the *Sidumo*-case and replaced with the test: "is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"<sup>13</sup> The rejection of the "reasonable employer"-test in favour of a "reasonable decision maker"-test might have significant implications for employers who are instituting disciplinary action against their employees and subsequently imposing the sanction of dismissal, as commissioners are no longer allowed to "defer" to the decision imposed by employers.<sup>14</sup> In *Shoprite Checkers (Pty) Ltd v Sebotha No*<sup>15</sup> Francis J held, with regard to the impact the *Sidumo*-case would have on discipline in the workplace, that:<sup>16</sup>

there are various prophets of doom about what would be happening to discipline in the workplace. Some employers were able to dismiss employees on the basis of the reasonable employer's test. Most chairpersons of disciplinary enquiries endorsed employers' decisions without any fail (*sic*). Commissioners are not there to rubber stamp decisions taken by employers.

The *Sidumo*-test might also have implications for employers who are seeking to take decisions of the CCMA on review, as Zondo JP held in *Fidelity Cash Management Service v CCMA*<sup>17</sup> that "it will not be often that an arbitration award is found to be one that a reasonable decision maker could not have made".<sup>18</sup>

The purpose of this mini-dissertation is therefore to consider what impact the *Sidumo v Rustenburg Platinum*-case has on disciplinary hearings in the workplace as a result of the criteria set to review awards made by commissioners. This will be done

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12 1999 20 *ILJ* 1707 (LAC) 30A; Cohen 2003 *SA Merc LJ* 199.

13 2007 ZACC 22 110.

14 2009 18 *IR Network* 1.11.17 (LC) 21.

15 2009 18 *IR Network* 1.11.17 (LC) (hereafter the *Sebotha*-case).

16 2009 18 *IR Network* 1.11.17 (LC) 21; see also Myburgh 2010 *ILJ* 19-20.

17 2008 29 *ILJ* 964 (LAC).

18 Myburgh 2009 *ILJ* 2; see also comments by Smit 2008 *ILJ* 1643.

through a literature study by using books, legislation, court decisions, conference papers and journal articles.

The law regulating unfair dismissals is the *Labour Relations Act*,<sup>19</sup> as amended, which determines that a dismissal would be unfair if the employer fails to prove that the reason for the dismissal relates to, amongst other issues, the employee's conduct.<sup>20</sup> The employer must further prove that the dismissal was effected in terms of a fair procedure.<sup>21</sup> Section 188 of the LRA further requires from any person who needs to determine the fairness of a dismissal to take into account the relevant code of good practice<sup>22</sup> issued in terms of the LRA. Schedule 8 to the LRA contains the Code of Good Practice: Dismissal,<sup>23</sup> which provides guidelines to any person who has to determine the fairness of any dismissal based on the conduct or capacity of an employee.

Item 7 of The Code provides guidelines which should be considered when determining the fairness of dismissal of an employee based on misconduct. They are:

- (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
  - (i) the rule was a valid rule or reasonable rule or standard;
  - (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (iii) the rule or standard has been consistently applied by the employer; and
  - (iv) *dismissal* was an appropriate sanction for the contravention of the rule of standard.<sup>24</sup>

Thus, commissioners have to consider whether dismissal was the appropriate sanction for contravening a rule or standard relating to the workplace. In this regard items 3(4) and 3(5) of The Code provide further guidance. It provides that, as a

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19 *Labour Relations Act* 66 of 1995 (hereafter LRA).

20 See s188(1)(a) LRA.

21 See s188(1)(b) LRA.

22 Schedule 8 *Code of Good Practice: Dismissal*.

23 Hereafter 'The Code'.

24 Myburgh and Van Niekerk 2000 *ILJ* 2153.

general rule, it would not be appropriate to dismiss an employee for a first offence. Dismissal for a first offence could however be appropriate where the misconduct is so serious or of such a gravity that a continued employment relationship would be intolerable.<sup>25</sup>

The Code further provides that, when an employer decides whether to impose the sanction of dismissal, the employer should consider not only the gravity of the offence but also the employee's circumstances, the nature of the employee's job and the circumstances of the transgression itself. It is clear from The Code that the decision to dismiss lies with the employer,<sup>26</sup> but the determination of whether the dismissal was fair, lies with the commissioner.<sup>27</sup>

According to the *Sidumo*-case the commissioner has to apply his or her mind to the issue properly before him or her, as failing to do so may result in a finding that he or she acted otherwise than a reasonable decision maker would,<sup>28</sup> should the award been reviewed and set aside. The commissioner has to apply his/her mind to such an extent that the finding and reasons for the finding will eventually pass the "reasonable decision maker"-test. Therefore, in chapter two of this dissertation the "reasonable employer"-test, which was applied by commissioners and the Labour Courts prior to the *Sidumo*-case, will be discussed. The criteria for review set by the Constitutional Court, namely the "reasonable decision maker"-test, will then be considered, as well as how the courts have subsequently interpreted and applied the "reasonable decision maker"-test in practice.

In chapter three the impact of the *Sidumo*-case on disciplinary hearings in the workplace will be analysed, especially in the light of the comments made by Francis J in the *Sebotha*-case:<sup>29</sup>

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25 Myburgh and Van Niekerk 2000 *ILJ* 2153; Grant 2009 *Obiter* 757.

26 Item 3(5) The Code; see also 2007 ZACC 22 (59), (75).

27 Item 7(b)(iv) The Code; see also 2007 ZACC 22 (59); Mischke June 2009 *IR Network*.

28 See *MEC for Education, Gauteng v Mjijima & others* 2010 19 *IR Network* 1.11.39 (LC) (9).

29 2009 18 *IR Network* 1.11.17 (LC) 22.

The message as I understand it arising from *Sidumo* is that the employer cannot impose discipline as it used to do in the past. ... It requires the employer to revisit its approach, the issue of sanction at the workplace, and apply the principles which have been given.

Finally, in chapter four a conclusion will be reached with regard to the impact the *Sidumo*-case has on disciplinary hearings in the workplace as a result of the criteria set to review awards made by commissioners. Recommendations will also be made specifically to employers, taking cognisance of the *Sidumo*-test and its impact on disciplinary hearings in the workplace.

## Chapter 2

### 2.1 "Reasonable employer" versus "reasonable decision maker"

Prior to the Constitutional Court decision in the *Sidumo*-case, the CCMA and Labour Court applied the "reasonable employer"-test whenever they had to decide whether a particular sanction issued by an employer was fair. The "reasonable employer"-test was however not supported by everyone<sup>30</sup> and indeed in *Toyota SA Motors (Pty) Ltd v Radebe*<sup>31</sup> Nicholson JA held that:

the application of the reasonable employer test was such a palpable mistake which permits us to overrule it.<sup>32</sup>

Despite the criticism of the LAC in the *Radebe*-case,<sup>33</sup> the CCMA and the Labour Courts continued to apply the "reasonable employer"-test. The history, meaning and application of the "reasonable employer"-test as well as the "reasonable decision maker"-test will hereafter be considered.

#### 2.1.1 The "reasonable employer"-test<sup>34</sup>

The "reasonable employer"-test emanated from section 57(3) of the *United Kingdom's Employment Protection (Consolidated) Act* of 1978 and reappeared in section 98(4) of the *Employment Rights Act* 1996 (UK). It stipulates:<sup>35</sup>

The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer: (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as

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30 See comments made by John Brand in *Tubecon (Pty) Ltd and National Union of Metalworkers of SA* 1991 12 ILJ 473 (ARB) 444A-G; Myburgh and Van Niekerk 2000 ILJ 2145.

31 2000 21 ILJ 230 (LAC) 50D (hereafter *Radebe*-case); usually courts are bound by earlier judgments, except if the predecessors made a palpable mistake, which the LAC believed was made in the *Nampak*-case; see also Partington and Van der Walt 2008 *Obiter* 222.

32 See also the *Sidumo*-case at (70); Myburgh and Van Niekerk 2000 ILJ 2151.

33 See also Cohen 2003 *SA Merc LJ* 195; see also Partington and Van der Walt 2008 *Obiter* 222.

34 For a complete history on the development of the "reasonable employer"-test, see 2007 16 *IR Network* 6.3.1 (LAC).

35 2007 ZACC 22 (68) and footnote 66; Myburgh and Van Niekerk 2000 ILJ 2146; Cohen 2003 *SA Merc LJ* 203; Partington and Van der Walt 2008 *Obiter* 221.

sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

Lord Denning MR applied the above provision with reference to a "band of reasonableness" as was demonstrated in *British Leyland UK Ltd v Swift*.<sup>36</sup>

There is a band of reasonableness, within which one employer may reasonably take one view: another quite reasonably take (*sic*) a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.<sup>37</sup>

In the *Nampak*-case Khoza was dismissed by his employer for gross negligence due to damage caused to a boiler. The chairperson found Khoza guilty of gross negligence of the "highest degree" and found "no mitigating circumstances". Based on that, he recommended dismissal.<sup>38</sup> Khoza's internal appeal failed and he referred the matter to the Industrial Court. The Industrial Court held that Khoza was indeed negligent, but his negligence was not gross, referring to the circumstantial nature of the evidence regarding the cause of his negligence. The court then interfered with the sanction imposed by the employer, found that the sanction was too harsh, and reinstated Khoza.<sup>39</sup> Nampak lodged an appeal to the LAC. The LAC then made the widely known famous decision, which was quoted and relied upon by employers for many years:<sup>40</sup>

The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction by the employer, but whether in the circumstances of the case the sanction was reasonable.

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36 1981 *IRLR* 91.

37 See quotation in Cohen 2003 *SA Merc LJ* 203; Partington and Van der Walt 2008 *Obiter* 221 footnote 31; Myburgh 2010 *ILJ* 3.

38 1999 20 *ILJ* 578 (LAC) 582D-E.

39 1999 20 *ILJ* 578 (LAC) 582G-I.

40 1999 20 *ILJ* 578 (LAC) 584A-C; see also 2007 ZACC (29); Cohen 2003 *SA Merc LJ* 194; Smit 2008 *ILJ* 1637 – 1638; Myburgh and Van Niekerk 2000 *ILJ* 2149.

The LAC quoted with approval the test as was set out in the *British Leyland UK*-case and made the comment that it was indeed the "correct" test to apply when determining whether dismissal was a fair sanction.<sup>41</sup>

Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.

Thus, the LAC applied the "reasonable employer"-test as it had been applied in the United Kingdom and held that "many a reasonable employer in the circumstances would have thought that it was right to dismiss him".<sup>42</sup>

In the *Country Fair Foods*-case the Appellant dismissed a male employee after he had been found guilty of assaulting a female employee, Smit. Prior to the assault incident, Smit was romantically involved with the male employee. When she ended the relationship, he tried to discuss the matter with her. She refused, and eventually he took a broomstick and struck her twice on the buttocks and thigh. The incident was witnessed by other female employees.<sup>43</sup> The arbitrator found that the employee indeed assaulted Smit, but held that dismissal was too harsh a sanction. The arbitrator replaced the sanction of dismissal with a final written warning and ordered the employee's re-employment, but with the provision that his services be deemed continuous from the date of his original engagement.<sup>44</sup> Kroon JA held in the LAC that it remained part of our law that:<sup>45</sup>

... it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.

