

# A reflection on the duty of mutual trust and confidence: Off-duty misconduct in the case of *Biggar v City of Johannesburg* revisited

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## Abstract

*The case of Biggar v City of Johannesburg Emergency Management Services (2011) 32 ILJ 1665 (LC) provides a critical analysis of the implied obligation of good faith and fair dealing in the context of off-duty misconduct. This paper examines the extent of the obligation upon the employer not to act without reasonable and proper cause, if the action is such as would be calculated or likely to destroy or severely damage the relationship of trust and confidence that exists between the employer and its employees. The paper further argues that failure by the employer to take the necessary steps to eliminate the off-duty racial abuse directed to the employee by the white co-workers resulted in the breakdown of trust and confidence in the workplace. Lastly, the paper examines the role that mutual trust and confidence play in protecting vulnerable employees by serving as a bulwark against illegitimate conduct on the part of the employer.*

**Key words:** mutual trust, confidence, off-duty misconduct, racism, fair dealing

## 1 Introduction

Both employer and employee have a duty of trust and confidence towards each other from the moment they enter into the employment relationship. This duty rests equally on the parties in the employment relationship and no party is obligated to breach trust.

It is settled law that an employer has no right to discipline an employee for after-hours conduct unless it can be demonstrated that the employer has some interest in the conduct of the employee (Le Roux & Van Niekerk 1994:184). It therefore follows that the private lives of employees are of no concern to the employer outside working hours. However, a rigid division between the private and working lives of employees is not always realistic because employers have an interest in how their employees behave outside their working hours if that behaviour affects employment relations.

Cases decided on this issue indicate that actions performed outside the workplace are *prima facie* considered not to be work-related, and accordingly are beyond the reach of the employer's disciplinary power (*City of Cape Town v South African Local Government Bargaining Council (SALGBC) and Others* [2011] JOL 26801 (LC)). The same approach applied even in the case of *Biggar v City of Johannesburg, Emergency Management Services* (2011) 32 ILJ 1165 (LC), hereinafter referred to as the *Biggar* case, where the employee and his family were subjected to off-duty racial treatment by his co-employees. As a result, the onus rests on the employer to establish that it has a

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sufficient and legitimate interest in an employee's conduct outside the workplace or after working hours to justify disciplinary action against the employee. This onus will be discharged only if the court is satisfied that there is some nexus between the employee's conduct and the employer's legitimate interest. Grogan (2010) correctly points out that while a nexus is enough in itself the employer is still required to prove that the employee committed the offence and that dismissal was an appropriate sanction. The argument is that even if misconduct is committed outside the workplace and after working hours, the employee's conduct may have consequences for the employer's business interests.

## **2 Methodology**

This study involves the application of the qualitative as opposed to the quantitative method of research. The traditional method of citation and analysis of cases and other sources is the main scientific method in legal scholarship; therefore, analysis of and engagement with contemporary literature in the field of law are applied in this paper. The discussion in this paper is limited to the examination and analysis of the problems associated with unfair discrimination in the workplace and a solution to these problems is suggested.

## **3 Background and issues**

The proceeding in the Labour Court in the case of *Biggar v City of Johannesburg, Emergency Management Services* (2011) 32 ILJ 1165 (LC) arose out of the applicant's unfair discrimination claim. The applicant claimed that during his tenure at the fire station he and his family were exposed to severe racism by certain white colleagues and their families living in the same fire station complex. Despite his efforts to bring matters to the attention of his employer, no adequate action was taken by the employer. The applicant further alleges that his children were also subjected to various forms of racial abuse by the children of his white colleagues who also resided in the complex.

The applicant alleged that the harassment continued even after the applicant complained to the employer. At one point, the applicant's wife was assaulted by his colleague and this resulted in the wife's fleeing to seek refuge at the fire station where the applicant was on duty. Despite the applicant's viewing his white colleagues' conduct as racist and the cause of the problem, surprisingly the applicant was blamed for the incidents. A meeting was held by the station commander, Mr Gciba, to address the matter and soon after the incident, the applicant asked to be transferred to the Disaster Management Department of the respondent (his employer). The applicant claims he has a qualification in the field of Disaster Management, which made such a transfer feasible, but nothing came of this request. Despite the applicant's being competent and having made several requests to be transferred to the Disaster Management Department, the employer failed to transfer the applicant.

