

Honesty is the best policy when moonlighting

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The Labour Appeal Court (LAC)'s recent judgment of *Bakenrug ta Joostenberg Meat v CCMA* [18 January 2022] has re-emphasized that employees have a duty of good faith to their employers, by disclosing material activities that may result in a conflict of interest.



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In this case, the employee was a sales representative in a business that produced and sold a range of meat products. The employee was dismissed after she was found guilty of a charge of dishonesty, in that she failed to inform her employer that she operated a business of her own that marketed dried meat products. The employer also contended that she had failed to give full attention to marketing the meat products it produced.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that that her dismissal was substantively fair. The CCMA Commissioner noted that the employer marketed meat products and, at the very least, the employee should have made the employer aware of her activities, so that it could decide whether her activities were in conflict with its own business. The employee, however, had failed to inform the employer of her side business, which, according to the CCMA Commissioner, was dishonest and unacceptable, and had the effect that the employee was unable to give her full attention to her duties.

Labour Court review

Dissatisfied with the CCMA Commissioner's finding, the employee launched a review application before the Labour Court. On review, the Labour Court held that the CCMA Commissioner's finding was unreasonable. The Labour Court held that the Commissioner ought to have considered the employee's evidence that she only ran her business on weekends, therefore there was no nexus between her performance and the running of her own business. Accordingly, the Labour Court set aside the Commissioner's award, and ruled in the employee's favour.

Essentially, the Labour Court's approach was that unless employees informed their employers that they are moonlighting to

the extent that there is some competition with their employers' business, no dismissible misconduct had occurred. In other words, an employee had no duty to inform the employer about a potential conflict of interest.

Appeal

On appeal to the LAC, the employer argued that the employee had kept her business activities secret from her employer in clear violation of her fiduciary duties. The LAC ultimately found that the award of the CCMA Commissioner was correct. The LAC held that the conclusion by the CCMA Commissioner that the employee had acted in a dishonest and unacceptable manner, was, on the facts, a reasonable decision. In setting aside the Labour Court's judgment, the LAC held that:

- the conclusion reached by the CCMA Commissioner, that "employees act in bad faith if conflict of interest may arise even though no real competition actually results" cannot be questioned;
- the evidence indicated that the employee failed to disclose the essential fact that she was running a sideline business in the meat products market;
- the employee's submission that she was still able to discharge her duties to the employer did not assist her case, because she failed to disclose material activities and was therefore manifestly acting in violation of the duty of good faith which she owes her employer; and
- the employee's dismissal was accordingly substantively fair.

The judgment of the LAC is important for both employers and employees. It cements the importance of the duty of good faith that an employee owes their employer and confirms that employees have a duty to inform their employers of any potential conflict of interest, including their involvement in any side businesses which may be in conflict with the business of their employers.

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