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41 1999 20 ILJ 578 (LAC) 584D-F; Partington and Van der Walt 2008 *Obiter* 222.

42 1999 20 ILJ 578 (LAC) 585B; see Partington and Van der Walt 2008 *Obiter* 221 footnote 31 for criticism against the "band of reasonableness".

43 1999 20 ILJ 1707 (LAC) 1704G-1705A.

44 1999 20 ILJ 1707 (LAC) 1705A-D; although the arbitrator ordered re-employment, the correct terminology would have been reinstatement, which was indeed corrected by the LC.

45 1999 20 ILJ 1707 (LAC) 1707G-H; Cohen 2003 *SA Merc LJ* 194; Myburgh and Van Niekerk 2000 *ILJ* 2150; Grogan *Dismissal* 156.

Thus, it is the employer's responsibility to set the standard of conduct expected from employees and therefore to determine the appropriate sanction for breaching that standard. Interference in the sanction imposed by the employer should therefore only be justified in the case of unreasonableness or unfairness. However, an arbitrator is not limited to the evidence that was before the employer at the time of the disciplinary hearing, but has to base his decision on all the evidence placed before him at the time of the arbitration.<sup>46</sup> Ngcobo AJP concurred with Kroon JA, but with a different emphasis. He held that commissioners have to remember that their awards were final and as such they were required to exercise caution when they consider the fairness of a sanction imposed by an employer.<sup>47</sup> In other words, commissioners should not interfere with a sanction only because they did not like it, and then held.<sup>48</sup>

There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction.<sup>49</sup>

Ngcobo AJP thus quoted with approval the "reasonable employer"-test, as was applied in the *Nampak*-case,<sup>50</sup> but went a step further by finding that there should even be a measure of deference to the sanction imposed by the employer.<sup>51</sup> Interference with the sanction imposed by the employer should only be justified when the sanction imposed was unfair or when the employer acted unfairly when imposing the sanction.<sup>52</sup> A commissioner would however have a duty to interfere with the sanction imposed by the employer if the sanction is so excessive to "shock one's sense of fairness".<sup>53</sup> Finally Conradie JA fully agreed with Ngcobo AJP that

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46 1999 20 *ILJ* 1707 (LAC) 1707H-I; see also Grogan *Dismissal* 149.

47 1999 20 *ILJ* 1707 (LAC) 1712J-1713A.

48 1999 20 *ILJ* 1707 (LAC) 1713A-B; Myburgh and Van Niekerk 2000 *ILJ* 2150.

49 Landman 2008 *ILJ* 1615; see also Grant 2009 *Obiter* 760.

50 1999 20 *ILJ* 1707 (LAC) 1713B and 1713I.

51 1999 20 *ILJ* 1707 (LAC) 1713A.

52 1999 20 *ILJ* 1707 (LAC) 1714A.

53 1999 20 *ILJ* 1707 (LAC) 1714A.

commissioners "should show deference to disciplinary sanctions imposed by employers."<sup>54</sup>

In the *Radebe*-case the LAC held that ordinarily a court would be bound by its own decisions and would have no right to prefer its own reasoning to that of earlier judgments.<sup>55</sup> It was clear that the "reasonable employer"-test originated from English law, which was based on a statutory provision which referred to an employer acting reasonably, and did not form part of our law. The LAC therefore rejected the "reasonable employer"-test as "such a palpable mistake", which permitted the court to overrule it.<sup>56</sup> The court held that it would only interfere with the decision of a commissioner if there was such a "yawning chasm" between what the commissioner decided and what the court would have decided.<sup>57</sup> Zondo JP stated that he thought that the matter has been so decisively decided by our courts and buried, yet subsequent developments have shown that he was wrong.<sup>58</sup>

In *De Beers Consolidated Mines v CCMA*<sup>59</sup> two truck drivers were dismissed by their employer for claiming nine hours overtime, which they had not worked. The commissioner interfered with the sanction imposed by the employer, based on the fact that dismissal was not an appropriate sanction under the circumstances.<sup>60</sup> After analysing sections 192(2) and 193 of the LRA, Willis AJ held:<sup>61</sup>

There must, in other words, be a degree of deference towards an employer's decision. To say this is not to resurrect the 'reasonable employer' test. It means that the arbitrator must take into account the prevailing norms and values of our society, paying particular regard to the norms and values of the industrial relations community as a whole and, having done so, may only interfere with the employer's decision to dismiss if satisfied that the decision was unfair.<sup>62</sup>

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54 1999 20 *ILJ* 1707 (LAC) 1717G; Myburgh and Van Niekerk 2000 *ILJ* 2151.

55 2000 9 *IR Network* 1.11.3 (LAC) (53).

56 2000 21 *ILJ* 230 (LAC) 50D (hereafter *Radebe*-case); usually courts are bound by the decision of their predecessors, except if the predecessors made a palpable mistake, which the LAC believed was made in the *Nampak*-case; see also Partington and Van der Walt 2008 *Obiter* 222; see also 2007 ZACC 22 (70).

57 2000 9 *IR Network* 1.11.3 (LAC) (56); see also Cohen 2003 *SA Merc LJ* 195.

58 See 2007 16 *IR Network* 6.3.1 (LAC) (2).

59 2000 21 *ILJ* 1051 (LAC) (hereafter *De Beers*-case).

60 2000 21 *ILJ* 1054A.

61 2000 21 *ILJ* 1063A; Cohen 2003 *SA Merc LJ* 196.

62 For a discussion on the *De Beers*-case see Myburgh and Van Niekerk 2000 *ILJ* 2151-2152.

The judge then referred with approval to the *Country Fair Foods*-case<sup>63</sup> and finally held that the commissioner misconstrued her function as one of having to determine a fair sanction and thus exceeded her powers in this regard.<sup>64</sup> The court made reference to the *Radebe*-case but held that in its view the current case has been distinguishable from *Radebe* in so far that in *Radebe* the seriousness of the misconduct was so clear that no reasonable person could have come to the conclusion that the length of service could be sufficient to render the dismissal an unfair sanction.<sup>65</sup> Conradie JA referred to the *Carephone v Marcus*<sup>66</sup>-decision and stated that the commissioner failed to make a "rational connection between the material available to her and the conclusion which she reached".<sup>67</sup>

The final endorsement of the "reasonable employer"-test, prior to the *Sidumo*-case, was the decision of the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*.<sup>68</sup> In the *Rustenburg Platinum Mines*-case, Sidumo was employed as a patrolman in the protection services department.<sup>69</sup> He was posted at one of the company's plants and was responsible for searching all persons leaving the plant, according to detailed searching procedures. Over a period of three days he was caught on video camera not complying with the detailed searching procedures, and he even allowed some people to sign the search register without being searched.<sup>70</sup> Disciplinary action was instituted against Sidumo.

He was found guilty of negligence and failure to follow established search procedures. In determining an appropriate sanction, the chairperson of the internal disciplinary hearing took into account Sidumo's clean disciplinary record, the fifteen years he had already served, and that "nothing went out during your shift, as far as you know".<sup>71</sup> However, Sidumo was also an experienced patrolman, posted at the plant to safeguard the company's most valuable product, and the misconduct created the potential for theft. The chairperson finally came to the conclusion that

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63 2000 21 ILJ 1063B.

64 2000 21 ILJ 1065I; see also Grogan *Dismissal* 157.

65 2000 21 ILJ 1055B-F.

66 1998 19 ILJ 1425 (LAC) (25).

67 2000 21 ILJ 1059H-I.

68 2006 15 IR Network 1.11.1 (SCA) (hereafter *Rustenburg Platinum Mines*-case).

69 2006 15 IR Network 1.11.1 (SCA) (1).

70 2006 15 IR Network 1.11.1 (SCA) (3).

71 2006 15 IR Network 1.11.1 (SCA) (4).

the misconduct affected the heart of the trust relationship between Sidumo and the company and as such made a continued employment relationship intolerable. Sidumo was therefore dismissed.

Sidumo lodged an appeal against his dismissal, but the appeal chairperson held that the fact that no actual losses could be proved was irrelevant, as actual or potential theft could have taken place, which could impact on the viability of the company. Furthermore it was because of Sidumo's seniority that he was employed in a position of trust, which he abused.<sup>72</sup>

The matter was referred to the CCMA. The commissioner held that the employer followed a fair procedure in dismissing the employee, although the sanction of dismissal was inappropriate. His finding was based on the fact that the company suffered no losses, the breach of the rule was unintentional or a "mistake" as argued by Sidumo, that the level of honesty of the employee was something to be considered, and finally that the offence did not affect the core of the relationship, which was trust.<sup>73</sup> The commissioner then substituted the sanction of the employer, with his own notion of what an appropriate sanction should be, by ordering the reinstatement of the employee and three month's compensation, subject to a written warning valid for a period of six months.<sup>74</sup>

Rustenburg Platinum took the decision of the commissioner on review to the Labour Court. Revelas J referred to the employee's clean disciplinary record of almost fifteen years and the fact that he did not commit an offence that demanded dismissal. She concluded that the commissioner's preference to corrective disciplinary action did not induce a "sense of shock", that there was no dishonesty on the part of Sidumo and that, at the best, he was guilty of poor work performance.<sup>75</sup>

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72 2006 15 *IR Network* 1.11.1 (SCA) (5).

73 2006 15 *IR Network* 1.11.1 (SCA) (11); see also Partington and Van der Walt 2008 *Obiter* 213.

74 2006 15 *IR Network* 1.11.1 (SCA) (1).

75 2006 15 *IR Network* 1.11.1 (SCA) (15); Cohen 2003 *SA Merc LJ* 199; Partington and Van der Walt 2008 *Obiter* 214.

Although the LAC expressly rejected three of the reasons forwarded by the commissioner for reinstating Sidumo, they referred to the other reasons forwarded by the commissioner and held:<sup>76</sup>

That [Sidumo] had a clean record and a long service period is capable of sustaining the finding by the commissioner that the sanction of dismissal was too harsh. Whether or not it would have been enough to sustain the finding had it been challenged in the founding affidavit is another matter. However, I must say, although the misconduct of [Sidumo] is indeed serious, I am not sure that I would not have been in doubt about whether I should interfere with the finding of the [commissioner]. And in case of doubt, the court should not interfere.<sup>77</sup>

Thus, great emphasis is being placed by the CCMA and the courts on mitigating evidence such as an employee's long service with an employer and the fact that the employee had a clean disciplinary record.<sup>78</sup>

The Supreme Court of Appeal<sup>79</sup> was very critical about the Labour Appeal Court's oversight over the CCMA commissioner's determinations. It held that a commissioner did not have the discretion to impose a sanction in the case of workplace misconduct.<sup>80</sup> That discretion lies in the first place with the employer.<sup>81</sup> The commissioner's duty is to determine whether the sanction imposed by the employer is fair.<sup>82</sup> The SCA referred, with approval, to the *Nampak*-case and summarised the approach of Ngcobo JA as follows:<sup>83</sup>

(a) the discretion to dismiss lies primarily with the employer; (b) the discretion must be exercised fairly; and (c) interference should not lightly be contemplated. ... (d) that commissioners should use their powers to intervene with "caution", and that they must afford the sanction imposed by the employer "a measure of deference".<sup>84</sup>

The SCA then emphasized some of the reasons underlying the analysis of Ngcobo JA, the first being textual in that one needs to look at the text of section 188(2) of the

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76 2006 15 *IR Network* 1.11.1 (SCA) (17).

77 See also the summary of N Smit in Smit 2008 *ILJ* 1636.

78 See Grant's comments on "long service" as mitigating factor Grant 2009 *Obiter* 758.

79 Hereafter SCA.

80 2006 15 *IR Network* 1.11.1 (SCA) (40).

81 Cohen 2003 *SA Merc LJ* 197; Smit 2008 *ILJ* 1637.

82 2006 15 *IR Network* 1.11.1 (SCA) (40); Smit 2008 *ILJ* 1637.

83 2006 15 *IR Network* 1.11.1 (SCA) (41) – (42); see also 2007 ZACC 22 (30) and (31).

84 Partington and Van der Walt 2008 *Obiter* 215; Beaumont January 2008 *Beaumont's Express* 15, 16.

LRA and The Code.<sup>85</sup> Section 188(2) of the LRA requires that any person who is required to determine the fairness of a dismissal, has to take The Code into account. Item 7(b)(iv) of The Code requires that any person who needs to determine whether dismissal for misconduct was unfair, to consider if "dismissal was 'an' appropriate sanction" for the breach of the rule or standard relevant to the workplace. According to the LAC the use of the infinitive word "an" opposed to the definitive word "the" shows that the legislature was aware that more than one sanction could be "fair" for the contravention.<sup>86</sup> The word "appropriate" in itself requires that the sanction should be suitable or proper and necessarily implies a range of responses.<sup>87</sup> Item 3(4) of The Code stipulates that:

... 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.

"Intolerable" also implies a measure of subjective perception and assessment in that "the capacity to endure a continued employment relationship must exist on the part of the employer".<sup>88</sup> The LAC did, however, make it clear that this does not mean that employers may merely state or allege that a continued employment relationship would be intolerable, for it to be held to be intolerable. The criteria remain whether the dismissal was fair.<sup>89</sup>

Conceptually, inherent in The Code is the notion of fairness. The word "fairness" implies a range of possible responses and the mere fact that:<sup>90</sup>

... a commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair.

Thus, a commissioner does not have to be persuaded that dismissal was the only fair sanction; only that it was a fair sanction. Thus, the mere fact that a commissioner might think that a different sanction would also have been fair, or fairer

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85 2006 15 *IR Network* 1.11.1 (SCA) (45); see also 2007 ZACC 22 (33) and 2008 29 *ILJ* 614 (LAC) 620H-621A.

86 2006 15 *IR Network* 1.11.1 (SCA) (45); see also Partington and Van der Walt 2008 *Obiter* 215.

87 2006 15 *IR Network* 1.11.1 (SCA) (45).

88 2006 15 *IR Network* 1.11.1 (SCA) (45).

89 2006 15 *IR Network* 1.11.1 (SCA) (45).

90 2006 15 *IR Network* 1.11.1 (SCA) (46); see also 2007 ZACC 22 (34).

or even more than fair, does not justify setting aside the sanction imposed by the employer.<sup>91</sup>

Finally, addressing the fear of a flood of cases being referred to the CCMA and the courts, does not lie in limiting the grounds for review, but rather in educating commissioners on the limitations the law has put on their powers to intervene in the decisions of employers.<sup>92</sup>

The LAC finally summarised its findings as follows:<sup>93</sup>

Commissioners must exercise caution when determining whether a workplace sanction imposed by an employer is fair. There must be a measure of deference to the employer's sanction, because under the LRA it is primarily the function of the employer to decide on the proper sanction. In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal is the only fair sanction. The statute requires only that the employer establish that it is a fair sanction. The fact that the commissioner may think that a different sanction would also be fair does not justify setting aside the employer's sanction.

The "reasonable employer"-test had thus been enforced by the SCA, but was short lived. Sidumo and the Congress of South African Trade Unions lodged an appeal against the decision of the SCA to the Constitutional Court. Before the Constitutional Court could have its final pronouncement on the issue, the LAC had one last opportunity to address the issue.

In *Engen Petroleum Ltd v CCMA & others*<sup>94</sup> Zondo JP was highly critical and almost offended by the SCA's decision in the *Sidumo*-case and stated:<sup>95</sup>

This time the issue has arisen again and this Court will deal with the issue fully and thoroughly once and for all. In saying this, this Court does not purport to claim a final say on the issue but seeks to do so because it has previously rejected the reasonable employer test and it has been criticised in the Rustenburg Judgement, *supra*, for its decision to reject the reasonable employer test.

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91 2006 15 *IR Network* 1.11.1 (SCA) (46); Partington and Van der Walt 2008 *Obiter* 216.

92 2006 15 *IR Network* 1.11.1 (SCA) (47) see also 2007 ZACC 22 (35). The CC held that this was no more than a supposition 2007 ZACC 22 (76).

93 2006 15 *IR Network* 1.11.1 (SCA) (48); see also 2007 ZACC 22 (31); Smit 2008 *ILJ* 1638.

94 2007 16 *IR Network* 6.3.1 (LAC) (hereafter the *Engen*-case).

95 2007 16 *IR Network* 6.3.1 (LAC) (3), (172); see also Mischke July 2007 *IR Network*.

The LAC did a very comprehensive study on the history of the "reasonable employer"-test and what it called the "own opinion"-approach, just in case the SCA would like to reconsider its position at some stage in the future, which it would be fully entitled to do.<sup>96</sup> In the *Engen*-case the Respondent was employed as a driver. Each truck was fitted with a tachograph and the company had a rule which stated that employees were not allowed to tamper with that device and were further required to ensure that it was in good working order before leaving the company's premises. On 17 September 2002 evidence from an independent analyst revealed that the Respondent made an unauthorised stop and that there was interference with the tachograph system.<sup>97</sup> The Respondent was dismissed subsequent to a disciplinary hearing. At that time he had about eight year's service with the Company, with a clean disciplinary record. The matter was referred to the CCMA. The commissioner held that dismissal was too severe a sanction and ordered Engen to reinstate the Respondent, but without back pay.<sup>98</sup> Eventually the matter was referred to the LAC, who had to decide whether the commissioner committed a reviewable irregularity by finding that dismissal as a sanction was too harsh.<sup>99</sup> The LAC held that, in the light of the SCA's decision in the *Sidumo*-case regarding the "own opinion"-approach, the decision of the commissioner had to be reviewed and set aside.<sup>100</sup> Zondo JP held that maybe this was a case where the employee should have been given a second chance, however:<sup>101</sup>

the question is whether or not dismissal as a sanction on the circumstances of this case can be said to be shockingly excessive or so excessive as to shock one's senses of fairness or whether no reasonable employer would have dismissed the employee.

Although Zondo JP believed that dismissal was an excessive sanction under the circumstances, he was bound by the SCA's decision and could not interfere in the employer's decision to dismiss the Respondent. Zondo JP would be very pleased

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96 2007 16 *IR Network* 6.3.1 (LAC) (3).

97 See 2007 16 *IR Network* 6.3.1 (LAC) (175) – (178); for a summary of the facts of this case see Mischke July 2007 *IR Network*.

98 See 2007 16 *IR Network* 6.3.1 (LAC) (183).

99 See 2007 16 *IR Network* 6.3.1 (LAC) (185).

100 See 2007 16 *IR Network* 6.3.1 (LAC) (186).

101 See 2007 16 *IR Network* 6.3.1 (LAC) (188); see also Mischke July 2007 *IR Network*.

with the Constitutional Court's final say on the matter in that it finally rejected the "reasonable employer"-test and replaced it with:<sup>102</sup>

Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

The "reasonable decision maker"-test will now be considered, as well as how the courts have subsequently interpreted and applied the test in practice.

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102 2007 ZACC 22 (110).

### 2.1.2 The "reasonable decision maker"-test

In the *Sidumo*-case the Constitutional Court analysed the reasoning of the SCA in some detail.<sup>103</sup> The court referred to section 23(1) of the *Constitution of the Republic of South Africa, 1996*<sup>104</sup> which provides that everyone has the right to fair labour practices. The court stated that this provision applies to employers and employees, and for employees it further implies security of employment.<sup>105</sup> The LRA was enacted to give effect to, amongst other issues, section 23 of the Constitution.<sup>106</sup> Section 3 of the LRA further deals with the duty of any person interpreting the provisions of the LRA, which includes commissioners, to "give effect to its primary objects; in compliance with the Constitution".<sup>107</sup>

The court then referred to section 138 of the LRA and stated that the commissioner has to determine whether the dismissal was fair, but must do so fairly and quickly.<sup>108</sup> This requires of the commissioner to determine whether or not the misconduct was committed, which is a factual enquiry.<sup>109</sup> However, the determination and assessment of fairness are not limited to what happened at the disciplinary hearing.<sup>110</sup> The Constitutional Court is very critical about the SCA's undue reliance on the word "an" when referring to an appropriate sanction used in item 7(b)(iv) of The Code, and held that "the infinitive article is not decisive".<sup>111</sup> In any event, The Code is a guideline and cannot supersede the Constitution or the provisions of the LRA.<sup>112</sup>

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103 2007 ZACC 22 (29) – (35); for criticism against the Constitutional Court's decision see Partington and Van der Walt 2008 *Obiter* 209 – 237.

104 Hereafter Constitution.

105 2007 ZACC 22 (55); see also *NEHAWU v University of Cape Town* 2003 2 *BCLR* 154 (CC) regarding the applicability to employers and employees; Partington and Van der Walt 2008 *Obiter* 218.

106 S1(a) LRA; 2007 ZACC 22 (56).

107 S3 LRA; 2007 ZACC 22 (57). Partington and Van der Walt 2008 *Obiter* 219.

108 2007 ZACC 22 (59).

109 2007 ZACC 22 (59); see also item 7 The Code.

110 2007 ZACC 22 (59).

111 2007 ZACC 22 (60).

112 2007 ZACC 22 (60).

