

EMPLOYMENT

The right to a fair hearing trumps the contract of employment

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ISSUE

Can an employee be dismissed, without due process, simply because she acted in breach of the express terms of her contract of employment?

SUMMARY

An employee who is removed from a client's premises as a result of failing a polygraph test is entitled to a disciplinary hearing prior to her dismissal. This is the case regardless of what the employee may have agreed to in her contract of employment. Even if an employee has breached her contract of employment the employer must still comply with the procedures laid down in the Labour Relations Act. Failure to do so may render any subsequent dismissal unfair.

COURT'S DECISION

In the case of *National Transport Movement obo Ramaboka/Fantique Trade 294CC t/a Specialised Security Services* (2018) 27 CCMA 8.37.3 the Commission for Conciliation, Mediation and Arbitration ("CCMA") had to consider whether the dismissal of an employee was substantively and procedurally fair. Portia Ramaboka ("the employee") was employed by Fantique Trade 294CC t/a Specialised Security Services ("the employer"). She was posted to Vector Logistics' ("Vector") Centurion Warehouse where she worked as a 'senior checker.' Vector was a client of the employer.

In terms of the [employment contract](#), she was required to submit herself to a polygraph test and if there was any indication of deception, she agreed that she would be removed from the client's premises. The employer would then be obligated to relocate her to an alternative site. If relocation proved impossible, the employee would be retrenched.

The employee underwent a polygraph test, and deception was indicated in respect of one of the four questions she had to answer. As a result, the employee was removed from Vector's premises. No alternative positions were available for her and her employer retrenched her. No process was held prior to her dismissal.

The CCMA had to determine whether the employee was unfairly dismissed by the employer. The employer argued that it acted in accordance with the terms of the contract of employment. As the employee had repudiated the contract (by failing to pass the polygraph test) the employer was entitled to terminate the agreement by virtue of such repudiation.

The CCMA held that a dismissal, despite being lawful, must also be fair. Where no hearing is held and where no corroborative evidence is lead to substantiate the allegations leveled against the employee, her dismissal would be both procedurally and substantively unfair. The Commissioner held that the employee's dismissal was unfair and that she should be awarded compensation.

IMPORTANCE OF THIS CASE

An employer cannot simply rely on the terms of a contract of employment to terminate an employee’s employment without complying with the provisions of the Labour Relations Act. Should the employer do so it runs the risk of a successful unfair dismissal claim being brought against it.



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