

EMPLOYMENT

Fairly unlawful or lawfully unfair? Employees and their rights on termination under the LRA and contract

1 March 2023 6 min read

The [South African Labour Relations act, 66 of 1995](#) (LRA) has been in operation and has since the date of its promulgation in 1995 been affording employees a practical means of (amongst a number of other critical matters) protecting their constitutional right not to be unfairly dismissed.

As such there can be very few people, both employees and employers, who are unaware that this important piece of legislation makes significant inroads into the ability of an employer to terminate an employment relationship. Amongst other things, the LRA requires an employer to have a substantively fair reason to dismiss an employee before taking a decision to do so, and also requires the employer to adopt a fair procedure which allows the employee an opportunity to make representations as to why they should not be dismissed, before any decision is taken by the employer.

For these reasons, South Africa is considered to be a "for cause" jurisdiction, in that the termination of the employment relationship must be for a cause which is recognized by law as sufficiently reasonable and fair. This is as opposed to other jurisdictions, such as primarily North America, which generally adopts an "at will" approach – in other words the employer can terminate the employment relationship at will and there are in fact limited statutory requirements which must be complied with before the employer may do so.

However, in addition to the considerations as to whether the termination of the employment relationship by the employer is fair, it must always be borne in mind that the contract of employment is also, and sometimes primarily, rooted in the contract which is concluded between the parties. As such, there are often very important considerations of contract law and breach of contract, which must be taken into account when determining whether or not an employee has any recourse against an employer in the circumstances where the employment relationship has been terminated.

As such, the **fairness** of a dismissal must be considered in light of whether an employer has satisfied the requirements of the LRA to dismiss the employee; this investigation can result in a finding of either a fair, or an unfair, dismissal; if the dismissal is found to have been unfair, the statutory remedies for compensation as set out in the LRA may be applicable, such as monetary compensation of up to 12 months remuneration, as well as reinstatement and or reemployment. However, in parallel to these fairness considerations, if the employment relationship is terminated in circumstances where the contract does not allow the employer to terminate, such termination may also be considered to be a breach of the contract and could be **unlawful**.

In this regard the employee may be entitled to the usual contractual remedies for breach of contract, which include remedies such as specific performance (in other words compelling the employer to comply with its contractual obligations) as well as damages for breach of contract.

In the case of *South African Municipal Workers Union obo Morwe v Tswaing Local Municipality and Others 2023 (LAC)*, the Labour Appeal Court considered a case in which an employee had been dismissed and thereafter launched an urgent application in the Labour Court for an order setting aside the decision to terminate his contract, and granting him the relief of specific performance. The specific performance claimed was for the employer to comply with its supposed contractual obligation to hold a disciplinary hearing to deal with allegations of serious disciplinary misconduct against the employee.

The supposed right to the holding of a disciplinary inquiry was contained in a collective agreement concluded between the union and the employer, which formed part of the individual employee's employment contract. However the Labour Appeal Court analyzed the contractual

provisions of the collective agreement and found that the employer was entitled to **elect** whether or not to hold a disciplinary inquiry but could similarly elect not to do so.

As such, the employee did not have an unconditional right to the holding of a disciplinary inquiry and, provided that the employer had exercised its discretion, as it was entitled to do in the contract of employment, not to hold an enquiry, it had not breached any contractual provisions of the employment agreement.

The Labour Appeal Court considered previous cases which were relied upon by the union to demonstrate that the employee had a right to the holding of a disciplinary inquiry, but found that the present circumstances could be distinguished on the basis that in the other cases the contracts of employment had required the holding of a disciplinary inquiry whereas in this case there was a discretionary election on the part of the employer.

As such although the employer had not held a disciplinary inquiry, it had provided the employee with an opportunity to make representations as to why he should not be found guilty of the allegations of serious misconduct and should not be dismissed as a result, and that this process was a sufficiently fair procedure to satisfy the requirements of the LRA for a **fair** dismissal.

Both employers and employees should be aware of this case in providing further confirmation of the fact that employees have rights both in terms of labour legislation, as well as their specific and individual contracts of employment, and employers should be aware that they are required when dealing with employees to give effect to an employee's entitlements which arise out of both of these sources.

However, especially when a dispute arises about a breach of contract, this area of the employment relationship is regulated primarily by the agreement between the parties, and as long as this does not take away any of the parties' rights under labour legislation, and the terms of the agreement are adhered to, no party can be claimed to have breached their contractual obligations. At the same time, it must always be borne in mind that the conduct of the employer must be fair in terms of the LRA. Attention should be always paid to both fairness and lawfulness when dealing with an employee.

Employer may fairly dismiss employees for refusing to accept operational changes in the context of restructuring



Bradley Workman-Davies

Director

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Kerry Fredericks

Director

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