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ATTORNEYS

EMPLOYMENT

No enquiry before being dismissed – no problem

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Labour relations and the fairness standards for dismissal of an employee in South Africa have long been centred around the formality of disciplinary or incapacity enquiry processes, and the tradition of the usage of these processes has built up an expectation that they are mandatory. However, not only is this not the correct approach in terms of the Labour Relations Act, 66 of 1995 (LRA), but recent case law coming out of a number of diverse forums is demonstrating a greater acceptance on the part of commissioners and judges to accept that a less formal, less rigorous approach is justified especially where compelling circumstances exist.

In the recent bargaining council decision of *National Union of Furniture & Allied Workers South Africa obo Javulani / Dreamworx Bedding (Pty) Ltd*, the Furniture Bargaining Council agreed an employee who incited violence in the workplace, bullied colleagues, abused female staff and threatened the lives of colleagues, especially having made explicit death threats against foreign employees in the employer's operations, had been fairly dismissed even without a formal disciplinary enquiry being held or the employee being formally notified of the holding of a meeting to discuss the allegations against him. In this case, the employer called a meeting to hear complaints against the employee, and then called a second meeting at which the employee was present when these complaints were presented. The employee did not challenge these complaints, other than to allege the complaints were all lies. In the face of the consistent versions presented by his colleagues, this was demonstrably untrue. Was the employee entitled to insist on a formal enquiry and to receive notice to prepare? Not necessarily, since, Item 4 of Schedule 8 of the Code of Good Practice on Dismissals provides that "*normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed an opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to assistance of a trade union representative or fellow employee.*"

It is important to note the Schedule provides that ordinarily the investigation should be conducted, but the corollary is if the circumstances permit, such as where witnesses may be intimidated or would otherwise not be willing to participate in an adversarial court-room style enquiry, this can be forgone. Also, ordinarily the employee should be given advance notice of the process but it is clear where the matter is relatively uncomplicated and the employee could be expected to provide a response to the complaints against him or her, there is no reason why a formal notice period of not less than 48 hours has to be presented to the employee. There is no reason why the employee in Dreamworx would have been unable to respond to his accusers in the meeting in which he was present. The Furniture Bargaining Council correctly found the dismissal was fair.

Employers should, in light of this and other cases, be aware that strict formality is not always required, and provided the process is fair — fairness must also be measured in respect of the employer not just the employee, and the employer should not be exposed to an unnecessarily formal, costly or time consuming process to discipline an employee — the employee can be dismissed without recourse against the employer.



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