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EMPLOYMENT MATTERS

GUIDELINES IN RESPECT OF MISCONDUCT DISMISSAL ARBITRATIONS - CCMA GUIDELINES

The Commission for Conciliation, Mediation and Arbitration (CCMA) published new guidelines on misconduct arbitration. The guidelines are aimed at consolidating the arbitration process, and therefore ensure consistent decision making by various arbitrators.

Employers should consider these guidelines when preparing for misconduct arbitrations or consider reviewing arbitration awards.

Aadil Patel

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CONDUCTING ARBITRATION PROCEEDINGS

There are five pointers that the arbitrator needs to bear in mind when deciding how a particular arbitration should be conducted.

These are:

- the complexity of the legal or factual matters involved in the case;
- the litigants' attitude to the form of proceedings;
- whether legal representation has been permitted;
- whether the parties are legally represented and
- the parties' experience in appearing at arbitrations.

It is important to note that arbitration proceedings do not constitute mere reviews of the employer's decision. Rather, they are new hearings where the fairness of the employer's decision is assessed on the basis of the evidence that has been placed before the arbitrator. This was crisply captured in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2008 (2) SA 24 (CC))* where the court held that the decision to dismiss lies with the employer, but the arbitrator determines the fairness of that dismissal. It is therefore important to rigorously consider what evidence will be placed before the arbitrator and which witnesses will be called to testify.

The guidelines provide for six stages of the arbitration process. At the outset, the arbitrator is directed to address certain preliminary issues before delving into the substance of the dispute.These include matters relating to jurisdiction as well as the discovery of evidence. Although the guidelines place the burden of establishing jurisdiction on the arbitrator, diligence should be exercised by the employee to ensure that the jurisdictional requirements are met.

Melanie Hart

ASSESSING EVIDENCE AND DRAFTING AN AWARD

The Guidelines on Misconduct Arbitrations provide a framework for Commissioners to assist in assessing the evidence presented at the arbitration and drafting the arbitration award.

This is invaluable not only to the Commissioner but also to the parties presenting their respective cases before the Commissioner.

The Commissioner's award should be structured along the following lines:

- the facts concerning the referral of the dispute;
- any preliminary ruling and the reasons for the ruling;
- the nature of the dispute;
- background facts;
- a summary of the evidence;
- an analysis of the evidence ;
- a conclusion on the fairness of the dismissal based on the above analysis;
- an analysis and determination of the remedy, if necessary; and
- the order.

In assessing the evidence, the Guidelines advise the Commissioner that there should be three broad parts to the organisation and assessment of evidence in the award.

Firstly, the assessment should deal with the background facts. This should be done to include the relevant facts dealing with

- the parties;
- the workplace;
- the applicable disciplinary codes and/or procedures and collective agreement/s;
- the employment relationship;
- the history of the dispute;
- the relief sought; and
- the conducting of the arbitration.

Secondly, the Commissioner should pen a summary of the evidence led. During this phase, the Commissioner should record all relevant evidence led, either in the order presented or chronologically. The documentary evidence should be presented as a list. The Commissioner should not assess the evidence at this stage already – that should only take place during the next phase.

Lastly, there should be an analysis of the evidence. In analysing the evidence, the Commissioner ought to determine the relevant facts to allow a finding on the procedural and substantive fairness. This involves assessing the probabilities, the credibility of the evidence and the relevant rules applicable to this process. The assessment of the probabilities requires a formulation of the contending versions and a weighing up of those versions to determine which is the more probable. The factors for that determination have to be identified and justified. Assessing the reliability of the witnesses involves an assessment of the following:

- the extent of the witness's first-hand knowledge of the events;
- any interest or bias the witness may have;
- any contradictions and inconsistencies;
- corroboration by other witnesses; and
- the credibility of the witness, including demeanour.

The Guidelines suggest to the Commissioner to structure the analysis of the evidence in a particular manner. Where a finding is made on procedural fairness of a dismissal, it should follow the structure or considerations listed in item 4 of the Code of Good Practice: Dismissal (Code) as elaborated on in Part D of the guidelines. In relation to a finding on substantive fairness of a dismissal, the Commissioner ought to have regard for the aspects covered under item 7 of the Code as elaborated on in Part E of the guidelines. Lastly, in relation to sanction or relief, this should be done in accordance with sections 193 to 195 of the LRA and Part F of the guidelines.

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Employers seeking to maximise their prospects for success at defending unfair dismissal disputes relating to misconduct will, no doubt, be able to do so where they take heed of these Guidelines given to commissioners. The Guidelines should be used by employers, firstly, as a framework for preparing their case for arbitration, secondly, as a checklist during the arbitration to ensure they have covered all the evidentiary bases and, thirdly, as a skeleton for drafting their heads of argument or closing submissions. By ensuring that all areas listed in this section of the Guidelines are covered, the employer will significantly minimise its risk of being surprised by the eventual award handed down by the Commissioner.

