PROCEDURAL FAIRNESS IN DISCIPLINARY HEARINGS

In an important judgment regarding the issue of procedural fairness in disciplinary hearings, Acting Judge Andre van Niekerk has held that the CCMA cannot apply a stricter standard of procedural fairness than that provided for in the LRA.

In this matter, the commissioner had found that the employee's dismissal was procedurally unfair because the chair of the enquiry was in a position junior to that of the complainant, and that it necessarily followed on account of that relationship that there was at least a valid perception of bias.

After examining the nature and extent of the right to fair procedure preceding a dismissal for misconduct as provided for in specific terms in the Code of Good Practice: Dismissal in Schedule 8 to the LRA, the Labour Court held that the Act's approach to procedural fairness is a "fundamental" departure from the almost "criminal justice" model that was developed by the old industrial court under the previous Act. That likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995, however, do not replicate the criminal justice model of procedural fairness. They recognise that the CCMA (or bargaining council) is the primary forum for ensuring workplace justice. It has the power to review the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

This approach thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on the merits, which is what the LRA envisages. This approach is also in line with the requirements of the relevant international labour standards.

On this approach, the court held, there is clearly no place for formal disciplinary procedures that incorporate all of the characteristics of a criminal trial, including the leading of witnesses, technical and complex "charge sheets", requests for particulars, the application of the rules of evidence, legal arguments, and the like.

What is required by clause 4 of the Code of Good Practice: Dismissal (which the LRA obliges commissioners to apply) is the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee.

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The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee, the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction, or any procedure established in terms of a collective agreement.

Neither the Act nor the Code obliges an employer to provide any workplace right of appeal against the decision to dismiss.

It is this standard of procedural fairness the Act establishes and which must be applied by commissioners. They are obliged to do so by sec 203 of the LRA which requires, in peremptory terms, that any person who interprets or applies the Act **must** take into account any relevant code of good practice.

Employers and unions may agree to retain a stricter approach to procedural fairness (based on the criminal justice model) if they wish, whether by way of a collective agreement or as an agreed term of employment. In this instance employers would be obliged to apply the standards to which they have agreed or that they have established. In the public sector, administrative law considerations might also require a greater degree of formality in disciplinary hearings

The court ultimately held that there was no legal basis for the application of the rule against bias that the commissioner applied. I applying this rule, the commissioner clearly applied the criminal justice model of procedural fairness, and the standards associated with it, instead of the requirements of the LRA, as fleshed out in the Code of Good Practice: Dismissal. The award was also set aside for another reason not relevant here, i.e. the commissioner's findings with regard to substantive fairness.

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