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EMPLOYMENT

The Risk Of Departing From Disciplinary Guidelines

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By Jacques van Wyk, Director; Andre van Heerden, Senior Associate and Chelsea Roux, Candidate Attorney

ISSUE

The risk of departing from a disciplinary guideline when imposing a sanction on an employee.

SUMMARY

Disciplinary codes are intended to be used as guidelines in the application of discipline in the workplace. Employers may depart from such codes albeit not for arbitrary or invalid reasons. In other words, the employer may only depart from same for good cause. This is because employees should have some degree of certainty regarding what sanction may be imposed upon them in circumstances where they commit misconduct.

FACTS

In the matter of *Mushi v Exxaro Coal (Pty) Ltd Grootgeluk Coal Mine* [2019] ZALAC 44 (13 June 2019) ("**Mushi**") the Labour Appeal Court ("**LAC**") dealt with, among others, the above issue.

The Appellant, Hosea Mushi ("**employee**"), had been employed by the Respondent, Exxaro Coal (Pty) Ltd ("**employer**"), at the Grootgeluk Coal Mine for 24 years.

One evening while the employee was on duty driving an oversized coal haul truck, he reported to his foreman that the shovel operator was loading the truck in an unsafe manner. The foreman instructed the employee to continue loading the truck while he observed the process. The foreman radioed the employer that he would board the truck at the loading area. The employee refused to let the foremen board the truck at this area. The foreman proceeded to walk towards the loading area and the employee moved the truck forward causing the foreman to move out of the way.

A disciplinary hearing was held arising out of the employee's conduct. The employee admitted to having behaved improperly but denied having undermined the authority of the foreman or threatened his life. The employer's disciplinary code, which is expressly recorded as being a guideline, provided that a final written warning be issued for misconduct of this nature. However, it was decided that the employee be dismissed for having refused to obey an instruction of the foreman, unsafe acts committed while driving the truck and improper behaviour in operating the truck.

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA")

The employee referred a dispute to the CCMA. At the arbitration both parties agreed that the misconduct committed was not in dispute but that the issues to be determined were:

- the appropriateness of the sanction; and
- the issue of consistency because the foreman had not been disciplined for deviating from the employer's safety rules.

No oral evidence was led by the parties.

The arbitrator agreed that there had been an inconsistency on the part of the employer in the application of its disciplinary code. Further, he held that the charges against the employee amounted to a duplication or "mutation" of charges as it all stemmed from one offence.

The arbitrator had consideration to the following factors in finding the sanction of dismissal to be inappropriate:

- the employee had not been charged with gross insubordination;
- there were no aggravating circumstances to prove that progressive discipline was inappropriate;
- the employee had been employed for 24 years;
- the employee had a clean service record; and
- the employee had shown remorse for his actions.

An award of reinstatement and back pay of R77,398.72 was made in the employee's favour. A final written warning was however imposed on the employee which would come into force on the date of his reinstatement and expire on a date as prescribed by the disciplinary code.

LABOUR COURT

The employer successfully took the arbitration award on review.

The Labour Court found the award reviewable on the basis that the employer had been prejudiced by not having an opportunity to address the issue raised by the arbitrator relating to the duplication of charges. The Labour Court found further that the charge need not have been for "gross" insubordination and that since the employee admitted to having endangered the life of the foreman, it was enough to justify dismissal.

The Labour Court set aside the CCMA's award on the basis that it was so unreasonable that a reasonable arbitrator could not have come to the same conclusion and substituted it with an order that the employee's dismissal was fair.

LAC

The employee thereafter approached the LAC where he argued that:

- the Labour Court had erred in considering all three charges when the arbitrator had not found the employee guilty of all three;
- he did not plead guilty because he did not accept that he had acted in an unsafe manner or endangered the life of the foreman but conceded that he did not carry out the foreman's instructions;
- as a result of the above, his conduct amounted to insubordination;
- the Labour Court erred in finding that the arbitrator had acted unreasonably; and
- because he was a first offender and in terms of the employer's disciplinary code, a final written warning was the appropriate sanction.

(Emphasis added)

The employer opposed the appeal and argued that:

- the arbitrator exceeded his mandate in finding that the three charges were a duplication of each other when the only issue before him was whether dismissal was appropriate sanction;
- the Labour Court was correct in finding that the duplication issue was raised for the first time by the arbitrator and that the parties accordingly did not have an opportunity to address the issue;
- the arbitrator's criticism that the employee should have been charged with gross insubordination was given without merit because the disciplinary code does not provide for "gross" misconduct; and
- the arbitrator had committed a reviewable irregularity by not considering the applicable working conditions, the employer's statutory obligations and its rules and procedures when determining an appropriate sanction.

The LAC held that the arbitrator was only tasked with determining the appropriateness of the sanction and whether the employer was consistent in the application of its disciplinary code. The LAC found that the employee had not admitted that his conduct threatened the life of the foreman. There was no evidence led to suggest this was the case. The issue then was whether insubordination warranted dismissal on the facts of the matter.

The LAC held that the disciplinary code was expressly recorded as being a guideline and that the appropriate sanction for insubordination, a refusal to obey instructions, misuse of property or improper behaviour is a final warning. The failure to charge the employee with 'gross misconduct' did not alter the nature or degree of the misconduct on the facts of the matter.

The LAC stated that "*disciplinary rules are intended to create a degree of certainty and consistency in the application of discipline in the workplace*." Departures from it should not be for arbitrary or invalid reasons. It held further that where the disciplinary code is expressly stated to be a guideline, a "*plausible and reasonable justification*" for the alternative sanction imposed must be given. Factors such as the gravity of the misconduct and aggravating or mitigating circumstances should be considered. With reference to this case, the employer was required to prove that dismissal was a fair sanction.

Furthermore, the LAC held that although health and safety rules are of paramount importance, no evidence was presented to show that the foreman's life was endangered by the employee's conduct (Emphasis added). The LAC found, therefore, that the arbitrator was correct in his conclusion that dismissal was too harsh a sanction.

IMPORTANCE OF THE CASE

Disciplinary codes, though often merely guidelines, nonetheless provide an element of certainty for employees. They also assist in ensuring that discipline is consistently applied. While employers may depart from the guidelines they can only do so in appropriate circumstances. An arbitrary decision to do so may render the imposition of a harsher sanction (such as dismissal) unfair.



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile