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EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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CAN A CHAIRPERSON IN A DISCIPLINARY APPEAL IMPOSE A MORE SEVERE SANCTION?

Employers sometimes underestimate the importance of their disciplinary code and procedure as it is often regarded as a mere guideline. However, employers often miss out on the opportunity to prescribe important powers to chairpersons especially for internal appeals. This failure may later prove detrimental to the disciplinary process.



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CAN A CHAIRPERSON IN A DISCIPLINARY APPEAL IMPOSE A MORE SEVERE SANCTION?

The question before the Labour Court was whether it was permissible for the appeal chairperson to impose a more severe sanction.

The Labour Court found that the employer's disciplinary code did not expressly give the appeal chairperson powers to increase the sanction.



Employers sometimes underestimate the importance of their disciplinary code and procedure as it is often regarded as a mere guideline. However, employers often miss out on the opportunity to prescribe important powers to chairpersons especially for internal appeals. This failure may later prove detrimental to the disciplinary process.

In the *Marina Opperman v CCMA and Others* (C530/2014) [2016] ZALCCT 29 (17 August 2016) case, Opperman a professional nurse went to work one morning and was randomly required to take a breathalyser. She tested positive for alcohol. After the disciplinary hearing, she was found guilty and was given a sanction of a severe warning valid for twelve months as prescribed in the employer's disciplinary code. Opperman lodged an internal appeal on the basis that the sanction was too harsh. The appeal chairperson substituted the disciplinary sanction with that of dismissal. Aggrieved by this sanction, Opperman referred the dispute to the CCMA which upheld the sanction of dismissal but ordered three months' compensation as it found the dismissal substantively fair but procedurally unfair. Opperman brought a review application to the Labour Court to review and set aside the CCMA award.

The question before the Labour Court was whether it was permissible for the appeal chairperson to impose a more severe sanction. In dealing with this question, the court considered the decision in *Rennies Distribution Services (Pty) Ltd v Bierman N.O* (2008) 29 ILJ 3021 (LC) which laid down the following principles: it would be unfair to allow a chairperson of an appeal hearing to increase a disciplinary sanction except where the disciplinary

code expressly allows for such powers; the affected employee should be warned that the chairperson may increase the sanction and must be afforded an opportunity to present argument as to why the sanction must not be increased.

However, these principles do not suggest that a disciplinary hearing must be conducted as a criminal trial as was held in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 (27) ILJ 1644 (LC). What is important is that the rationale underlying the reasons why a criminal court on appeal should caution the accused against a possible increasing sanction should be imported into our labour law. This is to ensure that the employee receives a fair hearing and takes into account the fact that the employee may be prejudiced by the imposition of a more severe sanction.

In applying the principles in the *Rennies Distribution* case, the Labour Court found that the employer's disciplinary code did not expressly give the appeal chairperson powers to increase the sanction. In addition to this, the court held that Opperman was not afforded an opportunity to make submissions as to why a harsher penalty should not be imposed. The court found that, the appeal chairperson therefore did not have powers to increase the disciplinary sanction under the circumstances.

CAN A CHAIRPERSON IN A DISCIPLINARY APPEAL IMPOSE A MORE SEVERE SANCTION?

CONTINUED

Employers should ensure that the powers of an appeal chairperson expressly provide for the substitution of the disciplinary hearing sanction.

Employers should ensure that the powers of an appeal chairperson expressly provide for the substitution of the disciplinary hearing sanction. This would afford employers greater flexibility to ensure the consistent application of discipline in the workplace. However, the affected employee must be warned of

the possibility of a more severe sanction being imposed prior to proceeding with the appeal process and be afforded an opportunity to make submissions as to why the sanction should not be increased.

Michael Yeates and Bheki Nhlapho



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Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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