There further was nothing to suggest that, when a commissioner needs to determine the fairness of a dismissal, the commissioner must approach it from the perspective of the employer. On the contrary,<sup>113</sup> article 8 of the International Labour Organisation *Convention on Termination of Employment* 158 of 1982 requires that employees whose services have been terminated, should have recourse to "an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator", with the emphasis on "impartial body".<sup>114</sup>

The Constitutional Court agreed with the *Nampak* and *Country Fair Foods*-cases that a commissioner should not approach a matter as if he had been the employer, and that the fairness of a dismissal has to be determined based on the facts and circumstances of each case.<sup>115</sup> Unfortunately, in clarifying how a commissioner should approach this task, the courts resorted to the "reasonable employer"-test as it was used in England.<sup>116</sup> The Constitutional Court made it very clear that the test applied by the SCA was severely criticised in England in that it did not allow for "a proper balancing of the interests of the employer and employee".<sup>117</sup> The test applied by the SCA in fact tilted the balance against employees, whereas it was indeed critically important that a scrupulous, evenly balanced approach between employers and employees had to be maintained.<sup>118</sup>

The Constitutional Court held that it has therefore to be the commissioner's sense of fairness that must prevail, as an impartial third party's determination was more likely to promote labour peace.<sup>119</sup> In doing so, the commissioner will not be required to defer to the decision of the employer, but has to consider all relevant circumstances.<sup>120</sup> The Constitutional Court further held that the test that has to be

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113 2007 ZACC 22 (61).

114 2007 ZACC 22 (61); see also Partington and Van der Walt 2008 *Obiter* 219.

115 2007 ZACC 22 (67)-(68).

116 2007 ZACC 22 (68); see also Partington and Van der Walt 2008 *Obiter* 219.

117 2007 ZACC 22 (69); see also Partington and Van der Walt 2008 *Obiter* 221.

118 2007 ZACC 22 (74); Smit 2008 *ILJ* 1639.

119 2007 ZACC 22 (75); Smit 2008 *ILJ* 1639.

120 2007 ZACC 22 (79); Peart October 2007 *Leppan Beech News Brief*.

applied for reviewing the awards of commissioners, is: "is the decision reached by the commissioner one that a reasonable decision maker could not reach?"<sup>121</sup>

According to the Constitutional Court, section 145 of the LRA is now suffused by the constitutional standard of reasonableness. This will give effect not only to the constitutional right to fair labour practices, but also to administrative action which is lawful, reasonable and procedurally fair.<sup>122</sup>

In applying the test of reasonableness, the Constitutional Court held that the decision reached by the commissioner in this case was not one which a reasonable decision maker could not reach.<sup>123</sup> It commented on the fact that there was no dishonesty, a significant factor for application of progressive discipline; that the mine suffered no losses; the employee had a history of long-serving duty and a clean disciplinary record.<sup>124</sup> What counted against the employee was the fact that he did not own up to his misconduct and denied that he received training. However, according to the Constitutional Court, the commissioner carefully and thoroughly considered the different elements of The Code and applied his mind to the question of appropriateness of the sanction.<sup>125</sup>

When analyzing the decision of the Constitutional Court it is however interesting to note that it did not consider a number of earlier decisions of the Labour Court and Labour Appeal Court on the issue of sanction.<sup>126</sup> Partington and Van der Walt also criticised the decision of the Constitutional Court as setting "a disconcerting precedent".<sup>127</sup> They posed the question as to: "how dishonest an employee must be to deserve dismissal".<sup>128</sup> Grogan made the following comment:<sup>129</sup>

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121 2007 ZACC 22 (110); see also Smit 2008 *ILJ* 1641.

122 2007 ZACC 22 (110), (158).

123 2007 ZACC 22 (119).

124 2007 ZACC 22 (117); see also 2009 18 *IR Network* 1.11.17 (LC) (26).

125 See also Partington and Van der Walt 2008 *Obiter* 233 for a summary.

126 Mischke *IR Network* November 2007.

127 Partington and Van der Walt 2008 *Obiter* 234 – 235; see also Myburgh 2009 *ILJ* 7.

128 Partington and Van der Walt 2008 *Obiter* 235; see also Grogan's comments in Grogan *Dismissal* 163.

129 Grogan December 2007 *Employment Law* 22; see also Partington and Van der Walt 2008 *Obiter* 235.

... at its narrowest, the *Sidumo* judgement seems to create a precedent that, in any future case in which an employee with 14 years' or more service and a clear disciplinary record is dismissed for failing to perform a key function, commissioners must rule the dismissal unfair, unless, perhaps, the employee was expressly charged with "dishonesty" and the employer provides conclusive proof at the arbitration hearing that the employee was dishonest. ... *Sidumo* will make it far more difficult for employers to persuade commissioners that the penalty of dismissal for proven misconduct is "appropriate" if the commissioner's heart persuades him or her to think otherwise.

According to Myburgh and Van Niekerk the disturbing tendency indeed exists on the part of commissioners to substitute their personal opinions for those of employers.<sup>130</sup> Despite the criticism, it is clear that the test to be applied at this stage is the "reasonable decision maker"-test, and commissioners are no longer required to defer to the decision of the employer. How did the courts subsequently interpret and apply this test?

In *Edcon v Pillemer*<sup>131</sup> an employee, a quality controller, with a clean disciplinary record and seventeen years of service, was dismissed for dishonesty after she had failed to report that her company car was involved in an accident while being driven by her son.<sup>132</sup> At that time she mistakenly believed that her son was not allowed to drive the company car and got the car repaired at her husband's panel beater shop. She initially denied that an accident took place, then she lied about the circumstances that lead to the accident, but finally she told the truth.<sup>133</sup> It is important to note that she was not charged for continuing to lie after the accident had initially been discovered.<sup>134</sup> She was indeed charged with:<sup>135</sup>

Failure to be honest and act with integrity in that you committed an act, which has affected the trust relationship between the company and the employee in that on 8 June 2003 to 8 October 2003: You failed to report an accident of a company vehicle... which your son was driving on the day of the accident (8 June 2003) and this resulted in a breach of trust between yourself and the company.

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130 Furthermore, "whether that inclination is due to partiality, a different ethical code, inexperience or lack of training, is neither here nor there" Myburgh and Van Niekerk 2000 *ILJ* 2158.

131 2008 29 *ILJ* 614 (LAC) (hereafter *Edcon*-case).

132 2008 29 *ILJ* 614 (LAC) 616J-617C; Myburgh 2009 *ILJ* 4-5; Partington and Van der Walt 2008 *Obiter* 235.

133 2008 29 *ILJ* 614 (LAC) 617D-F.

134 2008 29 *ILJ* 614 (LAC) 617H.

135 2009 18 *IR Network* 1.11.3 (SCA) (5).

An unfair dismissal dispute was referred to the CCMA and the commissioner held that the sanction of dismissal was too harsh in the light of the employee's seventeen years of unblemished service, her being only two years away from retirement, and the fact that the employer failed to prove that the employment trust relationship had been broken down.<sup>136</sup> The commissioner ordered reinstatement, but without back pay.<sup>137</sup> Edcon took the matter on review to the LC, which declined to set the award aside. Edcon then lodged an appeal to the LAC. The LAC referred to the *Sidumo*-case and held that *in casu* it cannot be held that a reasonable decision maker in the position of the commissioner could not reach the conclusion she reached.<sup>138</sup> Finally, with special leave to appeal, Edcon referred the matter to the SCA.<sup>139</sup>

With specific reference to the breakdown of the trust relationship, it is important to note that the SCA held that the company called only one witness, who did not even personally know the employee. One would be inclined to argue that there would be no need to lead evidence on the breakdown of the trust relationship and that the decision maker ought to be able to deduct the breakdown in the trust relationship based on, for example, the seriousness of the offence. The SCA however did not support this notion. This judgement is extremely important to employers, as it did not only emphasise the importance of leading evidence during the disciplinary hearing on the breakdown of the trust relationship, but it also made it clear that chairpersons of disciplinary and appeal hearings are not "witnesses" in the disciplinary hearings.<sup>140</sup> A chairperson's role is to ensure that a fair conclusion is reached, based on the evidence submitted to him/her during the disciplinary hearing process and not to rely on his/her own opinion as an employee of the company in making the decision.<sup>141</sup> Therefore, somebody in management who had dealings with the accused employee, should provide the necessary evidence with regard to in what respect the employee's conduct breached the trust relationship.<sup>142</sup>

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136 2008 29 *ILJ* 614 (LAC) 617I-618A; Partington and Van der Walt 2008 *Obiter* 235; Myburgh 2009 *ILJ* 5; see also the comments by Myburgh 2010 *ILJ* 14.

137 2008 29 *ILJ* 614 (LAC) 617I.

138 2008 29 *ILJ* 614 (LAC) 622G-H; Myburgh 2009 *ILJ* 5.

139 Reported in *Edcon v Pillemer* 2009 18 *IR Network* 1.11.3 (SCA) (2).

140 2009 18 *IR Network* 1.11.3 (SCA) (21).

141 2009 18 *IR Network* 1.11.3 (SCA) (21).

142 Myburgh 2010 *ILJ* 14; *Edcon v Pillemer* 2009 18 *IR Network* 1.11.3 (SCA).

The case law referred to, could have created the impression that the *Sidumo*-case would only be detrimental for employers in that employers were left to the mercy of commissioners, who now base their decisions on that of a reasonable decision maker, which decision would not necessarily support the employer's view on discipline. However, as the next case illustrates, the *Sidumo*-case "indeed cuts both ways".<sup>143</sup> Employers and employees are equally affected by the decision of the *Sidumo*-case.

In *Palaborwa Mining v Cheetham*<sup>144</sup> the employer operated a mine and had a written policy which stated that any employee found to have more than 0.05g/100ml alcohol in their bloodstream whilst on duty, might be dismissed for a first offence.<sup>145</sup> Cheetham was employed as a company secretary. Blood alcohol tests were randomly administered at the company. At the time of such a test he was found to have 0.115g/100ml alcohol in his bloodstream. Disciplinary action was instituted and Cheetham was found guilty. At that stage he had eight years of service with the Company and was 58 years of age. The employer dismissed Cheetham and justified its decision according to the facts that it had a duty to ensure the safety of its employees, that it had to be consistent, and that, although Cheetham was a first offender, he was a senior employee and held a responsible position.<sup>146</sup> Cheetham referred his dismissal to the CCMA. At the CCMA he did not challenge the employer's reasons for dismissing him but stated that he was using antibiotics and was under stress.<sup>147</sup> The CCMA held that the dismissal of Cheetham was substantively and procedurally fair. The matter was taken on review to the Labour Court which held that the commissioner failed to give adequate regard to Cheetham's personal circumstances.<sup>148</sup> The Labour Court judgement was then taken on appeal to the LAC.

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143 Grogan *Dismissal* 163.

144 2008 29 *ILJ* 306 (LAC) (hereafter *Palaborwa Mining*-case); for a summary of the case see Myburgh 2009 *ILJ* 5-6; see also Smit 2008 *ILJ* 1641.

145 2008 29 *ILJ* 306 (LAC) 309A-B.

146 2008 29 *ILJ* 306 (LAC) 309D-F.

147 2008 29 *ILJ* 306 (LAC) 309F-H.

148 2008 29 *ILJ* 306 (LAC) 308F.

