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What is derivative misconduct in the workplace?

Derivative misconduct is a term used in circumstances where an employee who has knowledge of misconduct, for example theft, does not notify the employer.

The employee may be dismissed for such misconduct. Derivative misconduct therefore arises where an employee possesses information that would enable an employer to identify wrongdoers but he or she fails to come forward.

What is the notion of derivative misconduct?

The notion of derivative misconduct can be defined as follows: "*Dismissal of an employee is derivatively justified in relation to the primary misconduct committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.*"

- The idea is that failure to notify the employer is in itself an act of misconduct which derives from the misconduct of another. In failing to disclose such knowledge, the employee had breached the common law obligation of good faith owed to the employer and therefore may be disciplined or dismissed for such misconduct. Such behaviour is also a breach of the trust upon which the employment relationship is founded.

The judge in his ruling in ***Dunlop Mixing and Technical Services (Pty) Ltd and Others v NUMSA obo Nganezi and Others 2016 ZALCD 9*** held that an employee is implicitly bound by a duty of good faith towards the employer and breaches that duty by remaining silent about the knowledge he/she possessed regarding the business interests of the employer being improperly undermined.

How do you apply the concept of derivative misconduct in the workplace?

The concept of derivative misconduct is usually applied in the context of strikes where there is a breach of picketing rules and an employer wishes to act against the employees who failed to report breaches of the rules by their fellow employees.

The Labour Appeal Court went on to summarise the elements of the offence that must be proven by the employer as follows:

- The information or knowledge that the employee fails to disclose must be "actual knowledge";
- Non-disclosure must be deliberate;
- The seriousness of the primary misconduct and the rank of the employee who fails to disclose, at most affects the gravity of the non-disclosure;
- A request to disclose information need not be made for the duty to disclose to be triggered, but if a request is made and is refused, culpability is aggravated;
- The employee need not have a common purpose with the perpetrator; and
- An explanation for the non-disclosure does not stretch to a defence to the charge but may be used in mitigation of culpability.

What are the responsibilities of an employer with regard to derivative misconduct?

In the latest case of ***NTM and others v PRASA 2018 2 BLLR 141 LAC*** **the court accepted the findings of the Dunlop case and applied it as a test, and subsequently found** that the reliance on derivative misconduct was misplaced because its essential elements as listed were not proven.

The employer had, in particular, failed to prove that the dismissed employees had actual knowledge of the incidents, let alone that they had been involved or were asked to disclose any information. It must be shown, on the balance of probabilities, that each employee had knowledge relevant to the primary misconduct and not merely that there was a possibility of the employee knowing. The knowledge allegedly possessed must be detailed and it must also be shown that the employee was culpable in the non-disclosure.

Furthermore, an appropriate way to discipline an employee for derivative misconduct would be to charge that employee with “a material breach of the duty of good faith”.

What is the difference between collective and derivative misconduct?

This case also highlighted the important distinction between collective misconduct and derivative misconduct. In the latter situation, the employee is not dismissed because he or she was part of a group, one or more of whose members committed the primary misconduct. The employee is dismissed because he or she failed to assist the employer in “bringing the guilty to book”.

Conclusion

In conclusion, the concept of derivative misconduct is accepted as a valid ground for dismissal, but the onus still rests on the employer to apply the test and make sure they have sufficient evidence as the burden of proof of the employer is a heavy one in such a case. It appears to be almost insurmountable.

Each case and inquiry should be an individual one. To avoid the notion of collective guilt, the employer will have to show case-by-case that each employee, as an individual, was aware of the circumstances.

SERR Synergy assists in chairing disciplinary inquiries and serves as objective chairperson in such cases.

About our Author: Henri Klopper joined SERR Synergy in 2014 and holds the title of Gauteng Labour Manager. He completed his LLB at the University of Pretoria in 2010 where he also attended law school. Henri was admitted as an advocate of the High Court of South Africa.

Western Platinum Refinery Ltd v Hlebela and others 2015 36 ILJ 2280 LC

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