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Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC)

The court stated that there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case. Indeed, both in **Engen** and in **Sidumo**, this Court and the **Constitutional Court**, respectively, said that the commissioner must decide that issue in accordance with his or her own sense of fairness. (See Engen, paragraph 117 at 1559A–paragraph 119 at 1559H–I; paragraph 126 at 1562C–D and paragraph 147; Sidumo's case at paragraphs 75 and 76.)

At paragraph 75 in the **Sidumo case**, the **Constitutional Court**, inter alia, said that “ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view”. At paragraph 76, the Constitutional Court quoted a passage from **Engen**, which, inter alia, contained a statement to the effect that unions “can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, **decide whether the dismissal is fair or unfair**”.

In terms of the Sidumo judgment, supra, **the commissioner must:**

- (a) “take into account the totality of circumstances” (paragraph 78);
- (b) “consider the importance of the rule that had been breached” (paragraph 78);
- (c) “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” (paragraph 78);

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- (d) “consider the harm caused by the employee’s conduct” (paragraph 78);
- (e) “consider whether additional training and instruction may result in the employee not repeating the misconduct”;
- (f) “consider the effect of dismissal on the employee” (paragraph 78); and
- (g) “consider the employee’s service record”.

The Constitutional Court emphasised that this is not an exhaustive list.

The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute, including the Act. In this regard, sections 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.

Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer **the question whether dismissal was, in all of the circumstances, a fair sanction in such a case.** In answering that question, he or she would have to use this or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.

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