

DISCIPLINARY

EMPLOYMENT

Excessive delay in disciplinary proceedings could render the dismissal unfair

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Lethoba and Rand Water (2025) 46 ILJ 2771 (CCMA)

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Introduction

Employers should guard against unduly delaying disciplinary proceedings as an excessive delay could render the process unfair. The CCMA, in *Lethoba and Rand Water* (2025)^[1], barred the employer from continuing disciplinary action due to an unreasonable delay between the service of the initial charge sheet on the employee and the issuing of additional charges.

Facts

The employee was suspended on 8 August 2023. The employer served the employee with the formal notice of the charges on 19 December 2023, and then supplemented the charges against the employee on 25 July 2025 – some 19 months later. The employer attributed the delay to, among other reasons, operational constraints, specifically the absence of their employee relations consultant.

The matter was then referred to the CCMA in terms of section 188A of the Labour Relations Act ('LRA'). Section 188A permits an employer to request a council, an accredited agency, or the CCMA to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee, provided that the employee has consented or the request has been made in accordance with a collective agreement. The arbitrator, under the auspices of the CCMA, then effectively conducts the disciplinary hearing.

The pertinent questions before the CCMA were whether the excessive delay constituted a waiver of the employer's right to discipline its employee, or whether the delay rendered the disciplinary process procedurally unfair.

CCMA Findings and Analysis

In relying on previous case law, the CCMA emphasized that a waiver "requires a clear, and intentional abandonment of rights", and that a mere delay cannot constitute a waiver. Rather, the impact of the delay must be determined using fairness as the benchmark.

The CCMA referred to the finding in *Mapyane v SA Police Services and Others*^[2], namely that any inexplicable delay or inaction by the employer undermines fairness and is contrary to the constitutional standard of prompt justice. Furthermore, the court in *Mapyane* emphasised that when an employee explicitly demands a swift resolution to the matter, the employer's failure to act promptly significantly undermines the fairness of the disciplinary process. *Mapyane* involved an 'ordinary' disciplinary hearing and not a hearing in terms of section 188A of the LRA. However the principles advanced remain applicable, that is, that an unjustified and excessive delay violates the right to prompt justice. The court in *Mapyane*, found that whilst the dismissal was substantively fair, the inordinate delay rendered it procedurally unfair.

In assessing whether a delay is contrary to the standards of fairness and prompt justice, the CCMA also had regard to the factors identified in *Stokwe v Members of the Executive Council, Department of Education, Eastern Cape* (2019) ('Stokwe')^[3]. The factors to be considered include the length of the delay, the reasons for the delay, the degree of action taken by the employee to assert their right to prompt justice, any prejudice the employee suffered as result of the delay, and the nature of the alleged misconduct. The application of these factors and the question of whether a delay would adversely impact the fairness of a disciplinary process is a question of fact and must be determined on a case to case basis.

In applying the aforementioned principles in the context of section 188A, the CCMA concluded that the 19 month period was an excessive delay, which triggered the presumption of unfairness. Citing general operational constraints, as argued by the employer, was insufficient in negating this presumption. The CCMA emphasized that employers are required to account, in detail, for any reason for their inaction during disciplinary proceedings to rebut an allegation of unfairness. This is especially so when the employee demonstrates reasonable attempt(s) to assert their right to prompt justice. Furthermore, the prejudice endured by the employee as result of the delay is a factor which could tip the scale in favour of the employee. Prejudice in this context amounts to, *inter alia*, being subjected to a prolonged state of uncertainty, which ultimately impacts an employee's ability to recall relevant events surrounding the conduct in question.

The CCMA concluded that the employer's excessive delay in instituting disciplinary proceedings undermined the right to prompt justice and rendered the process unfair. The arbitrator emphasized that when considering a section 188A referral, the CCMA has the authority, under section 138(9) of the LRA, to make a suitable award. This includes the discretionary power to terminate proceedings if delays or any other unfairness renders the continuation of the matter unjust or contrary to the purpose of the empowering statute. The employer was subsequently prevented from proceeding with the disciplinary action.

Conclusion

An employer's delay in promptly taking disciplinary action may be sufficient to render the process unfair. Employers should be cognizant of an employee's right to prompt justice. Any delay in proceedings will be measured against the relevant principles cited in, among others, *Stokwe* and *Mapyane* to determine whether the delay is unfair or not.

[1] (2025) 46 ILJ 2771 (CCMA).

[2] (2024) 45 ILJ 564 (LC).

[3] (2019) 40 ILJ 773 (CC).



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