DISCIPLINE IN THE EMPLOYMENT RELATIONSHIP

The previous employee relations article (i.e. first 2016/17 article) covered the importance of record keeping in the workplace. Whereas the first article of 2015/2016 covered fairness relating to holding a second disciplinary enquiry in respect of the same offence with which an employee has been charged. Both these articles relate to the management of discipline in the workplace which affects the employment relationship in which fairness is the fundamental element.

Section 23 of the Constitution Act makes provision for fair labour practices and gave rise to the enactment of the Labour Relations Act of 1995 (LRA). The LRA places a premium on fairness in the employment relationship.

The Public Service, like other employers, has a disciplinary code and procedure which was drawn within the framework of the Code of Good Practice in Schedule 8 of the LRA. The Disciplinary Code and Procedure (Resolution 1 of 2003) is intended, among others, to support constructive labour relations in the public service; and to promote fairness in the application/management of discipline. The Code of Good Practice at Item 3 provides that all employers should adopt disciplinary rules that establish the standard of conduct required of their employees.

The Disciplinary Code and Procedure, like the Code of Good Practice in Schedule 8 of the LRA within which it was drawn, provides for a hierarchy of progressive sanctions in the form of verbal, written and final written warnings and ultimately dismissal where all else has failed. This represents progressive approach to discipline. However, the gravity of the progressive sanction will depend on the nature of misconduct (Department of Public Service and Administration Labour Relations Sanctions Guidelines for the Public Service; p10). Therefore, dismissal can occur without following the hierarchy of progressive disciplinary sanctions listed in the Disciplinary Code and Procedure depending on the seriousness of the misconduct committed. Such a position is supported by courts as it was held in ***Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC)*** that even in the absence of a valid final written warning an employer is entitled to dismiss an employee in appropriate circumstances.

However, the Code acknowledges the fact that the courts have endorsed the concept of corrective or progressive discipline and that efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings (***Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC***).

In the circumstances where an employee has a deplorable record with a litany of transgressions, an employer is entitled to take into account the cumulative effect of these acts of misconduct to determine the appropriate sanction/outcome.

The disciplinary codes and procedures, although they were drawn within the framework of the Code of Good Practice in Schedule 8 of the LRA, normally have gaps that are not addressed in the Code of Good Practice. In some instances, such gaps are addressed through the decisions of the labour courts. For instance, there has always been a notion that a second disciplinary enquiry cannot be instituted against an employee as doing so was deemed as constituting double jeopardy.

However, that position was indirectly addressed by a decision in ***BMW (SA) Ltd v Van der Walt (2000) 21 ILJ 113 (LAC)*** where it was held that a second disciplinary enquiry could be opened against the employee if, in all the circumstances, it was fair to do so. This position was further supported in ***Branford v Metrorail Services (Durban) & others (2003) 24 ILJ 25269 (LAC)*** where it was emphasised that it would only be fair to hold more than one disciplinary enquiry in rather exceptional circumstances. Normally, that is when an employer becomes aware of the new information that was not placed before the Presiding Officer at the first hearing. However, it was reiterated that a second enquiry is justified if fair to institute such. It was further explained that the concept of fairness in this regard applies to both the employer and the employee as it involves the balancing of competing and sometimes conflicting interests of the employer on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

The Disciplinary Code and Procedure (Resolution 1 of 2003) provides that a written warning and a final written warning remain valid for six months respectively. It further stipulates that if during the six-month period, the employee is subjected to disciplinary action of the same or related offence, the written warning or final written warning; whatever the case is, may be taken into account in deciding an appropriate sanction.

A gap is - what if an employee commits an act of misconduct conveniently after the expiry of the said warning; will an employer be expected to keep issuing warnings? This gap has since been addressed in ***Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC)***. It was held in this case that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal. It was stressed that en employer is always entitled to look at the cumulative effect of the misconduct of the employee.

Further, it was held that to hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. It was stressed that an employee's duties include the careful execution of his work. Furthermore, an employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances. This demonstrates the fact that the South African labour law jurisprudence is developing to the extent that it is appropriately closing the gaps that were left open by the labour law makers. The responsibility then remains with employers to amend their disciplinary codes and procedures to make them consistent with these developments.

(An opinion from the Employment Relations desk
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