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EMPLOYMENT

Different sanctions for employees who participated in an unlawful strike

13 November 2018 *3 min read*

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ISSUE

Does the application of different discipline and issuing of different sanctions to certain employees who participated in an unprotected strike render their dismissal unfair?

SUMMARY

Disciplinary fairness does not require consistency, but it is an element that is considered by the court. Where an employer cannot justify the inconsistent discipline and sanction, such discipline and sanction may be unfair.

COURT'S DECISION

In the case of *KM Phora and Another v MEC: Department of Health Gauteng* JS587/14 (LC), the Labour Court had to determine whether the dismissal of Messrs Phora and Tladi ("the applicants") was fair and whether the Department of Health: Gauteng ("the employer") was consistent in issuing a sanction of dismissal in respect of the applicants' participation in an unprotected strike.

On 5 August 2014, some 84 employees embarked on an unprotected strike. The strike resulted from the outcome of an investigation into allegations that certain employees were involved in nepotism and selling of posts when recruiting new employees. The outcome, indicating a failure to prove the allegation, was reported to the grievant employees, who referred to themselves as 'the Concerned Workers Group'.

On 11 August 2014, the employer proceeded with a lockout and suspended all talks with employee leaders. On 17 August 2014, the employer and the trade unions representing the striking employees concluded a settlement agreement. In terms of the settlement agreement, all the striking employees, save for the applicants, were to receive final written warnings for participating in the unprotected strike. The settlement agreement provided that the applicants were summarily dismissed.

The Labour Court held that the department chose to enter into negotiations with the trade unions instead of charging the striking employees, save for the applicants. The Labour Court noted that the employees participating in an unprotected strike should be treated the same when it comes to discipline and sanction. The Court noted further that consistency is an element of disciplinary fairness, but that it is not a rule unto itself. The Court considered the fact that the applicants were already dismissed when the negotiations that led to the lenient sanction for other employees participating in the unprotected strike took place. The Court, however, held that there was no reason to exclude applicants from the indulgence afforded to the other striking employees. The Labour Court concluded that the decision to isolate and dismiss the applicants was capricious and unfair.

IMPORTANCE OF THIS CASE

Consistency is a factor in deciding whether the disciplinary action against employees is fair. This factor will be weighed up along with all other circumstances when deciding whether employees who committed the same offence in the same or similar circumstances should be treated

differently.



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