10 MAY 2017

EMPLOYMENT ALERT

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

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SUIT AND TIE OR JEANS AND A T-SHIRT – THE PROCEDURAL FAIRNESS OF AN INFORMAL DISCIPLINARY HEARING

In the recent judgment of *Passenger Rail Agency of South Africa v Moreki and Others* (J190/15, JR2361/16) [2017] ZALCJHB 114 (28 March 2017), the Labour Court had to determine whether a disciplinary hearing not conducted in the usual formal manner was procedurally fair and whether such a disciplinary hearing can only be conducted in exceptional circumstances as per item 4(4) of Schedule 8 of the Labour Relations Act, No 66 of 1995 (LRA).

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Item 4(4) of Schedule 8 to the LRA provides that in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

Item 4 of Schedule 8 to the LRA provides:

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

…

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

In the *Moreki* case, the employee was employed as an area manager by the employer. She was dismissed after being found guilty on numerous charges of misconduct. The employer, in this case, conducted an investigation which concluded that the employee had committed certain misconduct. The employer then issued the employee with a notice of disciplinary hearing and set out the charges. After various delays, the employer requested the employee to submit her written representations in response to the adverse findings set out in the investigation report. The employee failed to do so. Instead, she responded to the employer stating that she was entitled to a formal disciplinary hearing. The employer took a view that a formal disciplinary enquiry was not necessary and dismissed the employee on the basis of the adverse findings in the investigation report.

The employee referred a dispute to the CCMA alleging that her dismissal was substantively and procedurally unfair. The arbitrator found in favour of the employee and ruled that the dismissal was both procedurally and substantively unfair. The arbitrator's finding that the dismissal was procedurally unfair was based on the fact that no formal or oral disciplinary hearing was held against the employee.

Thereafter, the employee applied to have the award made an order of court. While this process was underway, the employer filed an application to review the arbitration award, unaware of the application by the employee. The award was made an order of court, in the employer's absence and after the review application had been lodged. Thus, the employer successfully applied for the rescission of the order.

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The Court determined that the appropriateness of the disciplinary procedure followed should be assessed on whether or not the process resulted in a "proper ventilation of the issues raised and consequently in procedural fairness".

In relation to the review application, the employer's case was that the arbitrator's award was not reasonable. The employer relied on its disciplinary code and item 4 of Schedule 8 to the LRA. The employee, however, argued that arbitrator was correct in finding that the employer did not prove the existence of exceptional circumstances, as required by item 4(4), before following the procedure it did.

The Labour Court held that the requirements set out in item 4(1) "constitute a minimum standard for procedural fairness in respect of a dismissal" and that the requirements relate to both an oral disciplinary hearing and a disciplinary process through correspondence (as occurred in the present matter).

The Labour Court held that item 4(4) set out the requirements for a situation where the employer intends to dispense with the pre-dismissal procedures in item 4(1). The Labour Court held, among other things, that, "if the disciplinary code and the Code of Good Practice (Item 4 of Schedule 8) make room for a less formal process to be followed (as opposed to a formal oral disciplinary enquiry), it ought to be open to the employer to follow anyone [sic] of such processes as long as such process complies with the minimum standard set in item 4(1)".

The Court determined that the appropriateness of the disciplinary procedure followed should be assessed on whether or not the process resulted in a "proper ventilation of the issues raised and consequently in procedural fairness".

The Court held that where an employee failed to make submissions despite being given the opportunity to do so, the employee could not later complain that she was not given an opportunity to state her case. Moreover, the employee failed to state in her response to the employer on which aspects she deserved an oral disciplinary hearing.

The Court concluded that in the absence of written representations, the employer could only consider what was before it. It held that the process was fair. It found that the arbitrator misapplied the provisions of the employer's disciplinary code and item 4 of Schedule 8 to the LRA by finding that the employer had to first prove exceptional circumstances before it could apply the informal procedure.

The Labour Court granted the review application and set aside the arbitrator's award.

This case demonstrates that the requirement of exceptional circumstances in item 4(4) of Schedule 8 of the LRA is not cast in stone. What is required is that the disciplinary procedure elected by the employer must enable the parties to deal with the relevant substantive issues and must be procedurally fair.

This case does not mean that employers should ignore their disciplinary codes and procedures. What it does highlight is that procedural fairness is determined on a case-by-case basis and that a disciplinary enquiry need not always be "formalistic".

Ndumiso Zwane, Bheki Nhlapho and David Pule

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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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