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EMPLOYMENT

Can a sanction of a final written warning be substituted with one dismissal appeal?

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ISSUE

Can an employer substitute the sanction of a final written warning with one of dismissal on appeal?

COURT'S DECISION

In the case of *Opperman v CCMA and Others* (C530/2014) [2016] ZALCCT 29 (17 August 2016), the employee, who was employed as a nurse, was asked to undergo a breathalyser test by her employer. She was found to have alcohol in her system which she had apparently consumed the previous night. After a disciplinary hearing the employee was given a 'severe written warning' valid for a period of 12 months. She lodged an internal appeal against the sanction only. The appeal chairperson subsequently imposed a sanction of dismissal. Thereafter the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration where the Commissioner found the dismissal to be substantively fair but procedurally unfair. The employee then applied to the Labour Court to have the Commissioner's award reviewed and set aside.

The employee's grounds of review were firstly, an error of law, and secondly, that the arbitrator grossly misapplied the law relating to inconsistency, which led to an unreasonable result.

The employee argued that the arbitrator committed an error of law by failing to take into account the decision of *Rennies Distribution Services (Pty) Ltd v Bierman N.O.* ('Rennies') which is that "except where a provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction".

The Labour Court also held that even where a chairperson is given such power, he must still adhere to the fundamental principle of *audi alteram partem*, which in this case required that the employee be allowed to make submissions why a harsher penalty should not be imposed. On these two grounds the Labour Court held that the arbitrator had committed an error of law.

The second argument presented by the employee was that the arbitrator grossly misapplied the law relating to inconsistency. In accordance with the 'parity principle', "an employee is entitled to be aware of the standard of conduct expected by the employer, and is entitled to know, in advance, what the consequences of non-compliance will be". It was common cause that on three previous occasions other employees were found guilty of the same offence, but received less severe sanctions. For this reason the employee alleged that the employer's inconsistent treatment of her was unfair. The Labour Court held that the arbitrator's finding that the dismissal was substantively fair was so unreasonable that no reasonable arbitrator could have come to the same conclusion.

In summary, the Labour Court held that the arbitrator's award be reviewed and set aside and that the award be substituted with a finding that the dismissal of the employee was procedurally and substantively unfair. Her employer was ordered to reinstate her.

IMPORTANCE OF THIS CASE

Three important points have arisen from this case. Firstly; an appeal chairperson may only impose a harsher sanction where that power is expressly given to him in terms of the employer's disciplinary code. Secondly; even if the chairperson on appeal has that power he must

inform the employee of that risk so that the employee may present submissions to persuade the chairperson on appeal as to why the sanction should not be increased. Lastly, this case reiterates the importance of an employer disciplining employees in a consistent and fair manner.

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