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EMPLOYMENT

Wereley v productivity south africa: lessons for employers

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On 4 December 2018, the Labour Court in Johannesburg delivered judgment in the matter cited above. The employer (Productivity S.A. /PSA) abandoned a disciplinary enquiry against the employee (Wereley) mid-stream, largely because of what it perceived to be the employee's delaying tactics. Not only did the employer abandon the enquiry mid-stream; it also dismissed the employee summarily. Not being one to take it lying down, the employee approached the Labour Court and alleged a fundamental breach of her contract of employment, and asked the Court to declare her dismissal unlawful and *void ab initio.*

From the Court's judgment, a standout principle is that once an employer has elected to institute disciplinary proceedings against an employee, it must stick to its chosen course to the end. It cannot willy-nilly abandon the proceedings and summarily dismiss an employee for the same reasons for which the employee was charged in the first place.

Drafting of Charge Sheets

The judgment contains further lessons for employers, the first of which relates to the drafting of charge sheets. PSA had served a charge sheet on Wereley, stating various complaints of misconduct against the employee. Among these was a charge of incompatibility. Before the start of the hearing, the employee requested further particulars, signifying that the charge sheet was not a model of clarity.

Employers would do well to draft a charge sheets against the employees with adequate clarity to enable employees to know which case he or she is called to answer. This will obviate the need for employees to ask for further particulars, or object to the vagueness of the charge sheet, which will in turn delay proceedings unnecessarily and pile up costs.

Furthermore, employers must also be reminded that a disciplinary hearing is not a witch-hunt, nor is it an opportunity to "deal" with the employee. In drafting their charge sheets, employers must not give the impression that they want employees dismissed by hook or crook by, for instance, throwing the book at them, as it were.

Employers Must Keep Their Disciplinary Codes Simple

Employers must also draft their disciplinary codes clearly, with minimum provisions required in law, and keep them simple. The PSA's Disciplinary Code and Procedure had a bizarre provision which required a formal investigation to be conducted prior to a disciplinary enquiry being held, in order to establish whether the employee had a case to answer. As it turned out, the pre-disciplinary enquiry investigation delayed the proceedings and added to the costs of the enquiry, which could have been avoided by the employer adopting a simple misconduct procedure.

Furthermore, some disciplinary codes also provide for an elaborate appeal procedure. This is also time consuming and costly. A disciplinary code which provides for a disciplinary enquiry only is sufficient in law.

Incorporation of Employer's Disciplinary Code

Wereley's contract of employment included a provision that the conditions of employment not specified in the contract would be in terms of the employer's rules, regulations and procedures. Additionally, the PSA disciplinary code stated that the code formed part of each employee's contract of employment.

Based on the provisions stated above, Wereley successfully contended that she was contractually entitled to a formal disciplinary enquiry before being dismissed. In deciding in her favour, the Court was influenced by the fact that the wording of the PSA code made formal disciplinary peremptory; and that the right to a formal disciplinary inquiry was expressly incorporated as part of Wereley's conditions of employment by not only her contract but also the disciplinary code itself. The Court went on to say, "If the content of the procedures was far less detailed and simply provided an opportunity to exercise the right to *audi alteram partem* within a rudimentary hearing framework, it might be plausibly argued that the employer enjoyed greater freedom in determining the conduct of an inquiry."

Expressly incorporating an employer's disciplinary code in employees' contracts of employment and also stating in the disciplinary code that the code constitutes employees' conditions of employment rob the employer of the flexibility it might otherwise have in conducting disciplinary enquiries at the workplace.

Summary Dismissal

Regarding the issue of summary dismissal, the Court held that the right to summarily dismiss an employee does not equate the right to dismiss without a giving the employee the opportunity to be heard. Wereley's contract of employment provided that the employer may summarily terminate the contract for any cause recognised by law as being sufficient. It also provided that the employer could terminate the contract without any payment in lieu of notice in the case of gross misconduct on the part of the employee. Based on these provisions, the PSA terminated Wereley's contract without any inquiry whatsoever, and without giving her an opportunity to be heard. The Court regarded this as a high-handed unilateral action, which warranted a punitive cost order.

The Court cited the following interpretation of summary dismissal from an earlier case with approval:

> *Under common law, an employee may be dismissed summarily only on the grounds of some misconduct justifying such summary dismissal; and it is only misconduct of such a nature that it constitutes a breach of the contract of employment so material that it goes to the root of the contract which amounts to such misconduct (Thompson De Kock's Industrial Laws of South Africa 2ed at 914)*

A breach which goes to the root of a contract of employment includes theft, dishonesty, and breach of trust.

Incompatibility

Regarding PSA's contention that Wereley's incompatibility and the resultant breakdown of trust in her justified invoking the summary dismissal provision in her contract, the Court held that "[t]here is no reason in principle why an inquiry about her incompatibility should not follow the normal procedure of a disciplinary inquiry, as it is obviously misconduct for an employee to foster and aggravate a disharmonious working environment." The Court dismissed the PSA's contention that it was entitled to determine the intolerability of the working relationship with Wereley unilaterally.

The Court also said the employer had the option to deal with the employee's alleged incompatibility as an operational requirements matter.

In the light of that ruling, employers must be wary of merely alleging an employee's incompatibility in order to resort to summary termination of her contract and also to avoid proceeding with the disciplinary inquiry in the normal course.

In conclusion, another important lesson for employers worth highlighting is that once an employer sets rules and procedures for workplace discipline, it is bound by the rules and procedures. It cannot arbitrarily choose whether to follow them or not.

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