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EMPLOYMENT ALERT

IN THIS **ISSUE**

BEWARE OF RIGID AND OVER-REGULATED DISCIPLINARY PROCEDURES

Employers with rigid and over-regulated disciplinary procedures which form part of a collective agreement or employees' terms and condition of employment, face the risk that non-compliance with these procedures may result in severe consequences including, disciplinary hearings being of no force or effect and/or a finding that they have waived their right to discipline employees.

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BEWARE OF RIGID AND OVER-REGULATED DISCIPLINARY PROCEDURES

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This case cautions employers against creating additional and onerous obligations for themselves in collective agreements, which are not a requirement of the law.

Collective agreements often include time periods within which disciplinary proceedings must start or be held. Failure to comply with these time periods may result in the disciplinary proceedings being declared of no force and effect. This was confirmed by the Labour Court in the decision of *SAMWU v City of Cape Town and Others (C701/13)* (SAMWU) in which Judge Steenkamp, in setting aside an arbitration award, found that the employer's failure to comply with its collective agreement constituted procedural unfairness and invalidated the disciplinary proceedings. The judgment reiterates that collective agreements are peremptory and as such, compliance with their provisions is required and not at the discretion of the employer. This case once again cautions employers against creating additional and onerous obligations for themselves in collective agreements, which are not a requirement of the law. The courts have repeatedly followed the 2006 decision in *Avril Elizabeth Home for the Mentally handicapped v CCMA [2006] 9 BLLR 833* finding that flexibility should be acknowledged in the exercise of discipline and encouraging employers not to adopt rigid, criminal model internal disciplinary proceedings.

The *SAMWU* and *Avril Elizabeth Homes* decisions were referred to and applied by the bargaining council in *Public Servants Association of South Africa obo Sepuru v COGTA [2008] 3 BALR 253.* In this case the employer delayed taking disciplinary action against an employee for a period of more than 381 days from the date on which the employee was issued with notice of the allegations of misconduct. The delay was notwithstanding the provisions of the collective agreement which required that disciplinary action be taken within 10 working days from the date of serving the charges on the employee. The employee referred a dispute to the bargaining council alleging that the employer had waived its right to take disciplinary action against him, given the failure to institute disciplinary proceedings within the 10 days stipulated in the agreement.

Referring to the decision in *SAMWU,* the commissioner confirmed that a deviation from the peremptory provisions of a collective agreement result in the disciplinary proceedings being of no force and effect. In this instance, the commissioner found that whilst the disciplinary action had started within the stipulated period, it had not been

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The employee argued that he was contractually entitled to a procedurally fair disciplinary process in accordance with the employer's policies which were an extension of his employment contract.

completed and continued to be delayed for more than a year. As the disciplinary hearing had started, the commissioner found that the employer had not waived its right to discipline the employee. However, the employer had failed to act promptly and fairly. It had delayed completing the hearing for more than 381 days and this delay was unreasonable. The commissioner directed the employer to complete the disciplinary action within 60 days from the date of the award.

The High Court came to a similar conclusion in the case of *Viedge v Rhodes University and Others* in which an employee brought an urgent application to have disciplinary action against him declared unlawful. The employee argued that he was contractually entitled to a procedurally fair disciplinary process in accordance with the employer's policies which were an extension of his employment contract. He challenged the process on the basis that the disciplinary hearing was not conducted in accordance with the employer's applicable policy which required the appointment of a chairperson at a specified level and that non-compliance with the policy constituted a breach of his contractual right to a fair disciplinary procedure. The High Court found that the employer's failure to comply with the policy was a breach of the employee's contract, rendering the disciplinary action taken against him unlawful and *void ab initio*.

These judgments are a clear warning to employers to avoid incorporating rigid disciplinary procedures in their collective agreements and/or employment contracts. Employers are encouraged to implement flexible disciplinary procedures and avoid adopting a stringent criminal justice model.

Gillian Lumb and Zola Mcaciso

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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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