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EMPLOYMENT

The dismissal process

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ISSUE

When does a dismissal take place and what must be shown to prove that fact?

COMMISSIONER'S DECISION

In the case of *Makosi / Nqanqdo Trading Enterprise* (2016) 25 CCMA 7.1.23, the applicant, Makosi, was working as an Electrician Supervisor. He was earning R350 a day and worked five days a week. The respondent, Nqanqdo Trading Enterprise ('Nqanqdo') informed the applicant that his working hours would have to be cut down to two days a week, and that Nqanqdo could only afford to pay him R200 a day. Nqanqdo also told the applicant that if he did not accept the offer then there would be no job for him. The applicant declined to accept the offer and claimed that he had been unfairly dismissed.

Section 192 of the Labour Relations Act 66 of 1995 ('LRA') provides that in any proceedings concerning an alleged unfair dismissal an employee must establish the existence of the dismissal. Once this has been established, the onus is then on the employer to prove that the dismissal was fair (both procedurally and substantively).

The Commissioner held that in order to prove that a dismissal took place it is necessary to prove the existence of an employment relationship and that the employment relationship was terminated in accordance with section 186 of the LRA. Furthermore, the employee must establish "some overt act by the employer that is the proximate cause of the termination of employment."

In applying this to the facts of the matter the Commissioner held that Nqanqdo's proposal that the employee accept an alternative position or be left with no job amounted to a dismissal in terms of section 186(1)(a). This was so because the position which the applicant previously held no longer existed at the point when the offer was made.

On the point of substantive fairness the Commissioner held that there was no evidence to suggest that the dismissal was fair. The onus was on the employer to establish the fairness of the dismissal, yet the employer was not present at the hearing and therefore failed to satisfy the onus. In relation to procedural fairness, the Commissioner held that because there were no pre-dismissal procedures followed, it had to be said that the dismissal was also procedurally unfair.

The Commissioner ordered the retrospective reinstatement of the applicant on the same terms and conditions prior to his dismissal, with back pay.

IMPORTANCE OF THIS CASE

In order for the existence of a dismissal to be established there must be an overt act by the employer that is the proximate cause of the termination of employment.

An employer who is faced with operational challenges (because for instance they can no longer afford to pay an employee what he is earning) cannot simply unilaterally impose changes to the terms and conditions of its employees or simply make redundant the positions which carry too much expense. The need for consultation before making a position redundant must be complied with first.

Where an employer makes it clear to an employee, without following any process, that failure to accept a position **will** mean he has no job then the employer runs the risk of an unfair dismissal claim. In addition, the act of making such a demand of an employee may amount to a dismissal.

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