EMPLOYEE'S SERVICE RECORD IN DISMISSAL CASES

The previous article, addressed the question of 'who must testify at a disciplinary enquiry as to whether or not the employer-employee trust relationship is irretrievably damaged'. Now that the answer to that question was determined, it is appropriate to look at the factors that are taken into consideration prior to the announcement of an appropriate sanction by the duly appointed official (the chairperson of the disciplinary enquiry).

Misconduct cases in the Public Service are regulated, among others, by PSCBC Resolution 1 of 2003 (The Disciplinary Code and Procedure for the Public Service) which was formulated within the framework of the Constitution Act, the Labour Relations Act, and the Public Service Act. Schedule 8 of the LRA at item 3(5) stipulates that when deciding whether or not to impose a sanction of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

The factor under consideration in this article is the impact of the employee's length of service in determining the sanction following a disciplinary enquiry. This factor is not considered in isolation but rather conjunctively with other relevant factors as mentioned in the preceding paragraph. In *'Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC)'* it was held that in approaching the dismissal dispute impartially, the totality of circumstances has to be taken into account. This is an extension of the factors referred to above. Obviously, these factors have already been dealt with by the relevant structures established in terms of the LRA and resulted in the adoption of certain positions which themselves become precedents.

The Labour Appeal Court has dealt with the employee's length of service as a mitigating factor when an appeal had been submitted by the employer party against the Arbitration Award issued by the Commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA). The Commissioner had found, among others, an omission that the employee's length of service had not been considered by the chair of the employer's internal disciplinary enquiry; and consequently ruled that there was substantive unfairness in the misconduct case. The misconduct case involved fraud by two employees in relation to their overtime claim. One employee had thirteen (13) years service and the other had eighteen (18) years service. The Commissioner after considering the matter ordered that the employees be reinstated with effect from the date of the Award.

The Labour Appeal Court looked into this matter and Zondo AJP made reference to the case of *Toyota SA Motors (Pty) Ltd v Radebe & others (200) 21 ILJ 340 (LAC)* and said "although a long period of service of any employee will usually be a

mitigating factor where such employee is guilty of misconduct, the point must be made that 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." He went on to indicate that the moment dishonesty is accepted in a particular case as being of such a serious degree to be described as gross, then dismissal inter alia, is an appropriate and fair sanction. 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 went on to make an example that a senior manager cannot, without fear of dismissal, steal more than a junior employee as the standard for everyone are the same, as such long service is not mitigatory. Willis JA, in the same case, stressed the importance of the principle of equality before the law which requires that the same principles and rules of law apply equally to all employers, regardless of size, importance or influence.

The point here is that, as much as the length of service is a mitigating factor, the nature and the seriousness or gravity of the misconduct committed will always dictate if the length of service can carry sufficient weight to sway the outcome in favour of an employee who is guilty of misconduct. It is incumbent upon every employee to avoid being involved in misconduct cases. For more information on this issue, please read *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration & others – Labour Appeal Court (JA68/99) 3 March; 7 March 2000*.

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