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EMPLOYMENT

Dismissal of employees who contravene a rule will be fair if proven that employees were aware of the rule or could be reasonably expected to have been aware of it

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Issue

Whether the employees could be said to have known, or reasonably to have known, about the rule that they breached.

Summary

When assessing misconduct of an employee, the correct test entails, among others, determining whether, on the evidence presented, the dismissed employees were aware of the specific rule prohibiting the misconduct or could have reasonably been expected to have been aware of such a rule.

Facts

In the case of *Pailpac (Pty) Ltd v De Beer N.O and Others (DA 12/2018) [2021] ZALAC 3 (1 March 2021)* the Labour Appeal Court ("**LAC**") had to consider the above issue. The facts of the matter are summarised as follows. The fourth to eleventh respondents ("**dismissed employees**") in the matter were all employees of the appellant ("**Pailpac**") and were members of the National Union of Metal Workers of South Africa ("**NUMSA**").

In 2014, NUMSA embarked on a national strike in the metal and engineering industry. This strike was protected. The dismissed employees participated in this strike but were subsequently dismissed for misconduct as they carried weapons such as sticks, PVC rods sjamboks and golf-clubs during the strike. Pailpac alleged that the employees had breached a policy called the "Breaches of Discipline" ("**BOD**") document as well as a picketing policy.

The dismissed employees referred an unfair dismissal dispute to the Bargaining Council for the Metal and Engineering Industries ("**MEIBC**"). The arbitrator held that the dismissed employees could not have been aware of the rule and their dismissal was therefore substantively unfair. The arbitrator found, in this regard, that "I do not believe that in the current circumstances that it will be fair to hold the [dismissed employees] bound to a rule that they did not know existed, or which was not effectively communicated to them." The arbitrator also reasoned that there was little evidence that the dismissed employees were "brandishing or wielding" the weapons as stated in the charges against them. She found that the dismissed employees were merely carrying the weapons.

Pailpac sought to review this decision in the Labour Court ("**LC**"). The LC dismissed the review, finding, among others, that the arbitrator had applied her mind to the evidence and the matter and that "the decision clearly falls within a band of reasonable conclusions. It cannot be case that the [arbitrator's] conclusion is one to which another arbitrator could not reasonably have arrived."

LAC's Evaluation

Pailpac appealed against the LC's judgement. Pailpac argued that the dismissed employees did have knowledge of the rule preventing them from carrying sticks and other weapons during a strike. Pailpac submitted that the arbitrator and the LC did not properly interrogate the evidence presented before them and failed to consider the contradictory versions of the dismissed employees.

Pailpac relied on the following two sets of rules which were effective on or after 2 July 2014:

1. Rule 58 of the "revised BOD rules" which prohibited "brandishing or wielding of dangerous weapons"; and
2. Clause 14 of the picketing policy which provided:

'The picketers shall at all times conduct themselves in a peaceful manner. They may carry placards, chant slogans, sing and dance, but they may not physically prevent members of the public, other employees or service providers from entering or leaving the premises, nor may they disrupt the normal functioning of the company or engage in unlawful or violent actions. No weapons of ANY kind are to be carried or wielded by the picketers.'

The LAC confirmed that the test in this case was whether, on the evidence, the dismissed employees were aware of the rule or could reasonably have been expected to be aware of the rule.

Pailpac's HR Manager confirmed that the revised BOD rules were placed on the notice board at the entrance of the factory and that such communication was standard practice. Furthermore, the employees were aware of the obligation to read the communications which were posted.

The dismissed employees had denied that the BOD rules were placed on the notice board but admitted to reading other notices regarding job vacancies, invitations, etc. This evidence was ignored by the arbitrator. The LAC held that such evidence proved that the dismissed employees regularly read notices on the notice board and should therefore have been aware or could reasonably be expected to have been aware of the rule.

With regards to the picketing policy, Pailpac's evidence was that it was placed on the wall adjacent to the gates to the employer's premises. There was evidence that other communications placed on the wall had been read by the employees. The LAC therefore rejected the employees' argument that they were unable to approach the wall and read the policy. The employees' evidence in this regard was unreliable and inconsistent.

Furthermore, there was ample evidence which demonstrated that the dismissed employees were "carrying", "wielding" or "brandishing" their weapons in contravention of the BOD and picketing rule. This evidence was ignored by the arbitrator and the LC. The LAC confirmed that courts have consistently cautioned against an overly technical and formulaic approach to interpretation of rules.

The LAC held that the breach of the rules by the dismissed employees as well as the intimidation of non-striking employees rendered their continued employment intolerable and made dismissal an appropriate sanction. The sanction of dismissal was therefore found to be fair and appropriate in the circumstances.

Importance of the case

This case is a clear example of the need to not only create appropriate rules that govern the workplace but to ensure that the employees are aware of such rules. In this regard, the use of a notice board with which to communicate with employees, for instance, proved invaluable in proving the case.

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