Unlocking labour laws

I am a shopsteward and have to help a member who has been employed for almost 12 months on a temporary basis. I would like to know which piece of legislation I should quote to have his contract converted to permanent, as I believe that temporary employment should not exceed 12 months, especially if the work is ongoing.

In terms of the common law a worker may be temporarily employed for a period specified in the contract of employment. The period can be specified in the number of days, months or years or in terms of a specified task, or both. At the expiry of the period the contract terminates automatically, and the worker is not dismissed.

The query does not say what period the contract specifies in this case, but there is no legislation that limits the period for which a worker can be temporarily employed. The only law that is of any help to a temporary worker is if the period terminates, and the worker had an expectation that the contract will be renewed. In this event, the worker may be able to claim unfair dismissal.

Some people argue that the lack of limitation on the period for which temporary workers can be employed is a major shortcoming in labour legislation especially as there is evidence of increased use of temporary contracts by employers. In the case of labour brokers, the legislation describes them as providing a 'temporary' employment service. However here too it does not limit 'temporary', so workers can be 'temporarily' employed indefinitely.

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I am a trade union organiser and need to know to what extent the period of service and a clean disciplinary record assists an employee found guilty of petty theft?

In *Shoprite Checkers v Sebotha* a bakery controller at Shoprite with 25 years of service and a clean record was found in possession of a bar of soap worth R6,99. He was dismissed for being in possession of "unpaid, uncancelled stock that you were not the lawful owner of and of which you did not declare".

The company rules state that employees must comply with the specific staff buying procedures which make it the responsibility of employees to declare goods they have bought in the workplace before they use or remove them. The company's argued that the rule was well known and had been consistently applied in a way which resulted in dismissal for any employee who contravened the rule.

The dismissed employee argued that there was a mistake and that the soap had not been noticed in the middle of other grocery items which he had paid for.

The CCMA (Commission for Conciliation Mediation & Arbitration) commissioner found that the circumstances that led to the employee not paying for the soap could only be as a result of negligence. The employees' period of service and lack of disciplinary

record were strong mitigating factors which led the commissioner to finding dismissal "excessive". This was supported by no dishonesty being shown to support the company's allegation that the trust relationship had been broken. The company was ordered to re-employ the employee.

The employer took the case to the Labour Court on review. It argued that the commissioner's finding created a precedent of it being unfair for employers to dismiss employees who steal their products if they have long service records. Considering the problem of shrinkage in the retail industry, this was unacceptable.

The employer also argued that the commissioner had not followed the precedents laid down by the Labour Appeal Court (LAC) regarding theft cases in the retail industry.

It is true that the LAC has consistently followed the approach that it "is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee…A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."

The LAC has reinforced this opinion in such cases a *De Beers Consolidated Mines Ltd v CCMA (2000)* where it stated: "A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with… minor theft; it has everything to do with the operational requirements of the employer's enterprise."

This judgement has been followed to confirm the dismissal of employees involved in drinking a 250ml bottle of orange juice; the removal of a few bale boards, worth R8.50 each; removal of meatballs from a kitchen (the employee had 15 years of service), and the writing-off of a R60 subscription as a favour to a member of a sports club. The *De Beers* judgement was also cited with approval by JA Davis in a recent LAC case involving an assistant baker at a Shoprite Checkers store.

One recent case, however, runs against the cases referred to above. In *Shoprite Checkers (Pty) Ltd v CCMA (2008)* a deli supervisor was captured on the store video camera on three occasions eating small items from the deli in areas where such activity was prohibited. He was charged with misconduct, found guilty and dismissed.

The commissioner found that dismissal was not automatically required to follow theft and it was "quite severe" in the circumstances. The employee had 30 years of service and was a first offender. JP Zondo held, on review before the LAC, that there was no doubt that *no reasonable decision maker would find the dismissal fair.* In particular, he writes: "For what the fourth respondent was found guilty of – and I accept that shrinkage is a problem in shops such as the appellant's shops and in similar businesses – to say that an employee who has worked for you for over 30 years and has a clean disciplinary record should be dismissed is, quite frankly, difficult to understand."

In the *Sebotha* case, the Labour Court noted that the cases involving Shoprite Checkers which had resulted in differing judgements by Davis and Zondo could be separated. The length of service, the clean disciplinary record and whether a person acted in 'flagrant violation' of the company rule are factors that play a role in the issue of sanction.

The court cautioned against 'prophets of doom' believing that the Zondo judgement would spell the end of discipline in the workplace. The retail industry did not need special protection and the prohibitions against workplace dishonesty remained. The court concluded that the decision reached by the commissioner was reasonable.

Interestingly, the court made much of the fact that the employer had decided not to charge the employee with theft or dishonesty. In addition, the court noted that it was crucial for the company to have called as a witness the security guard who found out about the soap. The court also felt that it was disturbing that the employee had been treated by the company as a "super human being who does not make mistakes". It felt that the real injustice was that the employee had been re-employed from the date of the award instead of being reinstated.

In conclusion, the long-held view that 'theft is theft' irrespective of the value of items and an unblemished long service record has been shaken by the recent judgements involving Shoprite Checkers. Employers who wish to dismiss employees who have long and clean service records will have to clearly link the conduct to an act of dishonesty or flagrant violation of a company rule as opposed to mere negligence, and should have good witnesses to prove their point. LB

This column is jointly contributed by professor Avinash Govindjee from the Faculty of Law at the Nelson Mandela Metropolitan University who is a part-time senior commissioner of the CCMA; Evance Kalula, professor and director from the Institute of Development and Labour Law, University of Cape Town; and professor Marius Olivier from the Institute of Social Law and Policy, an extraordinary professor in the faculty of Law, Northwest University, Potchefstroom.