The LAC referred to the *Sidumo*-case and stated that the judgement was indeed of "massive importance".<sup>149</sup> The LAC held that although decision makers may reach different conclusions, the decision making power was given to commissioners by the LRA, and that it therefore rests there.<sup>150</sup> Such a decision would therefore stand, except if it could be concluded that the decision taken was one which a reasonable decision maker could not have reached.<sup>151</sup> It would indeed, according to Smit, be extremely rare for courts to interfere with a sanction of dismissal, which<sup>152</sup>

has been confirmed by a commissioner as it would be difficult for a court in the light of two successive decisions in the same matter, by different persons, having different interests, to find that the decision to dismiss was one which a reasonable decision maker could not reach.

The LAC further held that the *Sidumo*-case did not only entail a shift away from deference to the employer, but it also<sup>153</sup>

- (a) as in this case, reduces the scope for a dissatisfied employee to take his or her dispute further; and
- (b) reduces the potential for the Labour Courts and the Supreme Court of Appeal to exercise scrutiny over the decisions of commissioners who are appointed to arbitrate in terms of the LRA.

This does not mean that awards of the CCMA can no longer be taken on review. In *Bestel v Astral Operations*<sup>154</sup> the LAC referred to the article by Myburgh and held that a commissioner's finding on the facts of a specific case will be considered unreasonable if:<sup>155</sup>

unsupported by any evidence; based on speculation by the commissioner; entirely disconnected from the evidence; supported by evidence that is insufficiently reasonable to justify the decision; or made in ignorance of evidence that was not contradicted.

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149 2008 29 *ILJ* 306 (LAC) 310C.

150 See also Myburgh 2009 *ILJ* 2; see also Myburgh 2010 *ILJ* 2.

151 2008 29 *ILJ* 306 (LAC) 310D-E.

152 Smit 2008 *ILJ* 1643.

153 2008 29 *ILJ* 306 (LAC) 311F-312A; Smit 2008 *ILJ* 1643.

154 2010 19 *IR Network* 1.11.28 (LAC).

155 2010 19 *IR Network* 1.11.28 (LAC) (14); see also Myburgh 2009 30 *ILJ* 13.

In *Shoprite Checkers v CCMA*<sup>156</sup> Maake was employed by Shoprite Checkers<sup>157</sup> as a controller in the delicatessen department. He was caught on video camera consuming food that belonged to Shoprite. He was charged with three instances of misconduct, found guilty and was dismissed. At that stage he had served thirty years of duty with the Company.<sup>158</sup> The matter was referred to the CCMA and the commissioner held that the dismissal of Maake was substantively and procedurally unfair, and ordered reinstatement.<sup>159</sup> Shoprite took the matter on review and the LC held that the commissioner committed gross misconduct in relation to her duties and her award was set aside.<sup>160</sup> The matter was referred back for arbitration.

The commissioner then held that Maake was indeed guilty of breaking a rule, but that it did not imply that dismissal was inevitable. He took into account the offence which was committed, that discipline had to be progressively applied, that Maake had a clean disciplinary record and, based on the totality of the circumstances, held that dismissal was too harsh a sanction.<sup>161</sup> He ordered that Maake be reinstated from the date of the award, and that he be issued with a severe final warning valid for six months. Thus, Maake forfeited approximately two and a half years of back pay. The matter was again taken on review.

The LC held that although there was no basis to justify interference in the decision of the commissioner, the matter was again referred back to the CCMA; the third time the matter would have been decided before the CCMA.<sup>162</sup> Both parties appealed against this decision. Shoprite argued that dismissal was indeed appropriate for the misconduct committed. Judge President Zondo referred to the *Sidumo*-case and held that the decision of the commissioner that the sanction of dismissal was too harsh, was<sup>163</sup>

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156 2009 18 *IR Network* 1.11.1 (SCA); for a summary of the case see Myburgh 2009 *ILJ* 7 or Mischke June 2009 *IR Network*.

157 Hereafter Shoprite.

158 2009 18 *IR Network* 1.11.1 (SCA) (3)-(6).

159 2009 18 *IR Network* 1.11.1 (SCA) (9).

160 2009 18 *IR Network* 1.11.1 (SCA) (10).

161 2009 18 *IR Network* 1.11.1 (SCA) (11).

162 *Shoprite Checkers (Pty) Ltd v CCMA & others* 2008 17 *IR Network* 8.8.1 (LAC) (hereafter Zondo decision).

163 2008 17 *IR Network* 8.8.1 (LAC) (19), see also Myburgh 2009 *ILJ* 7.

reasonable because it cannot be said that a reasonable decision-maker could not reach the same conclusion. In fact, I would go so far as to say that there is no prospect that a reasonable decision-maker, including a CCMA commissioner, could on the facts of this case find that dismissal was a fair sanction.

Maake brought a counter-review application against the decision of the commissioner based on, amongst other issues, the fact that his reinstatement was not made retrospective.<sup>164</sup> Zondo JP found that the decision of the commissioner not to award retrospective reinstatement or any compensation was not justifiable or reasonable.<sup>165</sup> He made this finding stating that for Shoprite the issue probably was not the value of the food, but the principle and the real problem of shrinkage.<sup>166</sup> Although he was not ignoring that problem, Maake had a clean disciplinary record, 30 years of service, and the value of the food was only between R20 to R30. At the time the award was made, Maake had already lost R33 000 in earnings for being without employment for approximately 2½ years.<sup>167</sup> Taking all those facts into account, it could not be said that a reasonable decision maker could have sought to impose any penalty, referring to the loss in income, in addition to a severe final warning, thus Zondo JP ordered reinstatement from the date of dismissal.<sup>168</sup> A lot of emphasis was thus placed on the employee's long period of service, his clean disciplinary record, and the value of the food that he consumed, in comparison to the amount of money he has already lost for not being retrospectively reinstated from the date of dismissal. This judgement was indeed setting a dangerous precedent that dismissal was no longer an appropriate sanction for unauthorised consumption of food and petty theft.<sup>169</sup>

The decision of Zondo JP was subsequently overturned by the SCA.<sup>170</sup> The SCA confirmed that the decision to dismiss belongs to the employer but, in terms of the LRA, a commissioner is required to determine whether the dismissal was fair.<sup>171</sup> The decision of the commissioner is final to that extent that a party cannot lodge an

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164 2008 17 *IR Network* 8.8.1 (LAC) (20).

165 2008 17 *IR Network* 8.8.1 (LAC) (26).

166 2008 17 *IR Network* 8.8.1 (LAC) (26); This particular store's shrinkage has increased from 1.5% to 4%, although the specific reason for the increase was unknown; see also Mischke March 2009 *IR Network*.

167 2008 17 *IR Network* 8.8.1 (LAC) (25)-(26).

168 2008 17 *IR Network* 8.8.1 (LAC) (26), (33); see also Myburgh 2009 *ILJ* 8.

169 See comment of Myburgh 2009 *ILJ* 7; also Mischke March 2009 *IR Network*.

170 2009 18 *IR Network* 1.11.1 (SCA) (35).

171 2009 18 *IR Network* 1.11.1 (SCA) (25).

appeal against it.<sup>172</sup> An aggrieved party does however have the right to institute review proceedings in the Labour Court. In terms of section 158(1)(g) of the LRA the Labour Court may review the performance or any function provided for in the LRA on any ground permissible by law, subject to section 145 of the LRA.<sup>173</sup> Thus, any party who wants to challenge an arbitration award, is limited to the grounds provided for in section 145 of the LRA. They are<sup>174</sup>

- (a) that the commissioner-
  - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
  - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
  - (iii) exceeded the commissioner's powers; or
- (b) that an award has been improperly obtained.

Section 145 of the LRA is at present suffused by the constitutional standard of reasonableness, so that the question needed to be asked, is: "is the decision reached by the commissioner one that a reasonable decision maker could not reach"?<sup>175</sup>

The SCA was of the opinion that the LAC misconceived the nature of its function. The LAC held that the LC ought to have finalised the review application instead of setting the award aside and remitting the matter to the CCMA for a *de novo* hearing. Under those circumstances, according to the SCA, the LAC ought to have remitted the matter to the LC for finalisation, yet it decided to finalise the matter itself.<sup>176</sup> By following this approach, the LAC effectively pulled on the shoes of the LC<sup>177</sup>

and was thus exercising, not its traditional appeal powers, but rather the fairly circumscribed section 145(2) review powers of the Labour Court. Its warrant for interference with the award of the arbitrator was narrowly confined.

The SCA held that, given the decision making power of the commissioner, and having regard to its reasons, it could not be said that the conclusion reached by the

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172 2009 18 *IR Network* 1.11.1 (SCA) (26).

173 See s158(1)(g) and s145 of the LRA; 2009 18 *IR Network* 1.11.1 (SCA) (26).

174 S145(2) of LRA.

175 2009 18 *IR Network* 1.11.1 (SCA) (27).

176 2009 18 *IR Network* 1.11.1 (SCA) (29).

177 2009 18 *IR Network* 1.11.1 (SCA) (30).

commissioner was one which a reasonable decision maker could not reach.<sup>178</sup> The SCA further held that section 193(1)(a) of the LRA placed a further limitation on the powers of interference by the LAC. The LRA indeed gave commissioners the discretion to order the employer to reinstate an employee from any date not earlier than the date of dismissal, thus to order reinstatement which is not retrospective to the date of dismissal.<sup>179</sup> The SCA further held that the LAC misconceived the nature of its function when it interfered with the decision of the arbitrator by substituting its own decision with that of the arbitrator, which it was not permitted to do.<sup>180</sup>

In *Shoprite Checkers v CCMA*<sup>181</sup> the employee was employed as an assistant baker. At the time of dismissal he had served nine years of duty and had a clean disciplinary record.<sup>182</sup> He was caught eating pap and bread that belonged to the employer. Disciplinary action was instituted; he was found guilty and dismissed. The matter was referred to the CCMA, which held that the employee was not guilty of any misconduct and ordered his reinstatement.<sup>183</sup> The matter was taken on review. The LC held that the employee was indeed guilty of misconduct and substituted the commissioner's award of reinstatement with that of a final written warning.<sup>184</sup> The LC again referred to the fact that employers in the retail industry suffer huge losses due to shrinkage, and that in the majority of cases dismissal would be appropriate. However, in this case dismissal should not have been imposed.<sup>185</sup> The LC again took into account the small value of the items consumed, the employee's clean disciplinary record and nine years of service with the company. The decision was taken on review.

The LAC took note of the Zondo-decision<sup>186</sup> but found that the facts of the current case were distinguishable.<sup>187</sup> The LAC took into account the long line of jurisprudence on theft, the fact that an employer should be able to trust its

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178 2009 18 *IR Network* 1.11.1 (SCA) (30).

179 2009 18 *IR Network* 1.11.1 (SCA) (35).

180 2009 18 *IR Network* 1.11.1 (SCA) (33).

181 2008 17 *IR Network* 1.11.32 (LAC) (hereafter Davis decision); for a summary of the case see Myburgh 2009 *ILJ* 7 footnote 30; the Davis decision was made after the Zondo decision.

182 2008 17 *IR Network* 1.11.32 (LAC) (15).

183 2008 17 *IR Network* 1.11.32 (LAC) (3).

184 2008 17 *IR Network* 1.11.32 (LAC) (4).