The remainder of this discussion centres on an examination of the *Biggar* case. The purpose is to isolate some novel questions which have arisen in recent times in South Africa and the Commonwealth concerning the fairness of the dismissal in response to the breach of the obligation of mutual trust and confidence. Firstly, an attempt will be made to delineate the nature of the employment relationship, in particular the overarching role of the obligation of mutual trust and confidence. In the second place, the importance of *Biggar* will be explored in the light of comparative developments from foreign jurisprudence. Thirdly, the author deals with the significance of the existence of

an implied duty of mutual trust and confidence in the employment context in curtailing illegitimate conduct or acts on the part of the employer on the one hand as well as off-duty misconduct by the employee on the other hand, thereby ensuring fuller protection of all the employee's constitutional rights.

#### **4 The nature of mutual trust and confidence as reflected in foreign jurisprudence**

The duty of cooperation derives from a single important case, namely *Secretary of State for Employment v Aslef* [1972] 2QB 455. The issue here was whether a work-to-rule by employees of British Rail constituted a breach of contract. The work-to-rule involved minute observance of the British Rail rule book with the intention, however, of throwing the entire railway system into chaos. The men insisted that they could not possibly be breaking their contracts merely by observing their strict terms. Lord Denning, however, identified a breach 'if the employee, with others take steps wilfully to disrupt the undertaking, to produce chaos so that it will not run as it should, then each one who is a party to those steps is guilty of a breach of contract' (Honeyball 2012). He gave 'a homely instance' of what he had in mind as a breach:

*Suppose I employ a man to drive me to the station. I know there is sufficient time, so that I do not tell him to hurry. He drives me at a slower speed than he need, with the deliberate object of making me lose the train, and I do lose it. He may say that he has performed to the letter of the contract; he has driven me to the station; but he has wilfully made me lose the train, and that is a breach of contract beyond all doubt (Honeyball 2012:60-61).*

However, Lord Denning disapproved of the suggestion by Lord Donaldson at first instance that the employee should actively assist the employer to operate his organisation. It was going too far to suggest 'a duty to behave fairly to his employer and do a fair day's work' (Honeyball 2012).

The implied term of trust and confidence is increasingly emerging as an important consideration in contracts of employment (Brodie 1996). While the implied term of trust and confidence imposes obligations on both employers and employees, its most significant consequence lies in its application to employers. Described as the corollary of the employee's duty to cooperate and to demonstrate fidelity and good faith (Creighton & Stewart 2000), it requires, in the words of Lord Steyn in *Malik v Bank of Credit & Commerce International (In liquidation)* [1998] AC 30 at 45 that an employer should not,

*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.[at paragraph 25-26]*

On the issue of implied obligation of good faith and fair dealing in employment, Justice McLachlin stated in the case of *Wallace v United Grain Growers Ltd* 1997 152 DLR 1 at paragraph 139 that:

*The contract under consideration here is not a simple commercial exchange in the marketplace of goods and services. A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is logical to imply that parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.*

Its purpose is to strike a balance “between an employer’s interests in managing his business as he sees fit and the employee’s interests in not being unfairly and improperly exploited” (*Malik v Bank of Credit & Commerce International SA (In Liquidation)* [1998] AC 30 at 46). The power imbalance informs virtually all facets of employment. In *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, Dickson CJ, writing for the majority of the Court, had occasion to comment on the nature of this relationship. He quoted with approval from Davies and Freedland (1983:18):

*[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination...*

In the context of South African labour relations, the common law position of the duty of mutual trust and confidence was best illustrated in the case of *Murray V Minister of Defence* [2008] 6 BLLR 513 (SCA) where Cameron JA held at paragraph 5 that:

*the best way to understand the impact of these rights on this case through the constitutional development of the common law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those that the LRA does not cover.*

The unequal balance of power between employer and employee underscores the ubiquitous role of mutual trust and confidence in protecting vulnerable employees. For instance, in *Media 24 Ltd & another v Grobler* (2005) 26 ILJ 1007 (SCA), the Supreme Court of Appeal was satisfied that the appellant company was in breach of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment. The court noted that it is well settled that an employer owes a common law duty to its employees to take reasonable care to ensure their safety (*Media 24 Ltd & another v Grobler* (2005) 26 ILJ 1007 (SCA) at paragraph 77).

In the field of labour relations a premium is placed on honesty because conduct involving moral turpitude on the part of employees damages the trust relationship on which the contract is founded (*Westonaria Municipality v South African Local Bargaining Council and Others* [2010] 3 BLLR 332 (LC)). Dishonest conduct in the course of employment will, in the absence of significant mitigating circumstances, provide a fair reason for dismissal. What justifies the dismissal is the loss of trust and confidence in an employee who has shown disloyalty and infidelity towards his employer (*Shoprite Checkers (Pty) Ltd v the CCMA* (CLL, Vol 18, August 2008, case number JA 46/05)).

