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# Stay out of my internal disciplinary matters? Not so fast

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In terms of the Labour Relations Act, 66 or 1995 (LRA) an employee who has been dismissed **has the right to refer a dispute** to the Commission for Conciliation Mediation and Arbitration (CCMA) in order to challenge the fairness of the decision taken to dismiss them. In such cases, after the employee has proven that they have been dismissed, the onus rests upon the employer to demonstrate that the dismissal was both substantively fair, as well as procedurally fair.

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In other words, the employer must demonstrate that it had a reason which is recognized in South African law as fair and sufficient to dismiss the employee, and that the process which was adopted by the employer to effect such dismissal was procedurally fair in affording the employee an opportunity to make representations as to why they should not be dismissed before the final decision is taken.

In the ordinary course, the procedure which is often followed by an employer to dismiss an employee is considered to be an internal procedure in which the CCMA or the Labour Courts will not ordinarily intervene, and it is only once the dismissal has taken place, that the employee can avail of their right to have either the CCMA or the Labour Court determine whether or not the decision to dismiss was in fact taken fairly. As such it is, ordinarily, only after the fact of a dismissal, that the fairness of the dismissal is determined by the external adjudicator either the CCMA or the Labour Court.

However, a recent case has shown that there may be exceptional circumstances in which the Labour Courts can be approached to provide interim relief while the internal disciplinary process is ongoing, and before a final decision to dismiss is taken. This case is important for employers to take into account in determining when an employee may be able to appeal to an external party while the disciplinary process is ongoing in order to ensure that the process or the outcome is fair.

In the case of *Southern African Clothing and Textile Workers Union obo Members v KZN Marketing Proprietary Limited and another (2023) LC*, the Labour Court considered whether or not a trade union representing employees who had been charged with participating in an unlawful strike were entitled to appeal to the Labour Court for intervention before the dismissals became final. In this case the presiding officer of the internal disciplinary process found the employees guilty of participating in unlawful strike action and recommended the sanction of dismissal. Before the employer had an opportunity to finally affect the dismissals, the employees approached the Labour Court for an urgent order declaring the strike to be lawful and protected, and also setting aside the presiding officer's ruling.

The Labour Court in considering the matter before it took cognizance of the prevailing position in South African law that the Labour Court should not ordinarily intervene in incomplete disciplinary proceedings, but that it always has the right to do so in circumstances where its intervention would be required to prevent a serious injustice. Although the court recognized that this would only occur in exceptional cases, it relied upon previous cases considered in the Labour Court which found that, for example, where a disciplinary inquiry was about to commence or had been conducted in the hands of a biased or unqualified presiding officer or where there was any other factual basis so serious as to vitiate in law the enquiry, the Labour Court would be entitled to intervene.

Accordingly, the Labour Court in this matter found that it had jurisdiction to issue a declaratory order, and in order to prevent an error in law made by the presiding officer, it declared that the strike which the employees had embarked upon was in fact lawful. Flowing from this, the Labour Court issued a declaratory order that the presiding officer's ruling that the employees were guilty of participating in an unlawful strike and should be dismissed was a nullity of no further force in effect.

In addition, the Labour Court took into account the fact that although the striking employees had simultaneously engaged in unlawful picketing action, this did not mean that their participation in the strike itself was unlawful. As such the Labour Court held that a strike and a picket are regulated separately in terms of the LRA, and that a strike is lawful if it complies with section 64 of the LRA. To the extent that employees separately embark upon picketing action, if that picketing action is not compliant with the requirements of the LRA, the employees could be disciplined for participating in an unlawful picket but the unlawfulness of that action would not impact on the lawfulness of the strike action.

This case is an indication that the Labour Court will exercise its role and function in order to ensure that labour laws are applied on an equitable basis and will intervene in exceptional circumstances even before an internal process has been finalized. Employers should always ensure that there is a correlation between the conduct of the employee and the reason for dismissal, failing which not only could any resultant dismissal be found to be unfair, but the employees may also have an entitlement to approach the court to intervene, as happened in this case.

How long is too long? Suspension of an employee pending a disciplinary process




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