185 2008 17 *IR Network* 1.11.32 (LAC) (13).

186 See footnote 162 *supra*.

187 2008 17 *IR Network* 1.11.32 (LAC) (25).

employees, that dishonesty affects the core of the employment relationship, that the size of the article or value of it (for that matter), does not make a difference, and that dismissal was a sensible response to the risk the operation was exposed to.<sup>188</sup> The LAC took the following into account in reaching its conclusion:<sup>189</sup>

He had acted in a flagrant violation of the company rules which has been implemented for clear, justifiable operational reasons. Other employees who had similarly found to have so acted had been dismissed.

Finally, the employer led evidence about the fact that the employment relationship had broken down.<sup>190</sup> It is not sufficient to merely allege that an employment relationship has broken down; evidence in that regard should be presented. The LAC held that the dismissal of the employee was fair.

In the *Sebotha*-case a bakery controller, who served twenty five years of duty, was dismissed by Shoprite after he was found in possession of a bar of soap to the value of R6.99.<sup>191</sup> Shoprite stated that the reasons for dismissing the employee were based on the following: the fact that the employee was dishonest, company rules that prescribed dismissal for theft, and because the company suffers losses of more or less R5 million per annum due to shrinkage.<sup>192</sup> The commissioner held that the company did not prove dishonesty, failed to prove that the employment relationship had irreparably broken down, therefore he reached the conclusion that the sanction of dismissal was too harsh.<sup>193</sup> The Labour Court held that, prior to the *Sidumo*-case, employers were able to dismiss employees on the basis of the "reasonable employer"-test.<sup>194</sup> Chairpersons of disciplinary hearings endorsed the decision of employers.<sup>195</sup> However, commissioners were not required to "rubber stamp" the decisions of employers, but to decide whether an employee's dismissal was fair or unfair.<sup>196</sup> The court severely criticised any attempt to reintroduce the "reasonable

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188 2008 17 IR Network 1.11.32 (LAC) (16)-(21).

189 2008 17 IR Network 1.11.32 (LAC) (25).

190 2008 17 IR Network 1.11.32 (LAC) (25)-(26); Myburgh 2010 ILJ 13.

191 2009 18 IR Network 1.11.17 (LC) (2).

192 2009 18 IR Network 1.11.17 (LC) (9).

193 2009 18 IR Network 1.11.17 (LC) (15)-(16).

194 2009 18 IR Network 1.11.17 (LC) (21).

195 2009 18 IR Network 1.11.17 (LC) (21).

196 2009 18 IR Network 1.11.17 (LC) (21).

employer"-test into South African law and held that it should be resisted.<sup>197</sup> The court also made it clear that the law applies to employers as well as employees. Furthermore, dishonesty in the workplace remains dishonesty, notwithstanding whether the dishonest act was committed in the private, public or retail sector.<sup>198</sup> The court referred to the test for reviews as set out in the *Sidumo*-case and asked the question whether the decision reached by the commissioner was one that a reasonable decision maker could not reach?<sup>199</sup>

The court is thus concerned with the outcome, and if the outcome is reasonable, it does not matter that there might have been flaws in the reasoning process by the commissioner.<sup>200</sup> A range of decisions will fall within the limits of reasonableness and for an employer to succeed on review, the employer will have to show that the decision reached by the commissioner fell outside the limits of reasonableness.<sup>201</sup> The Constitutional Court provides clear guidelines that have to be taken into account in considering an appropriate sanction.<sup>202</sup> After considering factors such as the absence of dishonesty, the fact that the employee testified that it was a "mistake", which was not challenged by the employer by calling the appropriate witness, the court held that the sanction issued by the commissioner was still harsh, but it was not a decision a reasonable decision maker could not reach.<sup>203</sup>

Since the judgement in the *Sidumo*-case a large number of cases have been decided based upon the "reasonable decision maker"-test.<sup>204</sup> As has emerged from the above discussion, the test is indeed two-edged, which implies that it cuts both ways with regard to employers and employees, making it extremely difficult to take the decisions of commissioners on review.<sup>205</sup> However, according to Myburgh<sup>206</sup> this would only be true provided commissioners have considered all materially relevant

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197 2009 18 *IR Network* 1.11.17 (LC) (21).

198 2009 18 *IR Network* 1.11.17 (LC) (21).

199 2009 18 *IR Network* 1.11.17 (LC) (23).

200 2009 18 *IR Network* 1.11.17 (LC) (23); Myburgh 2009 *ILJ* 1.

201 2009 18 *IR Network* 1.11.17 (LC) (25).

202 2009 18 *IR Network* 1.11.17 (LC) (25); see also 2007 ZACC 22 (78).

203 2009 18 *IR Network* 1.11.17 (LC) (31)-(32).

204 For a list of some of these cases see 2009 18 *IR Network* 1.11.1 (SCA) footnote 9.

205 See also comments by Peart October 2007 *Leppan Beech News Brief*; Grogan *Dismissal* 163.

206 Myburgh 2009 *ILJ* 10.

factors and have not otherwise misdirected themselves. In other words, commissioners must apply their minds to the facts of the case<sup>207</sup> and the law.

In the following chapter the impact that the "reasonable decision maker"-test has on disciplinary hearings in the workplace, will be considered.

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<sup>207</sup> See in this regard 2010 19 *IR Network* 1.11.28 (LAC) (14).

## Chapter 3

### 3.1 The impact of the *Sidumo*-case on disciplinary hearings in the workplace<sup>208</sup>

In the previous chapter the history, meaning and application of the "reasonable employer"-test were considered, as well as the death of the "reasonable employer"-test with the decision of the Constitutional Court in the *Sidumo*-case. Then the "reasonable decision maker"-test has been considered in some detail, and how the courts have interpreted and applied this test in practice. The impact of the *Sidumo*-case on disciplinary hearings in the workplace will now be considered, especially in the light of the comments made by Francis J in the *Sebotha*-case:<sup>209</sup>

The message as I understand it arising from *Sidumo* is that the employer cannot impose discipline as it used to do in the past. ... It requires the employer to revisit its approach, the issue of sanction at the workplace, and apply the principles which have been given.

According to Myburgh<sup>210</sup> it is impossible to escape from the fact that the *Sidumo*-case has indeed presented employers with some serious challenges, and according to Peart<sup>211</sup> "it had a profound implication for the labour relations community in South Africa". According to Grogan, the most that can be said after *Sidumo* is that, even if the employer is satisfied that he/she can meet all the requirements as set out in item 7 of The Code, there will always be the risk that an arbitrator will find that the sanction of dismissal was inappropriate.<sup>212</sup> The major difficulty in this regard is the weighing up of a set of factors concerning the employer's interest against another set of factors concerning the employee's interest to ultimately reach a decision that is fair to both parties.<sup>213</sup>

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208 It is important to note that the "reasonable decision maker"-test does not only find application in unfair dismissal disputes but also in unfair labour practice disputes, as was evident in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council* 2009 18 *IR Network* 1.11.52 (LC) which dealt with an appointment/promotion dispute.

209 2009 18 *IR Network* 1.11.17 (LC) 22.

210 Myburgh 2010 *ILJ* 2.

211 Peart October 2007 *Leppan Beech News Brief*.

212 Grogan *Dismissal* 164.

213 Grant 2009 *Obiter* 757.

In taking disciplinary action against employees, employers need to consider the principles given in the *Sidumo*-case, The Code and the CCMA Guidelines: Misconduct Arbitrations.<sup>214</sup> During 2009 the CCMA published draft guidelines for arbitrators to assist them in how to conduct arbitration proceedings, to evaluate evidence for the purpose of making an award, to assess procedural and substantive fairness of a dismissal, and to determine an appropriate remedy in the event of an unfair dismissal.<sup>215</sup> It was envisaged that those guidelines would have been fully implemented by April 2010, yet to date they have not been implemented and the document containing it is therefore still a draft version. However, they do provide a good indication to employers in relation to what arbitrators will be looking at when determining misconduct dismissals, as they are based on binding judgments. The directives given in the *Sidumo*-case were specifically taken into account.<sup>216</sup>

As already highlighted in Chapter 1, The Code provides guidelines to employers taking disciplinary action against their employees, and to commissioners who need to decide whether dismissals for misconduct were unfair.<sup>217</sup> Item 7 provides that commissioners must specifically consider the following:

- (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
  - (i) the rule was a valid rule or reasonable rule or standard;
  - (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (iii) the rule or standard has been consistently applied by the employer; and
  - (iv) *dismissal* was an appropriate sanction for the contravention of the rule of standard.<sup>218</sup>

Each of these issues is explained in detail in the Misconduct Guidelines. A commissioner who needs to determine the fairness of a dismissal, have to take into account the totality of the circumstances.<sup>219</sup> It is therefore critically important that

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214 Hereafter Misconduct Guidelines; see also Myburgh 2010 *ILJ* 10.

215 See item 2 Misconduct Guidelines.

216 Items 9, 74, 88 and 95 Misconduct Guidelines; see also comments made by Myburgh regarding the importance of these guidelines Myburgh 2010 *ILJ* 10.

217 Item 7 The Code.

218 See comments by Smit 2008 *ILJ* 1635; Myburgh and Van Niekerk 2000 *ILJ* 2153.

219 2007 ZACC 22 (78); see also 2009 18 *IR Network* 1.11.17 (LC) (24); see also Myburgh 2010 *ILJ* 18; Beaumont January 2008 *Beaumont's Express* 21.

employers do not take any of the issues listed in item 7 of The Code<sup>220</sup> for granted, but that they produce the necessary evidence to prove each of the elements that a commissioner will take into account. The employer is indeed required to ensure that the principles as set out in the *Sidumo*-case are captured in evidence delivered before a chairperson of a disciplinary hearing.<sup>221</sup>

As was held in the *Sidumo*-case, fairness requires a balance of interests between the employer and the employee, holding the scales evenly balanced.<sup>222</sup> Based on this principle, Navsa J listed a number of specific issues to be taken into consideration, which was not an exhaustive list:<sup>223</sup>

In approaching the dismissal dispute impartially a commissioner will take into account the totality of 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 the employee and his or her long-service record.

Based on the issues listed above, the employer will have to lead evidence on the importance of the rule that has been breached, the reason for imposing the sanction of dismissal, the harm caused by the employee's conduct, and whether additional training and instruction may result in the employee not repeating the misconduct.<sup>224</sup> According to Beaumont the "harm" referred to could be harm caused to the employer's business, property or reputation, or to other employees or to the employment relationship.<sup>225</sup> It is also interesting to note that in the list of issues to be taken into consideration by commissioners, Navsa J, writing for the majority, did not even mention the issue of breach of the trust relationship, although he stated that the list was not an exhaustive list.<sup>226</sup> According to Mischke it is strange that the

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220 These elements are repeated from item 76 to 93 of the Misconduct Guidelines.

221 Beaumont May 2008 *Beaumont's Express* 100.

222 2007 ZACC 22 (66); Beaumont January 2008 *Beaumont's Express* 21; Grogan *Dismissal* 161.