The presence of this implied duty of mutual trust and confidence in the employment relationship renders both the employee and the employer accountable for their conduct (Brodie 1996). That is why the parties to the employment contract are duly encouraged to conduct themselves in a manner that will ensure that the employment relationship goes smoothly and is free from mistrust.

## **5 Breach of mutual trust and confidence: Lessons from the Biggar judgement**

The obligation of mutual trust and confidence implies that the employer must not behave arbitrarily or unreasonably, or so as to destroy the necessary basis of mutual confidence (*Malik v BCCI* [1998] AC 20 at 35). The effect of the obligation requires that

a balance be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.

It must be borne in mind that Judge Lagrange's judgment in the *Biggar* case did not contain a reference to the breakdown of mutual trust and confidence. However, what could be deduced from his analysis of the case is that the employers have an obligation to uphold the duty of mutual trust and confidence towards employees. In essence, the *Biggar* case implied that an employer ought to ensure that it meets its obligation of good faith and fair dealing by protecting an employee from racial abuse by his co-employees even outside the workplace. Lagrange in his judgment made reference to racially abusive conduct by the co-employees and further highlighted the failure by the employer to take the necessary steps to eliminate racism. Failure on the part of the employer to eliminate racism is alone sufficient to render the employer in breach of the terms of mutual trust and confidence in the employment relationship.

It is pertinent to point out that the employer's failure to deal with racism decisively had both constitutional and labour law implications based on the right to equality and dignity as well as to fair labour practices (*Biggar* case at para 2). The Constitution of the Republic of South Africa, 1996, provides in section 9(3) that the State may not unfairly discriminate against anyone either directly or indirectly on grounds that include race, and in subsection (4) the Constitution provides for national legislation to be enacted to prevent unfair discrimination. It is for this reason that the Employment Equity Act 55 of 1998 (EEA) was enacted and it is pertinent to the *Biggar* case. It will be recalled that in the *Biggar* case the judge expressed the concern that the employer that had failed to uphold constitutional values in the workplace was actually an organ of state (*Biggar* case at para 2). The employer, by virtue of being an organ of state, has an obligation to uphold the constitutional rights of its employees and also to desist from any act viewed as promoting racial and unfair discriminatory treatment.

Another glaring example of breach of mutual trust and confidence is demonstrated by the employer's failure to punish the perpetrators when it was clear that the employee and his family were being continuously subjected to racial abuse even after he had reported the matter to the employer. It will be recalled that in 2005 two of his white colleagues were involved in a fight in full view of other employees but no disciplinary action was taken against them. In October 2007, barely nine months after the incident, the applicant was charged with misconduct for fighting with colleagues and was issued with a warning. This inconsistent conduct on the part of the employer in handling employment relations is viewed as an act likely to destroy or severely damage the relationship of trust and confidence existing between the employer and its employees

Racism continues to be prevalent in society despite the advent of the democratic Constitution and the passage of anti-discrimination legislation aimed at promoting substantive equality and redressing the imbalances created by the apartheid legacy (Maloka 2004:109). In this case it must be mentioned that the applicant was made to work continuously with the perpetrators even though there were persistent acts of racism. It is clear from Judge Lagrange's judgment that the employer did not have any intention of rooting out racism in the workplace (see paragraph 19):

*It cannot be said the employer took no steps to try and address the racial hostility which manifested itself in the residential quarters at the station. On the applicant's own account, a warning was issued to two of his antagonists and initially senior staff did attend to matters when incidents occurred. However, the respondent did not follow through on any of these initiatives to try to achieve a lasting solution, and it is remarkable that no disciplinary action was ever instituted against the perpetrators of*

*the racial abuse directed towards the applicant and his family. The only reasonable conclusion that can be drawn is that the employer was essentially reluctant to deal with the real issues and matters were allowed to fester unresolved.*

The employer's inconsistency in dealing with the real issues of racism eventually resulted in the employer's breaching the obligation of mutual trust and confidence on account of failing to take adequate steps to prevent unfair discrimination in the workplace.

