



## CONSISTENCY IN THE REALM OF WORKPLACE DISCIPLINE

**Consistency, also referred to as the parity principle, in essence, means that fairness demands that similar acts of misconduct should be treated similarly – and thus visited with the same consequences, writes specialist labour lawyer CRAIG BERKOWITZ of Berkowitz Attorneys, and an acting judge in the Labour Court of South Africa**

**B**efore delving into what consistency actually means in workplace discipline, there are some indispensable contextual fundamentals that will be useful in understanding where exactly consistency slots into our labour law.

Even somebody with only a smattering of legal knowledge will tell you two things. Firstly, in law, any black-and-white concept is infused deeply with a healthy dose of grey, and secondly, despite the hallowed legal principle in South African law of a precedent being binding (known as “*stare decisis*”, or for the handful who don’t speak Latin, “the decision stands”), the only real consistency in law is inconsistency!

### MISCONDUCT AS A CONCEPT

Firstly, the issue at hand must be that of a misconduct. What this means is that you are dealing with an employee who has contravened a rule or standard regulating conduct in the workplace.

Secondly, there are the concepts of procedural and substantive fairness that pervade every aspect of labour law. To be fair, any action must be both procedurally and substantively fair.

Procedural fairness concerns the procedure to be followed when dealing with the matter at hand, while substantive fairness deals with the subject matter. By way of a simple example, if an employee is accused of stealing, procedural fairness concerns giving the employee a fair opportunity to respond to the allegations of theft, while substantive fairness deals with the act itself (that is, stealing) and the rule regulating such conduct in the workplace.

In regards to substantive fairness, Schedule 8 of the Code of Good Practice: Dismissal provides the following: “Any person who is determining whether a dismissal for misconduct is unfair should consider:

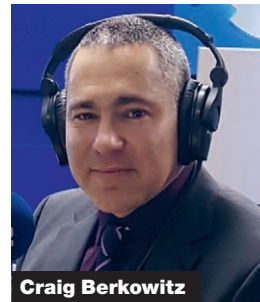
- Whether or not the employee contravened a rule or standard.
- If a rule or standard was contravened, whether or not:
  - the rule was a valid or reasonable rule or standard;
  - the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - the rule or standard has been consistently applied by the employer; and

- dismissal was an appropriate sanction for the contravention of the rule or standard.”

The requirement for the rule or standard to have been consistently applied by the employer is what gives rise to the question of consistency in regard to disciplinary action. While the same act of misconduct by one employee may be repeated by another employee, what will never be replicated is the circumstances of that misconduct, the circumstances of the employee or the mitigating and aggravating factors.

Accordingly, consistency is not a rule unto itself, but merely one factor to be considered.

Our courts have also said that an employee cannot merely allege names and penalties of other comparable offenders, but rather that a full record of the hearings, which resulted in those employees receiving lesser sanctions, would need to be provided so that the full merits of the cases can be compared.



Craig Berkowitz

### CONSISTENCY IN PRACTICE

The Labour Appeal Court (LAC) recently had occasion to deal with the issue of consistency.

The facts before the LAC were that a principal of a school was dismissed because of financial mismanagement of the school, while his subordinate – who had signed the cheques and prepared the payment advices – was not disciplined at all. The LAC found that the subordinate did not have a managerial role in the school comparable to that of the principal, that he took instruction and guidance from the principal, and it could thus not be said that there was an inconsistent application of discipline.

An employee who therefore deserves to be dismissed for an offence cannot claim an unfair dismissal based solely on the fact that a similar act of misconduct did not also result in dismissal. It should be clear from what has been said above that for consistency to be applicable, all the facts and the factors have to be consistent. ●

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