If you did not do it, could you still be guilty?

By Johan Botes

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Just because you did it, does not mean you're guilty! This pearl of wisdom proudly featured on the billboard advertising the services of an attorney in the United States of America. Leaving room for a charitable interpretation of the message, it acts as a nice link to a recent decision of the Constitutional Court in South Africa. The apex court had to consider whether an employee ought to be reinstated into service after the employment tribunal awarded the employee's reinstatement to remedy his unfair dismissal. His dismissal was unfair, as the tribunal concluded that he did not commit the misconduct that resulted in his dismissal. Thus, the Constitutional Court effectively had to consider "if you did not do it, could you still be guilty?" or perhaps more accurately "if you did not do it, does it mean that you should not be punished?"

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The basis of a dismissal for misconduct is that the employee committed a workplace wrong, with the relationship between employer and employee having been broken down irretrievably as a result. This is hardly controversial – if an employer concludes that its accountant has been syphoning off company funds into his Bahamas retirement fund, who can blame the employer for not being willing to place any further trust into this employee? It would appear unreasonable to conclude that the accountant would serve the business faithfully in future, and to thus require the employer to retain this person in service. Similarly, where an employee has committed sexual harassment, surely the employer can no longer trust that this employee will not pose harm to other staff, customers or service providers? In these instances, it seems axiomatic that dismissal is the logical effect of the misconduct.

But what to do when the misconduct is not proven on the probabilities? This dilemma is faced by any employer defending a claim of unfair dismissal at the employment tribunal. It is not uncommon for the employer’s internal or hired disciplinary hearing chairperson to have been persuaded of the employee’s wrongdoing, only for the arbitrator appointed by the employment tribunal to conclude differently. The arbitrator is then faced with the employer’s pleas to not allow the employee back into the workplace merely because the employer was unable to satisfactorily prove the employee’s wrongdoing,

contrasted with the employee's demand to be restored to his prior position because the employer could not prove that he did anything wrong. What to do indeed!

Inherent in our social compact and workplace justice principles are the legislative checks and balances placed on employer actions. Whilst our law recognises the employer's right to manage its business, it seeks to address the inherent power imbalance between employees and employers by affording the employee relief where the employer overreached in its people management rights. The employment tribunal offers a free service to terminated employees to challenge the fairness of their dismissal. If the tribunal concludes that the employee had been wronged, it may award various remedies to the employee. Where the employer was unable to prove that the employee committed misconduct, clearly the sanction the employer imposed for the misconduct committed should fall away.

For example, if I dismiss you for stealing from me, but are then unable to convince an arbitrator that you did indeed steal from me, then logic dictates that the consequences that followed (your dismissal) are tainted. Even pre-schoolers understand that it is unfair to punish people for doing something wrong when, in fact, they did not do it. If you wrongly accused your playground friend of stealing your favourite toy when they actually did not, then you apologise, give them a hug and ask whether they will still be your friend. You don't continue to shun them, even after your mom confirms she found your toy where you left it at home. If you do, you are likely to end up eating lunch by yourself with no-one willing to play with you.

Default remedy

The drafters of our labour legislation purposely created reinstatement as the default remedy for those dismissals where the employer's substantive reasoning for termination could not be sustained at the tribunal. The explanatory memorandum to the draft Labour Relations Bill, as quoted by the Constitutional Court in *Booi v Amathole District Municipality and Others [2021]*, clarifies that reinstatement is required to be the primary remedy in the light of the prohibition of strikes in support of dismissal disputes. Reinstatement affords credibility to the system of compulsory arbitration which was intended to be "... simple, quick, cheap and non-legalistic...". In short, for the dispute resolution system to be credible and accepted by its users, it had to follow the basic playground justice principle of forcing you to say sorry and invite your friend back where you wrongly accused them.

But whilst workplaces may resemble nursery schools at stages, the imbalance in power is more acute, the impact of bad decisions more dramatic and the need to balance conflicting rights and interests more compelling. The legislature recognised that there would be occasions where it may not be that simple to kiss and make up when the teacher tells you to. What happens if your friend actually hits you after you wrongly accused her of taking your toy? Would you still be required to be the one to say sorry first?