Are there further lessons to be drawn from jurisprudence regarding off-duty misconduct? The celebrated case of *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC) clearly illustrates this. Although the road rage incident took place outside the workplace, in *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC) its prejudicial impact on the business of the employer was palpable. The proceedings in the Labour Court arose out of the applicant employee's dismissal for operational reasons, in consequence of pressure brought to bear on management by the employees and their trade union. Kroeger was employed by the respondent company as a factory manager from 1999 until his forced departure in 2001. In the aftermath of a widely reported racially motivated road rage incident in which Kroeger shot and killed a black man, the majority of the company's hourly paid (black) employees demanded that the offending employee be dismissed. The reason behind the petition was that the targeted employee had previously threatened to kill the black staff and called them "kaffirs". Black employees feared for their lives. In order to deal with the matter, the respondent's management suspended Kroeger on full pay, explaining to him that this was for his own personal safety. Following exhaustive negotiations and correspondence with the workers' representatives, the workforce refused to withdraw their petition that the employee should not be allowed to return to work. At a meeting between management and the employee and his representatives, Kroeger insisted that he be allowed to return to work. The employees again refused to withdraw their demand. The deadlock could not be broken; eventually the company dismissed the employee for operational reasons. The court found that the employer, faced with industrial action or mass resignation of skilled employees, had dismissed the employee for a fair reason.

In *NUMSA obo Biliman/Coatek* [2005] 6 BALR 646 (MEIBC) the employee was not charged for "incitement". The charge arose from a notice published by the employee, which stated: "To those who are eating bread and butter with blood underneath – their time is limited. No more white dominance." The shop steward claimed in a default hearing that the notice merely advertised the march and explained its purpose. The arbitrator held that in the absence of evidence from the employer to indicate the unlawful conduct the employee had allegedly incited, she could not assess whether the employee was guilty of incitement. However, the employee was not reinstated, as he wished; he was awarded limited compensation because he had acted irresponsibly by publishing an inflammatory notice with racist undertones. On the other hand in *NUMSA obo Yako/Maxiprest* [2006] 9 BALR 885 (MEIBC) the employee was upset when he found the company change room locked, and accused a manager of doing so to keep black workers separate from others. The employee protested loudly, causing a commotion, and accused his supervisor of racism in the presence of clients and used other colourful language as well. The arbitrator rejected the employee's claim that he had neither sworn at his supervisor nor accused him of racism, and upheld the dismissal.

It is respectfully submitted that there is absolutely no place in contemporary labour relations for derogatory racial remarks between races in South Africa. The firmest

disciplinary measures are required in this regard where there are transgressors, irrespective of whether these transgressors are employers or employees. In the present matter the applicant had a predilection for the use of the word 'kaffir'. The fact that the person did not intend to offend (the applicant contended that he used the word in jest) is irrelevant. In this regard Revelas JA in *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC) made an apt observation at paragraph 1983G-H:

*... the applicant was insensitive to the feeling aroused by the word. A strong response to hearing the word 'kaffir', the applicant regarded as an overreaction. Taking action in favour of those who feel offended by the word, he deemed a sign of weakness.*

An example of a situation where the uttering of a racially derogatory remark to denigrate a black employee attracted a strong and meaningful rebuke is to be found in the case of *Crown Chickens (Pty) Ltd t/a Richards Poultry v Kapp & Others* (2002) 22 ILJ 863 (LAC). The court summarised its conclusion about racism in the workplace by stating:

*The attitude of those who refer to, or call, Africans "kaffirs" is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country – black and white – who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard courts must play their proper role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will "give expression to the legitimate feelings of outrage" and revulsion that reasonable members of our society – black and white – should have when acts of racism are perpetrated.*

## 6 Conclusion

This paper has demonstrated that the obligation of mutual trust and confidence cuts both ways. This paper has further demonstrated, through the analysis of the *Biggar* case, that the employer must not behave arbitrarily or unreasonably, or in a manner that destroys the necessary basis of mutual confidence. The effect of the obligation requires that a balance be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. More importantly, this will involve, *en passant*, an exposition of the content of the employer's duty to act in a manner consonant with mutual trust and confidence in exercising its prerogative on the termination of the employer-employee relationship.

## 7 Recommendations

Taking into consideration the sensitivity of the race issue in the South African labour environment as highlighted in the *Biggar* case, this paper suggests that the employer must ensure that the duty of mutual trust and confidence forms the pillar of the employment relationship. Furthermore, the researchers recommend that this duty be fulfilled by all parties to the employment contract. This paper further suggests that the employer should organise workshops on the subject of racial discrimination which will serve to raise awareness of the consequences for the employees of conducting themselves in a racially discriminatory manner.

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