223 2007 ZACC 22 (78); see also 2009 18 *IR Network* 1.11.17 (LC) (24); and Myburgh 2010 ILJ 5-6; see also Peart October 2007 *Leppan Beech News Brief*; Smit 2008 ILJ 1640; 2008 17 *IR Network* 8.14.4 (CCMA) (58); Grant 2009 *Obiter* 760.

224 2007 ZACC 22 (78); see also Partington and Van der Walt 2008 *Obiter* 220; Beaumont May 2008 *Beaumont's Express* 97; Mischke September 2009 *IR Network*.

225 Beaumont May 2008 *Beaumont's Express* 97.

226 2007 ZACC 22 (78); Mischke *IR Network* November 2007.

Constitutional Court did not deal with the issue in any detail, as it was indeed an important principle to consider, especially in the context of dishonesty.<sup>227</sup>

However, in the *Edcon*-case the SCA made it quite clear that it was not only critical for employers to lead evidence on the breakdown of the trust relationship, but also made it clear that chairpersons of disciplinary and appeal hearings are not witnesses in the process.<sup>228</sup> Somebody in management who had dealings with the accused employee, should provide the necessary evidence with regard to the employee's conduct that breached the trust relationship.<sup>229</sup>

Ncgobo J added that commissioners are required to:<sup>230</sup>

take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. ... The commissioner must seek to understand the reasons for a particular rule being adopted and its importance in running of the employer's business.

According to Mischke one could argue that this issue concerns the validity of the rule, something which commissioners must in any event consider in terms of item 7(b)(i) of The Code.<sup>231</sup> However, Mischke is of the view that this seems more an issue of operational requirements; that a commissioner must understand the reasons for the rule being adopted and the importance of the rule in the running of the business; thus in effect the Constitutional Court has introduced a new factual issue that will have to be proven and argued before a commissioner.<sup>232</sup>

Navsa J referred at a later stage during his judgement to other factors which must be considered by commissioners.<sup>233</sup> Although those factors were referred to when he dealt with whether the result of the award was reasonable, they are relevant for the purpose of our discussion.<sup>234</sup> He stated that:<sup>235</sup>

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227 Mischke *IR Network* November 2007.

228 2009 18 *IR Network* 1.11.3 (SCA) (21); see also Grogan *Dismissal* 164-165.

229 Myburgh 2010 *ILJ* 14; 2009 18 *IR Network* 1.11.3 (SCA).

230 2007 ZACC 22 (181)-(182); Partington and Van der Walt 2008 *Obiter* 236-237; Myburgh 2010 *ILJ* 6.

231 Mischke *IR Network* November 2007.

232 Mischke *IR Network* November 2007; 2007 ZACC 22 (182).

233 2007 ZACC 22 (116)-(117).

234 Myburgh 2010 *ILJ* 7.

235 2007 ZACC 22 (117); Myburgh 2010 *ILJ* 7-8.

The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training are factors that count against him. His years of clean and lengthy service were certainly a significant factor. In my view, the Commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of the appropriateness of the sanction.

In the determining of an appropriate sanction, issues such as denial of guilt, presenting misleading evidence, and not showing any remorse, are indeed aggravating factors which must be taken into account.<sup>236</sup> Although the judge was referring to the factors which should be considered by commissioners, employers could only benefit by training their employees, who would be required to chair disciplinary hearings, to consider the same factors when they need to decide upon an appropriate sanction for the misconduct which was committed.<sup>237</sup>

The employee will have to provide reasons for challenging his/her dismissal, the effect of the dismissal on him/her, and his/her long-serving duty record.<sup>238</sup> However, with regard to long-serving duty Grant is of the view that it is only relevant in so far as it is measuring the likelihood of the employee repeating the offence, which should be weighed against the operational risk to the employer.<sup>239</sup> According to Mischke there can be no doubt that dismissal will have a profound impact on the employee. It was not clear what the Constitutional Court specifically had in mind, but one can only suppose that the court was referring to the personal circumstances of the employee, which is not a new principle.<sup>240</sup>

In the *Sebotha*-case the court explained its understanding of the *Sidumo*-case. The court stated that employers can no longer impose discipline as they used to.<sup>241</sup> However, at the same time it does not give employees the right to commit misconduct and then use *Sidumo* as a defence.<sup>242</sup> Employers are however required

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236 Myburgh 2010 *ILJ* 8.

237 Beaumont January 2008 *Beaumont's Express* 22.

238 2007 ZACC 22 (78); Partington and Van der Walt 2008 *Obiter* 237; see also Beaumont January 2008 *Beaumont's Express* 22, with regard to considering both employer and employee's interests and arguments; Beaumont May 2008 *Beaumont's Express* 97.

239 Grant 2009 *Obiter* 758.

240 Mischke *IR Network* November 2007; see also item 3(5) The Code.

241 2009 18 *IR Network* 1.11.17 (LC) (22).

242 2009 18 *IR Network* 1.11.17 (LC) (22).

to revisit their approach to discipline and the issuing of an appropriate sanction, and need to apply the principles as provided in the *Sidumo*-case.<sup>243</sup> Employers can no longer issue sanctions as if *Sidumo* did not exist, as there must be a balance.<sup>244</sup> It is important to note that the court stated that even the role of chairpersons is not to "rubber stamp" the decision of the employer, but that they are appointed to ensure fairness.<sup>245</sup>

As previously stated, it is important to pay attention to the Misconduct Guidelines, although they are still a draft. It provides important information about how the CCMA interpreted the *Sidumo*-case, and as a result provides valuable guidelines to employers having to deal with misconduct in the workplace.<sup>246</sup>

The CC briefly referred to the fact that an arbitration is a hearing *de novo*,<sup>247</sup> but did not deal with this aspect in any detail later during its judgement. However, according to Smit the fact that a commissioner must deal with the totality of the circumstances implies that commissioners should admit new evidence where appropriate.<sup>248</sup> Clause 17 reaffirms the position that an arbitration is a *de novo* hearing and that the arbitrator must therefore determine the matter based on the evidence presented to the arbitrator during the arbitration.<sup>249</sup>

However, it is important for employers to note that this does not prevent an arbitrator from drawing an inference from disciplinary hearing records, if submitted as evidence in the arbitration. Clause 17 even states that a positive inference can be drawn if the witness's evidence is consistent with the record of the disciplinary hearing, and a negative inference can be drawn if a witness's version changes or if a party did not set out its version during the disciplinary hearing. In *SATAWU obo Nel and Vehicle Delivery Services*<sup>250</sup> the CCMA indeed drew a negative inference from the fact that the employee's evidence at the arbitration hearing conflicted with the version he

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243 2009 18 *IR Network* 1.11.17 (LC) (22); see also comments by Grant 2009 *Obiter* 759.

244 2009 18 *IR Network* 1.11.17 (LC) (22).

245 2009 18 *IR Network* 1.11.17 (LC) (22).

246 See comments made by Myburgh 2010 *ILJ* 10.

247 2007 ZACC 22 (18).

248 Smit 2008 *ILJ* 1640; see also the discussion by Mischke on the meaning of a *de novo* hearing Mischke September 2009 *IR Network*.

249 2007 ZACC 22 (18); see also discussion by N Smit in Smit 2008 *ILJ* 1640.

250 2008 17 *IR Network* 8.14.4 (CCMA).

gave during the internal disciplinary hearing.<sup>251</sup> It is thus very important that employers ensure that accurate minutes are taken of disciplinary hearings. Employers should fully set out their version during the disciplinary hearing and not bargain on the fact that an arbitration is a *de novo* hearing, thus only present a proper version at the arbitration hearing. An employer will indeed not be allowed to lead evidence on charges the employee has been found not guilty on during an internal disciplinary hearing.<sup>252</sup>

With regard to the determination of procedural fairness, clause 57 stipulates that the arbitrator must have regard to Item 4 of The Code and if there is a workplace procedure in place, the arbitrator should have regard to that procedure. According to Grogan employers will generally be held to the standards they have adopted in their disciplinary codes.<sup>253</sup> In *Avril Elizabeth Home for the Mentally Handicapped v CCMA*<sup>254</sup> Van Niekerk AJ was very critical about the "criminal justice" model of disciplinary proceedings and stated that the LRA recognised that "workplace efficiencies should not be unduly impeded by onerous procedural requirements".<sup>255</sup>

Thus, for those employers who do have a workplace procedure in place, it would be advisable to revisit that procedure.<sup>256</sup> The legal status of the disciplinary procedure will affect the approach the arbitrator will take in assessing the procedural fairness of the dismissal. Clause 64 recognises those that are contained in collective agreements, those that are contractually binding, and those that are unilaterally established by employers. Clause 57 makes it very clear that an arbitrator's approach to procedural fairness will be determined by the workplace procedure that is in place and the legal status of that procedure.

Clauses 74 to 107 deal with the way arbitrators should approach substantive fairness. The Misconduct Guidelines refer to Item 7 of The Code and stipulates that each of those issues requires a factual enquiry. Clause 93 stipulates that, with regard to the determination whether dismissal was an appropriate sanction, three

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251 2008 17 *IR Network* 8.14.4 (CCMA) (30), (33).

252 Mischke September 2009 *IR Network*.

253 Grogan *Dismissal* 165.

254 2006 15 *IR Network* 1.11.4 (LC) (hereafter *Avril Elizabeth Home-case*).

255 2006 15 *IR Network* 1.11.4 (LC) 5.

256 2009 18 *IR Network* 1.11.17 (LC) 22.

enquiries are required, namely an enquiry into the gravity of the contravention of the rule, an enquiry about the consistency of the application of the rules and sanction, and also inquiry into factors that may have justified a different sanction.<sup>257</sup>

The enquiry into the gravity of the contravention of the rule concerns the sanction prescribed in the workplace disciplinary code, in other words an enquiry into the sanction as a response to the contravention of the rule. It further deals with mitigating and aggravating factors, in other words the circumstances of that contravention. Yet again, chairpersons can take note of the factors listed in the Misconduct Guidelines, and may use those factors in determining and motivating an appropriate sanction.

With regard to consistency the Misconduct Guidelines refer to both historical and contemporaneous consistency.<sup>258</sup> In the event that an employee raises inconsistency, an employer has to be able to defend his/her decision to differentiate between two employees, otherwise the disparity in treatment will be unfair.<sup>259</sup> Yet again, a number of chairpersons ignore this issue and try to justify their action based on the fact that each case is judged on its own merits. Employers are indeed advised to apply their minds whenever the issue of inconsistency is being raised, or to face the possibility of an adverse award against them.

The next factual enquiry is whether there are factors that may justify a different sanction to dismissal. Clause 103 of the Misconduct Guidelines refers to those factors that are relevant to the risk of further instances of misconduct being committed in the future, and the risk of harm to the business. Beaumont explained that the effect of learning from mistakes is reinforced through "acknowledgement by the employee of wrongdoing, remorse and apology".<sup>260</sup> In this instance the Misconduct Guidelines refers to the employee's circumstances (length of service, previous disciplinary record and personal circumstances),<sup>261</sup> the nature of the job (damage or injury of any further infractions to a continued employment

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257 Myburgh 2010 *ILJ* 10.

