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May an employer take on the right to alter a chairperson's decision in a disciplinary hearing?

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May an employer overturn the decision of a chairperson of a disciplinary hearing if it believes the chairperson's sanction was too lenient?

Summary

An employer may not take on the right to alter a chairperson's decision in a disciplinary hearing. To do so would be procedurally unfair. Should an employer wish to overturn the chairperson's decision, the employee must be given a fair hearing regarding the possibility of altering the sanction.

Chairperson's decision in a disciplinary hearing

In *South African Revenue Service v CCMA & others* (C683/11) [2015] ZALCCT 14 (10 February 2015), the Labour Court had to determine whether the employer (SARS) could override the decision of a presiding officer of a disciplinary hearing.

The employee in this case was found guilty by the chairperson of a disciplinary hearing of downloading pornographic material from the internet. The chairperson recommended that the employee be issued with a final written warning.

The employer did not agree with this sanction and, after giving the employee an opportunity to make representations why the sanction issued by the chairperson should not be substituted with the sanction of dismissal, dismissed the employee. The employee's trade union referred a dispute to the CCMA, where a CCMA Commissioner held that the dismissal was unfair. The employer applied for the review of the Commissioner's decision.

The employer argued that it had afforded the employee sufficient opportunity to make representations as to why he should not be dismissed and thus his dismissal was procedurally fair.

The Labour Court relied on the finding of the Labour Appeal Court ("LAC") in *South African Revenue Services v CCMA & others* [2014] 1 BLLR 44 (LAC) in which the LAC effectively found that the applicant was abrogating to itself a right to alter the decision of the disciplinary enquiry chairperson even though its own procedures only provided a right of appeal to the employee.

The only avenue open to the employer in the case under consideration was a review of the decision of the chairperson, which it did not make use of. The employer did not explain to the employee why it disagreed with the sanction or why it believed a stronger sanction should be imposed, despite the employee asking for such detail.

The employer had also made it clear to the employee that it intended dismissing him unless he could persuade it otherwise. Furthermore, the employer had acted completely contrary to a binding collective agreement dealing with the procedure for disciplinary action against employees.

The court held that the dismissal was procedurally unfair and awarded compensation.

The Risk Of Departing From Disciplinary Guidelines.

Importance of the case

Employers are often of the view that a chairperson's sanction is incorrect because it is too lenient or does not fit the offence. This case makes it clear that an employer may not abrogate itself a right to alter the decision of a chairperson.

Such power may be provided for in terms of the employer's disciplinary procedures, in which case an employer must ensure that such power is exercised fairly; otherwise, the employer's only option is to take the decision on review.

The above case should, however, be distinguished from situations where the courts have recognised that it would be unfair to burden employers with decisions that are clearly wrong. The courts have provided some guidance in finding a balance between the rights and interests of the employer and employee in this regard.

In *BMW v Van Der Walt* (JA10/99) [1999] ZALAC 28, the Labour Appeal Court held that whether a second disciplinary enquiry may be opened against an employee would depend on whether it is fair to the employer and employee to do so.

The same principle would also apply where the employer reconsiders a disciplinary penalty and substitutes it with a more severe penalty (as per *Branford v Metrorail Services and Others* (DA19/2002) [2003] ZALAC).

Employer's disciplinary procedure

It should also be noted that where an employer's disciplinary procedure makes specific provision for the power to overrule a chairperson's decision, this is not in and of itself sufficient to render the interference as being fair.

The employer would still have to show that it was substantively fair to interfere and the employee was accorded procedural fairness (for example, being informed of the review and being given the opportunity to make representations).

In principle, an employer is allowed to intervene with the disciplinary outcome if fairness requires it, regardless of whether there is a specific provision in the disciplinary code authorising interference.

However, the courts and dispute resolution forums are often reluctant to endorse employer intervention where provision is not made for it in terms of the disciplinary code.



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