

EMPLOYMENT

The meaning of a hearing DE NOVO in arbitration proceedings

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Section 138 of the Labour Relations Act 66 of 1995 accords the commissioner's discretion to determine the matter and form of the proceedings in an unfair dismissal dispute. In terms of section 138 (2), subject to the discretion of the commissioner, a party may give evidence, call witnesses and address concluding arguments to the commissioner.

De novo, in the context of arbitrations

There is consensus in legal literature that arbitration proceedings before a commissioner constitute a hearing *de novo*. Bryan Garner defines *de novo* as "usually an adjective <*de novo* review>, as an adverb means "anew" E.g. we review summary judgement *de novo*".[1] The Oxford English Dictionary ascribes a similar meaning to the term being "Afresh, starting again from the beginning".[2]

De novo, in the context of arbitrations, means determining the matter afresh. However, there seems to be confusion regarding the meaning and the import of the term *de novo* in the context arbitration proceedings at the [CCMA](#).

Some practitioners and CCMA commissioners, in dealing with unfair dismissal arbitrations, feel inclined to apply the term in its literal sense. They understand *de novo* to mean that you disregard whatever happened at the disciplinary hearing (the record of the disciplinary hearing) as you are hearing the matter afresh and for the first time. We refer to this as the literal interpretation of the term *de novo*.

The literal interpretation of the term is not supported by the Labour Court and Constitutional Court, as it gives rise to problematic scenarios at CCMA arbitrations. If the record of the disciplinary hearing is disregarded, a litigant may lead evidence that was not led at the disciplinary hearing and/or did not form part of the evidence to which the employee was found guilty on.

Another example is where an employee was 'acquitted'[3] of a certain charge at the disciplinary hearing and the employer introduces this charge at the arbitration hearing on the basis that the hearing is a fresh determination of issues.

Sometimes the blame lies squarely at the door of the arbitrating commissioners in that they lack appreciation for the limits of the discretion conferred upon them by the above provisions of the LRA. Commissioners sometimes elect to use the literal interpretation of the term *de novo* and reconvene a disciplinary hearing instead of determining the fairness or otherwise of the employer's decision.

This begs the question of whether the record of a disciplinary proceeding is necessary for the fair determination of the dispute at the CCMA, in light of fact that the arbitration is hearing *de novo*?

Discretion contained in section 138 of the LRA

In *Sidumo and Another v Rustenburg Platinum Mines* [2007] 12 BLLR 1097 (CC) the Constitutional Court explained how the discretion contained in section 138 of the LRA should be understood, as follows:

"Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion."

But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner ... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair."[4] [our emphasis]

Grogan commenting on the parameters of the discretion envisaged in section 138 states the following:

"A tribunal confined to assessing the reasonableness and fairness of the decision to dismiss may interfere with the employer's decision only if that decision is found to be unreasonable and unfair when assessed against an independent standard."[5]

Our view is that the record of the disciplinary proceeding is crucial to the exercise of discretion by arbitrating commissioners. It aids the arbitrator to understand as how the employer arrived at the decision to dismiss the employee. As such, the commissioner does not start from scratch in real terms. From such record, the commissioner is in a position to assess whether the employer complied with the guidelines set out in Code of Good Practice: dismissal.[6]

The relevance of the record of disciplinary proceedings in an arbitration was confirmed in the recent Labour Appeal Court judgement in *Palluci Home Depot (Pty) Ltd v Herskowitz* [2015] 5 BLLR 484 (LAC).

This judgement dealt with a number of irregularities committed by the arbitrating commissioner in rendering his arbitration award.

This article confines itself to that part of the judgement that deals with the necessity to consider the record of disciplinary proceedings.

It does not deal with the other parts of the judgement.

Code of Practice: Dismissal

In this case, the court held that a CCMA commissioner had fatally misdirected himself in considering and finding the employee guilty on a charge that played no part in the decision to dismiss the employee and by failing to have regard to the Code of Practice: Dismissal. The following appears from the judgement:

[44].... the chairman of the disciplinary hearing, in his recommendation, dealt only with sub-charges "A1" (insubordination), "B1" (duplication of IBT's), "B3" (sub-standard stock management and control – stock counts/stock levels/stock management and failure to report findings to managing director as instructed), "C2" (allowed the cell phone to be removed from the control office and "C4" (failed to obey the instructions of the MD with regard to the scheduling of shifts at the Canal Walk Branch). The chairman did not deal with the remainder of the charges, but went on to recommend the dismissal of the first respondent on the basis of his findings that she was guilty of insubordination and poor performance only.

[45] the chairperson of the disciplinary hearing accordingly, refrained from enquiring into, and finding the first respondent guilty of the sub-charges relating to her purported refusal to carry out instructions.....

[46] Accordingly, the commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent's dismissal on the basis of reasons for the dismissal, which the appellant did not rely on at the time of dismissing the first respondent. But for this error, I believe that the Commissioner would have arrived at a different result in the award.

This case accordingly demonstrates that the arbitrating commissioner does not start from a clean slate in determining the fairness of the dismissal. The record of the disciplinary hearing ought to be used to understand how the employer arrived at the decision to dismiss the employee.

The case further demonstrates that the record of the disciplinary hearing can be used by the commissioner to understand the charges that the employee was found guilty on and those that he was not found guilty on. The record of the disciplinary hearing to a certain extent narrows the issues to be determined by the commissioner, in that he does not have to decide on evidence that did not form part of the employer's decision to dismiss the employee.

Conclusion

As such, in light of the above, it is suggested that the idea that arbitration proceedings (relating to dismissal disputes) constitute a hearing *de novo* should be understood in a proper context. The role of the commissioner in such proceedings is to determine the fairness or otherwise of the decision to dismiss, the hearing is *de novo* in that regard. However, the arbitrator does not start from a blank slate s/he has to take into account the evidence that was led during the disciplinary proceedings as well as the evidence led before him at the arbitration, to assess the versions of the witnesses.

The commissioner cannot disregard the record of disciplinary proceedings purely because he is hearing the matter for the first time. The record of disciplinary proceedings could also be used to assess whether the dismissal of the employee was effected in accordance with a fair procedure.

Most importantly commissioner must test the totality of the evidence submitted by the employer against the guidelines on dismissal set out in the LRA Code of Good Practice: Dismissal.

[1] Bryan Garner, a Dictionary of Modern Legal Usage, 2nd Ed, 1995.

[2] Shorter Oxford English Dictionary, 6th Ed, 2007.

[3] This word is used cautiously. In this article it relates to a situation where the employer failed to discharge the onus of proof that the employee committed misconduct.

[4] **Sidumo and Another v Rustenburg Platinum Mines**, at page 177 to 178.

[5] Grogan J, Dismissal, 2014: 2ed; page 194.

[6] Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.



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