258 Clause 99 Misconduct Guidelines; Myburgh 2010 *ILJ* 11; Beaumont May 2008 *Beaumont's Express* 97.

259 Clause 99 Misconduct Guidelines.

260 Beaumont May 2008 *Beaumont's Express* 97.

261 Clause 105 Misconduct Guidelines.

relationship),<sup>262</sup> and the circumstances of the contravention (remorse, provocation, coercion, use of racist or insulting language and the absence of dishonesty).<sup>263</sup>

A reading of the Misconduct Guidelines clearly illustrates that the disciplinary code and procedure of an employer are essential to the determination of the fairness of the sanction of dismissal.<sup>264</sup> It is clear that an employer is indeed entitled to set the rules applicable to his/her workplace according to its operational requirements.<sup>265</sup>

It is thus clear from the above that the *Sidumo*-case indeed had a severe impact on employers taking disciplinary action in the workplace as a result of the criteria set to review awards made by commissioners. This judgement also serves as a caution to employers who adopted a strict, narrow approach to imposing the sanction of dismissal, to consider reviewing their approach.<sup>266</sup> Employers would therefore be prudent not to ignore its impact and to review their attitude towards discipline in the workplace as well as to re-evaluate their disciplinary code and procedure in dealing with disciplinary matters.

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262 Clause 106 Misconduct Guidelines.

263 Clause 107 Misconduct Guidelines.

264 Myburgh 2010 *ILJ* 11.

265 2006 15 *IR Network* 1.11.1 (SCA) (46); Myburgh 2010 *ILJ* 11-12; Smit 2008 *ILJ* 1636.

266 Grant 2009 *Obiter* 760.

## Chapter 4

### 4.1 Conclusion and recommendations

Prior to the Constitutional Court's decision in the *Sidumo*-case the CCMA applied the "reasonable employer"-test to determine whether a specific sanction, issued by an employer, was fair. The "reasonable employer"-test provided to employers a lot of flexibility to dismiss employees for misconduct,<sup>267</sup> as employers' decisions to dismiss were "protected" from scrutiny by the CCMA based on the *Nampak*<sup>268</sup> and *Country Fair Foods*<sup>269</sup>-cases.

The history of the "reasonable employer"-test and its subsequent rejection by the Constitutional Court were considered. The Constitutional Court replaced the "reasonable employer"-test, which required a measure of deference to the decision of the employer, with that of the "reasonable decision maker"-test, which required an answer to the following question<sup>270</sup>

Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

That means, in the event that the decision reached by the commissioner is one that a reasonable decision maker could not reach, that the decision of the commissioner will be overturned on review. Chapter 2 further considered the Constitutional Court's motivation for instituting the "reasonable decision maker"-test. The Constitutional Court considered section 23 of the Constitution, the relevant provisions of the LRA, as well as South Africa's obligation in terms of article 8 of the International Labour Organisation *Convention on Termination of Employment* 158 of 1982 in reaching the conclusion that the "reasonable decision maker"-test would more likely promote labour peace.<sup>271</sup> The author then referred to a number of subsequent decisions to determine how the courts have interpreted and applied the "reasonable decision maker"-test in practice.

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267 2009 18 *IR Network* 1.11.17 (LC) 21.

268 1999 20 *ILJ* 578 (LAC).

269 1999 20 *ILJ* 1707 (LAC).

270 2007 ZACC 22 (110); see also Smit 2008 *ILJ* 1641.

271 2007 ZACC 22 (75); Smit 2008 *ILJ* 1639.

Chapter 3 considered the impact of the *Sidumo*-case on disciplinary hearings in the workplace. The guidelines as provided for in the *Sidumo*-case, its application of The Code and its impact on the drafting of the Misconduct Guidelines were also considered.

From the above analysis it should be very clear that the *Sidumo*-case had a severe impact on disciplinary hearings in the workplace, with regard to the determination of substantive as well as procedural fairness. Although some employers might have in the past been successful to dismiss employees on the basis of the "reasonable employer"-test, the *Sidumo*-case replaced this test with the "reasonable decision maker"-test. The CCMA will thus no longer merely approve the decision taken by employers.<sup>272</sup> The *Sidumo*-case further warns employers and chairpersons about the dangers of adopting a strict, narrow approach to imposing the sanction of dismissal.<sup>273</sup> The CCMA is no longer required to "defer" to the decision of employers.<sup>274</sup> It is therefore in agreement with the comments made by Francis J in the *Sebotha*-case.<sup>275</sup>

The message as I understand it arising from *Sidumo* is that the employer cannot impose discipline as it used to do in the past. ... It requires the employer to revisit its approach, the issue of sanction at the workplace, and apply the principles which have been given.

In the light of the impact that the *Sidumo*-case has on disciplinary hearings in the workplace, employers would be prudent to consider at least the issues as set out below. It is indeed the employer's prerogative to set the rules applicable to his/her workplace according to its operational requirements.<sup>276</sup> However, company standards or rules should be clear.<sup>277</sup> According to Myburgh it is important that company standards and rules are determined and communicated clearly and unambiguously and to reaffirm it as and when required.<sup>278</sup>

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272 2009 18 *IR Network* 1.11.17 (LC).

273 Grant 2009 *Obiter* 760.

274 1999 20 *ILJ* 1707 (LAC) 1713A; 2007 ZACC 22 (61).

275 2009 18 *IR Network* 1.11.17 (LC) 22.

276 2006 15 *IR Network* 1.11.1 (SCA) (46); Myburgh 2010 *ILJ* 11-12; Smit 2008 *ILJ* 1636.

277 Staude "Life after *Sidumo*" (unpublished).

278 Myburgh 2010 *ILJ* 12.

Employers should investigate cases before formulating charges, to ensure that the evidence submitted during the hearing supports the charge. In the *Edcon*-case the employee was charged for dishonesty relating to her failure to report an accident, yet the employer tried to rely on her "lack of candour" during the investigation to prove that the employment relationship was broken.<sup>279</sup> The LAC held that an employer had the duty to inform the accused person "with sufficient particularity, of the real nature of the charge".<sup>280</sup> Partington and Van der Walt commented that the *Edcon*-case reinforces the fact that, before employees are dismissed, they should be informed of the misconduct to which the employer takes exception.<sup>281</sup> Employers will for example not be allowed to rely on the alleged dishonest conduct of the employee to impose dismissal when the charge did not reflect an element of dishonesty, and when no evidence was lead in that regard.<sup>282</sup>

Although an arbitration is a hearing *de novo*, employers should be strongly advised to state a full and proper version during the disciplinary hearing, as a negative inference can indeed be drawn for failing to do so.<sup>283</sup>

Employers must remember, as was highlighted in the *Sebotha*-case, that the role of chairpersons is to ensure fairness, and not to merely approve the decision of the employer.<sup>284</sup> Even though some chairpersons might be full-time employees of the employer, such persons are required to act as an impartial body when chairing a disciplinary hearing.

Employers should not assume that serious offences "automatically" destroy the employment relationship.<sup>285</sup> It is important that the company representatives in disciplinary hearings lead cogent evidence to chairpersons on the destruction of the

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279 2008 29 *ILJ* 614 (LAC) 623A-623E; Partington and Van der Walt 2008 *Obiter* 236.

280 2008 29 *ILJ* 614 (LAC) 623E.

281 Partington and Van der Walt 2008 *Obiter* 236.

282 2009 18 *IR Network* 1.11.17 (LC) (30).

283 Clause 17 Misconduct Guidelines; Smit 2008 *ILJ* 1640.

284 2009 18 *IR Network* 1.11.17 (LC) (22).

285 See comments by Mischke in relation to when an employer was able to prove the facts of for example a case dealing with theft, there was hardly any question to sanction, due to the nature of the offence and the impact on the employment relationship; however this "complacency" has now been shattered, Mischke March 2009 *IR Network*.

employment relationship.<sup>286</sup> Employees must be allowed to plead in mitigation, and those factors must be seriously considered by chairpersons.<sup>287</sup> Chairpersons should consider progressive discipline and provide cogent reasons for imposing the sanction of dismissal, or for that matter, any sanction being imposed.<sup>288</sup> Employers and chairpersons should remember in this regard that commissioners will evaluate and analyse their reasons for imposing the sanction of dismissal.<sup>289</sup>

Dismissal, as a sanction, should not be imposed in borderline cases, such as where employees have a history of long-serving duty, a clean disciplinary record, and where no dishonesty is involved or where the sanction could be inconsistent.<sup>290</sup>

Internal chairpersons should undergo proper training about how to chair disciplinary hearings and obviously how to determine an appropriate sanction.<sup>291</sup> Larger companies can consider appointing competent independent chairpersons.<sup>292</sup> Initiators or complainants should lead evidence to the effect that the trust relationship has broken down and that a continued employment relationship would be untenable.<sup>293</sup>

In the light of the impact the *Sidumo*-case has on disciplinary hearings in the workplace, as set out in Chapter 3 above, employers would be strongly advised to reconsider their position towards enforcing discipline at their workplace, in order to limit the possibility of interference by the CCMA. As could be seen, once the CCMA has made an award, it is difficult to take the matter further on review.<sup>294</sup>

It is quite ironic that the intention of the legislator was indeed as stated by Myburgh and Van Niekerk:<sup>295</sup>

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286 Myburgh 2010 *ILJ* 14; 2009 18 *IR Network* 1.11.3 (SCA) (20); Staude "Life after Sidumo" (unpublished).

287 Staude "Life after Sidumo" (unpublished).

288 Staude "Life after Sidumo" (unpublished); Beaumont January 2008 *Beaumont's Express* 15.

289 Myburgh 2010 *ILJ* 20; Clause 17 Misconduct Guidelines; Mischke September 2009 *IR Network*.

290 Myburgh 2010 *ILJ* 20.

291 Staude "Life after Sidumo" (unpublished).

292 Staude "Life after Sidumo" (unpublished).

293 Staude "Life after Sidumo" (unpublished).

294 2008 29 *ILJ* 306 (LAC) 311F-312A; see also comments made by Smit 2008 *ILJ* 1643.

295 Myburgh and Van Niekerk 2000 *ILJ* 2154.

that a misconduct dismissal dispute should be resolved in an arbitration which is informal, quick and cost effective.

As previously stated, Van Niekerk AJ in the *Avril Elizabeth Home*-case was very critical about the "criminal justice" model of disciplinary proceedings and stated that the LRA recognised that "workplace efficiencies should not be unduly impeded by onerous procedural requirements".<sup>296</sup> However, taking all of the above into consideration, the *Sidumo*-case indeed has the result that disciplinary hearings and arbitrations became everything but informal, quick and cost effective. Indeed, the *Sidumo*-case has a major impact on disciplinary hearings in the workplace, and employers will definitely suffer the consequences if they choose to ignore the guidelines as provided.

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296 2006 15 *IR Network* 1.11.4 (LC) 5.

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