

Automatically unfair dismissals: An employer may dismiss an employee for lodging a false grievance

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Issue

Is the lodging of a grievance the exercise of a right under the LRA? Can an employer dismiss an employee for lodging a baseless grievance against another employee without it being regarded as an automatically unfair dismissal?

Summary

An employer may dismiss an employee if he or she has lodged a grievance against another employee which is false. Dismissing an employee for doing so does not amount to an automatically unfair dismissal because the lodging of a grievance is not the same as exercising a right conferred by law.

Facts

In the case of *DBT Technologies (Pty) Ltd v Garnevska (JA61/2018) [2020] ZALAC 26* the Labour Appeal Court (“**LAC**”) had to consider the above issue. The facts of the matter are briefly as follows: Mariela Garnevska (“**Ms Garnevska**”) was employed by DBT Technologies (Pty) Ltd (“**DBT**”) in January 2010. At the time of her dismissal she was the Senior Financial Planning and Analyses Manager.

On 2 February 2015, a meeting was held to in order to resolve a contractual dispute between DBT and one of its subcontractors. Mr Gregory Mailen (“**Mr Mailen**”), a Project Director employed by DBT attended the meeting. Mr Mailen and Ms Garnevska openly disagreed about a contractual dispute at the meeting. Mr Mailen left the meeting before it concluded. Ms Garnevska alleged that on his way out of the meeting he hit her over the head with a file. Ms Garnevska reported the incident to her supervisor, went to visit a doctor and then filed a grievance against Mr Mailen. The essence of her grievance was that Mr Mailen had assaulted her. A grievance inquiry followed which found that the assault was not proven and the grievance was dismissed. Ms Garnevska unsuccessfully appealed the finding.

DBT then charged Ms Garnevska with misconduct and called her to a disciplinary enquiry. In the disciplinary enquiry, Ms Garnevska was found to have committed gross misconduct for falsely accusing Mr Mailen of assault and for preventing other employees from performing their duties. The chairperson of the enquiry recommended that Ms Garnevska be dismissed. This finding was upheld on appeal and Ms Garnevska was dismissed for dishonesty.

Ms Garnevska referred a dispute to the Labour Court, alleging that her dismissal was automatically unfair. She claimed that lodging a grievance was the exercise of a right under the LRA and that she had been dismissed for doing so. Her dismissal therefore, she further claimed, fell within section 187(1)(d) of the LRA.

DBT denied that her dismissal was automatically unfair and that the disciplinary process was instituted as a result of the grievance lodged by Ms Garnevska. They contended that the disciplinary process was instituted on the grounds of misconduct, specifically the false allegation of assault made by her against Mr Mailen.

The Labour Court found that the predominant cause of the dismissal was the lodging of the grievance and not the alleged dishonest or false accusation against Mr Mailen. The Labour Court held that the dismissal was automatically unfair as contemplated in section 187(1)(d) of the LRA and ordered compensation to be paid to Ms Garnevska. In essence, the Labour Court found that the reason Ms Garnevska was dismissed was because she ‘took action, or indicated an intention to take action, against the employer by exercising a right conferred by’ the LRA.

DBT then took the Labour Court’s judgment on appeal to the LAC.

LAC’s evaluation

The LAC found that in determining whether a dismissal is automatically unfair, an enquiry into its causation must be undertaken. It must also be determined whether the reason for the dismissal is one of the grounds listed in section 187(1) of the LRA. In terms of section 187(1)(d) of the LRA, the inquiry is whether the “*employee took action, or indicated an intention to take action, against the employer*” by exercising a right provided for in the LRA or participating in proceedings contemplated in the LRA. Factual causation is established by asking whether the dismissal would have occurred had the employee not taken action against the employer. If yes, then the dismissal is not automatically unfair. However, if no, it does not mean that the dismissal is automatically unfair as there would need to be legal causation established. Legal causation is established where the reason was the main, dominate, proximate or most likely cause of the dismissal.

The LAC held that there was no evidence that at the time of her dismissal, Ms Garnevska had taken action or indicated to take action against DBT. The only action taken against the employer was the referral of the dispute about her dismissal to the CCMA in terms of the LRA. The LAC also held that the right to file a grievance is not provided for by the LRA nor does the LRA establish grievance mechanisms or proceedings. The right to file and process a grievance is based in contract. It is derived from “*grievance procedure incorporated as part of the implied terms of the individual contract of employment*”.

Even if it is established that a right in terms of the LRA was exercised, it would still need to be established that the dismissal was due to the employee taking action or the intending to take action against the employer prior to the dismissal and that such ‘pre-dismissal action’ was the real reason for the dismissal. The LAC held that section 187(1)(d) of the LRA is not concerned with the filing of a grievance. A request by an employee to discipline a fellow employee for an alleged misconduct does not fall within the ambit of the conduct contemplated in section 187(1)(d). Should there be evidence to prove that an employee was dismissed for filing a legitimate grievance, the dismissal would amount to an unfair dismissal as it would be for a substantively unfair or invalid reason. The LAC found that on the facts, no automatically unfair dismissal had occurred and the LAC upheld the appeal.

Importance of the case

The lodging of a grievance does not amount to an employee taking action, or indicating an intention to take action, against the employer. The mere fact that an employee has lodged a grievance is therefore not a bar on an employer taking action against the employee where the employee has committed a misconduct by lodging the grievance such as, for instance, where the allegations contained in the grievance are false or dishonest.



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