CAN THE COURTS CHANGE THE SANCTION PRONOUNCED BY THE PRESIDING OFFICER OF THE DISCIPLINARY HEARING

There is a general belief or assumption that the employers' internal disciplinary processes, especially the outcome thereof cannot be interfered with or brought under the scrutiny of the courts of law if the employer is not satisfied with the sanction pronounced by the presiding officer of an internal disciplinary enquiry/hearing. This could be based on the fact that generally, disciplinary codes and procedures at workplaces do not have an expressed position in that regard.

Fortunately, there are various authorities/case laws that are now available and provide a clear position in this regard. A duly appointed presiding officer of an internal disciplinary enquiry/hearing is regarded as an impartial official who is tasked with objectively looking into the evidence or facts before them. They must research the relevant authority or case law in regard to the matter at hand and objectively make an appropriate decision. In Gcaba and Chirwa as quoted in Hendricks v Overstand Municipality and Another (CA24/2013)[2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014), a position that was adopted was that once a set of carefully-crafted rules and structures have been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system in that, in practical terms, remedies for unfair dismissal and unfair labour practices contained in the Labour Relations Act (LRA) should be used by aggrieved employees. It was further indicated that those remedies, in terms of section 191(1) (a) of the LRA, are expressly restricted to the dismissed employee or the employee alleging the unfair labour practice. In this instance, an employee will be seeking no sanction or a lesser sanction.

However, there could be instances in which the employer is not happy with the decision of the presiding officer. In the case law referred to in the preceding paragraph, it was indicated that the only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review in terms of section 158(1) (h) of the LRA which empowers the Labour Court to hear and determine the review. The employer reviewing a sanction, in this instance, will normally be seeking a severe penalty to the one pronounced by the presiding officer of an internal disciplinary enquiry/hearing.

In Hendricks v Overstand Municipality and another (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014) a senior official in an eponymous position required him to ensure the enforcement of the law. However, he instead flouted the law by signing off on representations prepared on his behalf by his junior official, which he knew were untrue, whereby he intended to have his speeding fines quashed and thereby to benefit financially. At a disciplinary enquiry/hearing, his mitigation was, among others, that he had a clean record over 17 years, and that he was appointed as head of legal enforcement in 2009. The Labour Court took a position, which was later concurred with by the Labour Appeal Court, that the fact that the employee had been appointed as the head of legal enforcement in 2009 could not be a mitigating factor; instead it should have been an

aggravating factor. That was based on the fact that he should have ensured that the law was enforced, but he instead flouted the law and dishonestly tried to defeat the ends of justice.

This reasoning is consistent with that in the case of *Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC*) where Zondo AJP "although a long period of service of any employee will usually be a mitigating factor ... there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal ... one such clear act of misconduct is gross dishonesty." Conradie JA, in the same case, indicated that long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability and that it does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. He further indicated that a senior manager cannot, without fear of dismissal, steal more than a junior employee as the standard for everyone are the same, and as such long service is not mitigatory.

The position of the Labour Court in Hendricks v Overstand Municipality and another (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014) was that the offence involved more than an element of dishonesty, but was in fact a grossly dishonest act, committed with deliberate intent and involved instructing a subordinate to participate in the commission of the said act. It further indicated that the offence involved a significant abuse of authority and possibly criminal conduct by the official in the municipality tasked with overall responsibility for law enforcement. His conduct, it was held, rendered him wholly unsuitable to occupy his post as the practice to quash staff fines and making fraudulent representations could not be condoned. Therefore, the Labour Court set aside the decision of the presiding officer (the sanction of a final written warning coupled with suspension without pay) and substituted it with one of dismissal; the Labour Appeal Court when it later considered the employee's appeal, concurred with the decision of the Labour Court.

Therefore, the courts including the Supreme Court of Appeal, based on available case law, have adopted a position that a decision can be reviewed and set aside where a presiding officer has imposed the sanction that is grossly unreasonable and irrational in relation to the nature of the offence or act of misconduct committed, and where such an act/decision fails to take account of all the relevant facts and is manifestly unfair to the employer.

An opinion from the labour desk
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