Johan Botes

APPROACH TO PROCEDURAL FAIRNESS

The manner in which an arbitrator determines whether a dismissal for misconduct is procedurally fair is distinguished in the Guidelines by whether or not a workplace disciplinary procedure exists.

If there is no workplace disciplinary procedure, the Guidelines dictate that the Code of Good Practice: Dismissal (Code) must be applied, subject to permitted departures in exceptional circumstances such as 'crises zone' cases where an employer acts to protect lives or property. In addition, a procedure may be dispensed with where the employee refuses or fails to state a case or if the employee is absent without leave or without an explanation. In such an instance, an employer is required to base its decision on the merits of the allegations of misconduct without the employee stating a case.

Apart from the above circumstances, other departures from the principles set out in the Code should be justified. In an instance where an arbitrator finds that the procedure followed was defective or the departure from the Code was not justified, the Guidelines require an arbitrator to consider whether the defect is material. The seriousness of the defect is later taken into account when determining compensation for procedural unfairness.

The Code contemplates a flexible and less onerous process to disciplinary proceedings. Therefore, the procedural fairness of a dismissal is essentially tested against five requirements, namely:

- The employer must notify the employee of the allegations of misconduct using a form and a language that the employee could reasonably understand.
- The employer must give the employee a reasonable time to prepare a response to the allegations of misconduct.
- The employee should be allowed assistance from a trade union representative or fellow employee.
- The employee should be given the opportunity to state a case in response to the allegations against him or her.
- The employer should communicate the decision ultimately taken, preferably in writing and with reasons for its decision. If the employee is dismissed, the employer should advise the employee of his or her right to refer to the matter to the CCMA or a dispute resolution procedure in terms of a collective agreement.

If there is a disciplinary procedure in place in a workplace, then its legal status will affect the arbitrator's approach when determining the procedural fairness of a dismissal. There are three categories of workplace procedures, namely, those contained in a collective agreement, those that are contractually binding on parties and those that have been unilaterally established by the employer.

The Code expressly provides that it is not intended to be a substitute for a disciplinary code and procedure contained in a collective agreement. Accordingly, in an instance where such an agreement is in place, an arbitrator is required to test the procedural fairness of a dismissal against the agreed procedure and not the Code. Reference is, however, made to the Code where the agreed procedure is silent on an issue.

In respect of a contractually binding disciplinary code or procedure (for example where there is an express reference in an employee's contract of employment that the provisions of the procedure form a term of the contract), this agreement does not have the status of a collective agreement and must therefore be tested against the Code. If this procedure is more burdensome than the Code, the procedural fairness of a dismissal must be tested against the contractual procedure. Given that the disciplinary procedure is contractually binding, the Guidelines stipulate that a departure from the agreed procedure should constitute procedural unfairness. The materiality of the breach will, however, be assessed when determining if the unfairness justifies an order of compensation.

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The final category of workplace procedures, namely an employer imposed procedure, is also tested against the Code. If there is any departure from the Code, the Code takes precedence. Given that this procedure has been unilaterally imposed and is not legally binding, the Guidelines provide that it should not be strictly applied. Accordingly, departures from this procedure or the Code should not, in itself, result in a finding of procedural unfairness unless there is material prejudice to the employee.

With regard to the issue of representation at disciplinary proceedings, if a workplace procedure affords the right to representation, an employer's decision whether or not to allow such representation should be evaluated in terms of that procedure. The Guidelines reaffirm that while neither the Labour Relations Act nor the Code recognise an automatic right to legal representation, should a workplace procedure afford this right, it should be granted. When rights of representation are not regulated by a workplace procedure, the Guidelines refer arbitrators to the Code and its guidelines that an employee should be allowed the assistance of a trade union representative or a fellow employee.

The final issue covered by the Guidelines with regard to procedural fairness is the manner in which one should approach disciplinary action against a trade union representative (shop steward).

In this regard, the Guidelines refer arbitrators to the Code, which requires an employer to inform and consult a union before instituting disciplinary action against a trade union representative, office bearer or official.

The Guidelines provide that the object of consultation, as contemplated in the Code, is to advise and communicate with the union that the disciplinary action is not motivated by a desire to victimise but rather to deal with the possible impact of disciplinary action on the ongoing relationship between the employer and the union.

The Guidelines reiterate that the requirement of consulting with the union on the issue of disciplinary proceedings against its representative is only applicable in instances where a union is a 'recognised union' and has been granted the requisite organisational rights.

Employers may, however, be justified to depart from the requirement of consulting with the union where the union and representative are not prejudiced by the failure to inform and consult, and the employer has a good reason for such departure.

Gavin Stansfield

APPROACH TO BE ADOPTED BY THE ARBITRATOR WITH REGARDS TO REMEDIES IN TERMS OF THE CCMA GUIDELINES ON MISCONDUCT ARBITRATIONS

The final section of the Guidelines sets out the approach to be adopted by an arbitrator when considering the issues of remedies for an unfair dismissal and costs of the proceedings.