Defence against reinstatement

Section 193(2)(b) of the Labour Relations Act, 66 of 1995, affords employers a defence against reinstatement, even if the employer was wrong in dismissing the employee, where "the circumstances surrounding the dismissal are such that a continued employment relationship has become intolerable." This recognises the multiplicity of factors that underpin relationships, and the importance of sound relationships between employer and employee in the workplace. As the Constitutional Court confirmed in Booi, the threshold to establish such intolerability (of the continued relationship) is rightly very high. As it stated in paragraph 42 of the judgment,

> *"[i]t should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal."*

The court affirmed the arbitrator's conclusion that the employer's witness' testimony on the intolerability of an ongoing relationship was dependent on a finding that the employee committed the misconduct. Acting Deputy Judge President Khampepe, writing for the unanimous bench, confirmed that the enquiry into the breakdown of the employment relationship

is an objective one, not based on the subjective or potentially irrational views of the employer. The manager's views about the ongoing employment relationship were insufficient to meet the high threshold set for a finding of intolerability. The court ordered the reinstatement of the employee.

Where does the judgment leave employers desperate to avoid accommodating back into the workplace an employee it unceremoniously dismissed for misconduct? Clearly, first prize is to be able to prove the employee's wrongdoing on a balance of probabilities (and, by extension, proving that dismissal was indeed the appropriate sanction). Anticipating that an arbitrator may conclude differently, a prudent employer will also ensure that it places before the tribunal objective evidence to show why the circumstances surrounding the dismissal has made continued employment intolerable. This evidence must go further than a manager's subjective views of being able to work with the employee in future – there has to be a factual basis for the trust breaking down in the event that the employee's misconduct is not proven.

Intolerable relationship

Showing that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable does not necessarily limit the employer to circumstances applicable at the time of dismissal only. The problematic circumstances could relate to the employee's conduct after the dismissal, for example. If the employee were to assault the manager at the tribunal, for instance, it would be palpably unreasonable to expect the employer to take the employee back in service, even where the tribunal exonerates the employee from the original misconduct (that resulted in his dismissal). In *Afgen (Pty) Ltd v Ziqubu [2019]*, the LAC confirmed that the employee's conduct prior to and post dismissal may be considered. Further, in *Buthelezi v Amalgamated Beverage Industries [1999]*, the labour court cautioned employees about ventilating their grievances in the press.

> *"While employees have a right to freely express their grievances against their employers in the press, they do so at the risk of forfeiting their right to reinstatement or re-employment because high profile mud-slinging – particularly where an employer's business depends on a positive public image – makes a continued employment relationship intolerable."*

Also, evidence of further misconduct that only surfaced after the dismissal may not assist the employer in proving that it had valid reason for dismissing the employee at the time, but it could convince a commissioner that the employee should not be entitled to any or significant relief, including reinstatement.

The Constitutional Court was at pains to signal to employers that they cannot dismiss employees without reason, then merely to seek to avoid reinstatement by "... the backdoor of disingenuous and last-minute allegations pertaining to an intolerability of a continued employment relationship."

Alternative relief

Where sound reasons exist to terminate an employee's service, but the employer is then unsuccessful in proving this at the tribunal (often for technical reasons), employers may show that the employee should receive alternative relief and not reinstatement as the primary remedy. Whilst workplaces are more complex than playgrounds, basic justice dictates that the schoolyard bully should not be allowed to run amok merely because no-one is able to obtain CCTV footage of him hurting others. Where an employee is given the benefit of the doubt because the employer had not been able to shift the onus, fairness dictates that the commissioner considers the impact of reinstatement on the workplace, other employees and the employer. In appropriate circumstances, the employee could be awarded compensation as more equitable relief. Workplace justice demands that we consider the entire ecosystem when remedying wrongs. Should we not do that, our employee relations system may be reduced to "Just because you did it, does not mean you are guilty".

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