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EMPLOYMENT ALERT

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Decriminalise your disciplinary hearings even further

An employee of the Department of Social Development was sentenced to direct imprisonment for charges of bribery and corruption for four years. Upon release, his employer issued him with a written notice of termination due to incapacity. At the arbitration proceedings, the arbitrator found the employee's dismissal procedurally unfair, awarding him three months' compensation. The employee took the award on review, contending that his dismissal was also substantively unfair.

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Decriminalise your disciplinary hearings even further

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An employee of the Department of Social Development was sentenced to direct imprisonment for charges of bribery and corruption for four years. Upon release, his employer issued him with a written notice of termination due to incapacity. At the arbitration proceedings, the arbitrator found the employee's dismissal procedurally unfair, awarding him three months' compensation. The employee took the award on review, contending that his dismissal was also substantively unfair.

The crux of the employee's ground of review in *Molehe v Public Health and Social Development Sectoral Bargaining Council and Others* (167/2014) [2019] ZALCCT 19 (2 August 2019) was that the arbitrator had found the dismissal to be substantively fair even though the employer had not led evidence and, as a result, the arbitrator had simply accepted that because of the four-year imprisonment, dismissal was warranted on the ground of incapacity.

In coming to his decision and dismissing the applicant's review application, Rabkin-Naicker J emphasised that the employee, on his own version, had been found guilty beyond a reasonable doubt in a court of law for conduct relating to his very own 'clients' – those in the community in need of health and

medical services. Thus, the employee's own testimony confirmed that the dismissal was substantively fair and there was no need for the employer to provide such evidence.

The learned judge noted the imperative of avoiding rigidity when applying the principles of labour law and held that the relevant facts and circumstances of a particular case must always be taken into account.

The principle of a flexible disciplinary process espoused by Rabkin-Naicker J is further supported by Van Niekerk AJ in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* [2006] 9 BLLR 833 (LC) (14 March 2006). In this case, the learned judge held that the rules relating to procedural fairness do not replicate the criminal justice model but rather recognise that when it comes to workers, justice is found in the expeditious and independent review of an employer's decision to dismiss, "with reinstatement as the primary remedy when the substance of employer decisions are found wanting".

The Labour Appeal Court in *EOH Abantu (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and Another* (J 68/08) [2008] ZALC 40 further enunciated on this important principle

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Decriminalise your disciplinary hearings even further...continued

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and stated that employers embarking on disciplinary proceedings are not skilled legal practitioners and can sometimes define or restrict alleged misconduct too narrowly and incorrectly. In such instances, the court held that provided a known workplace standard has been contravened, no substantial prejudice will flow from an incorrect characterisation of an offence.

The jurisprudence above highlights the need for flexible workplace disciplinary processes and signifies that the continued application of the criminal justice model

in the workplace results in a duplicated process and one which provides no tangible benefit to the employer or employee. Employers, arbitrators and the like should refrain from transposing criminal justice principles into their processes and decisions. As stated in *Avril Elizabeth*, we must constantly be reminded that justice is found in the expeditious and independent review of an employer's decision to dismiss an employee.

Aadil Patel, Anli Bezuidenhout and Rowan Bromham






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