An arbitrator is empowered in terms of s193 of the Labour Relations Act, No 65 of 1995 (LRA) to direct an employer who has unfairly dismissed an employee to reinstate, re-employ or pay to the employee a determined amount of compensation. In so doing, the arbitrator is required to provide reasons in an award for the remedy that he or she has granted.

Reinstatement is the principle remedy for substantively unfair dismissals. This remedy provides for a dismissed employee to be placed in the same position and to restore the contractual relationship that applied prior to the dismissal. Reinstatement can be fully retrospective, that is the employee is placed in the same position as if there had been no dismissal.

The Guidelines provide that an arbitrator must direct that an employer reinstate an employee in such an instance unless

- the employee does not wish to be reinstated;
- a continued employment relationship would be intolerable; or
- it is not reasonably practicable to reinstate the employee.

Where an employee does not wish to be reinstated, the arbitrator must ensure that the employee has had an opportunity to state that this remedy is not sought and that he or she has made this decision with full knowledge of his or her rights under the LRA. Once the arbitrator is satisfied that the employee has made an informed decision, it is not appropriate for the arbitrator to interrogate the employee's decision.

Where it is alleged that a continued employment relationship would be intolerable, that is, where there is no reasonable prospects of a good working relationship being restored, evidence to support this submission must be presented during the arbitration. Similarly, where it is alleged that reinstatement would be inappropriate, the onus is on the employer to present evidence

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to show that this remedy is not feasible or that it would be cause a disproportionate level of disruption or financial burden for the employer. The fact that another employee has been appointed in the dismissed employee's position is not in itself a reason to deny reinstatement.

When awarding reinstatement, the question of 'back pay' for the period between the date of dismissal and the date on which the employee resumes work, must be addressed in the arbitrator's award.

The three instances where reinstatement is considered an inappropriate remedy are equally applicable to the remedy of re-employment. This remedy entails ordering an employer to re-employ the dismissed employee in either work in which the employee was employed (without a retrospective element) or in other reasonably suitable work. In the event that this remedy is granted, the arbitrator is required to stipulate the extent to which the terms and conditions of employment are preserved or changed and what benefits an employee should receive for the period between the date of dismissal and the date of re-employment.

Where reinstatement or re-employment is awarded, an arbitrator's award must specify the date on which the reinstatement or re-employment becomes effective as well as the date on which the employee is expected to resume his duties.

In the event that the remedies of reinstatement or re-employment are considered inappropriate, an arbitrator is empowered to grant an order for compensation subject to it being just and equitable in light of the circumstances of the case and provided that it does not exceed 12 months of the employee's remuneration.

In awarding compensation for substantively unfair dismissals, the courts have held that the purpose is generally not to punish employers, but rather to determine an amount of compensation with reference to the situation of both the employee and employer. Accordingly, the quantum of compensation awarded must be determined in accordance with the evidence led on the circumstances of both parties, as well as the employee's financial loss and the nature of the unfair dismissal. Different considerations are taken into account when determining compensation applicable to a substantively unfair dismissal as opposed to a procedurally unfair dismissal.

When determining compensation for a substantively unfair dismissal, an arbitrator is obliged to consider, among other things, the employee's remuneration and benefits at date of dismissal, whether the employee has secured alternative employment, the employee's prospects for future employment, the employer's financial position and whether the dismissal was both procedurally and substantively unfair.

Unlike compensation for substantive unfairness, compensation in respect of a procedurally unfair dismissal is viewed as a punitive measure against an employer to the extent that it has breached an employee's right to a fair pre-dismissal procedure. In determining this form of compensation, an arbitrator must determine whether compensation is appropriate in light of the severity of the procedural unfairness as well as what would be regarded as just and fair under the circumstances, taking into account the anxiety or hurt suffered by the employee as a result of the unfairness.

Accordingly, no compensation may be awarded, despite an element of unfairness in the procedure, where the procedural irregularity was minor and did not prejudice or inconvenience the employee.

In addition, an arbitrator who finds that a dismissal is procedurally unfair may charge the employer an arbitration fee.

In terms of s138(10) of the LRA, an arbitrator must exercise discretion whether or not to make a costs order. For instance, costs may be awarded where either party or his representative has acted in a frivolous or vexatious manner. Given that parties are not necessarily represented by legal representatives in proceedings before the CCMA, the costs awarded may also include the actual costs incurred by a party that is unrepresented or is represented by an employee, director, member, union official or employer's organisation representative.

In addition to the powers bestowed by the LRA, in terms of s74 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) an arbitrator is vested with the jurisdiction to determine claims for amounts which are owed to the employee in terms of the BCEA (such as unpaid salary or leave pay) in conjunction with unfair dismissal disputes. This jurisdiction is, however, conditional on the employee specifying such a claim in his/her referral form, the amount has not have been owing for longer than a year prior to the date of dismissal and non-compliance order has issued or other legal proceedings instituted to recover the amount.

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