CAN AN EMPLOYEE BE SUBJECTED TO A SECOND DISCIPLINARY HEARING/ENQUIRY IN RESPECT OF THE SAME MISCONDUCT AFTER THE FIRST DISCIPLINARY HEARING?

In the 4th Quarter (2014/2015) employee relations article, we dealt with a question of whether or not the courts can change the sanction of a disciplinary enquiry pronounced by a duly appointed presiding officer. We concluded that the courts including the Supreme Court of Appeal, based on available case law, can indeed review and set aside a presiding officer's decision. That can happen in a situation where he/she 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.

Pursuant to the aforesaid, this article looks into the issue of whether or not an employee can be subjected to a second disciplinary enquiry if the employer is not satisfied with the outcome of the first disciplinary hearing in respect of the same misconduct without being judged to have committed double jeopardy.

There is a general belief that it is unfair and unlawful to subject an employee to a second disciplinary enquiry if the employer is not satisfied with the outcome of the first disciplinary enquiry. This belief may be based on the principle of agency which holds that the principal is bound by the conduct of the agent, meaning that the employer is bound by the conduct/decision of the chairperson who acted upon the employer's mandate ***(Northern Platinum Ltd v ME Phoko; Commission for Conciliation, Mediation and Arbitration; and National Union of Mineworkers on behalf of Ntholeng)***. In appointing the chairperson to chair the disciplinary hearing/enquiry, the mandate of the chairperson is to conduct the disciplinary enquiry fairly, apply the rules of the game in terms of the relevant prescripts/legislation, and arrive at an appropriate decision based on the facts of the case.

Generally speaking, an employer who is not happy with the outcome of the enquiry could have been looking for a dismissal and the sanction pronounced is the one short of dismissal; meaning that the employee was issued with a final written warning or even a more lenient sanction. A dismissal, according to clause 2 of Schedule 8 of the Labour Relations Act 66 of 1995 (LRA) as amended, must be effected for a fair reason in accordance with a fair procedure. In a dismissal dispute, according to section 192(1) and 192(2) of the LRA, the employee must establish the existence of the dismissal and the employer must prove that the dismissal is fair.

The issue of holding a second disciplinary enquiry was considered in ***BMW (SA) Ltd v Van der Walt (2000) 21 ILJ 113 (LAC)***. The employee had fraudulently arranged for the removal of two FMC wheel alignment equipment for repairs without following the employer's procedure and to have them sold to a third party for self-gain. At the first disciplinary enquiry, the employee was not found guilty of the misconduct. Thereafter, further and new information became known to the employer. The employee was then charged with a new and different charge of misconduct, consequently; he was found guilty and dismissed. The matter ended in the Labour Appeal Court which ruled, by a majority decision, that a second disciplinary enquiry could be opened against the employee if, in all the circumstances, it was fair to do so. Further, it was indicated that in labour law fairness and fairness alone is the yardstick; and that it would probably not be considered to be fair to hold more than one disciplinary enquiry except in rather exceptional circumstances.

The issue of a second disciplinary enquiry was considered again in ***Branford v Metrorail Services (Durban) & others (2003) 24 ILJ 25269 (LAC)***. The employee had made eight fraudulent petty cash claims totalling R834 for items such as tea, coffee, sugar and milk powder for which he was given a recorded oral warning. Subsequently, an internal audit into the case was performed which resulting in a disciplinary enquiry against the employee which led to his dismissal. The matter ended up being considered in the Labour Appeal Court (LAC) for adjudication. The position taken in the BMW case referred to above was considered extensively. It was reiterated that the current legal position is that a second enquiry is justified if it will be fair to institute such an enquiry. It was held that it would thus be incorrect to contend that the Van der Walt test is that a second enquiry is only permissible in exceptional circumstances. It was further explained that the concept of fairness in this regard applies to both the employer and the employee. 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. In the circumstances of this case, it would be manifestly unfair for the company to be saddled with the quick, ill-informed and incorrect decision of one of its employees who misconceived the seriousness of the matter and hurriedly took the inappropriate decision to impose an equally inappropriate penalty of an oral warning on the employee. The court found that the employee had been disciplined for fraud whereas the verbal warning he had been given was for a mere irregularity. Accordingly, the court concluded that the employer was entitled to hold a second disciplinary enquiry as it was fair to do so.

Therefore, the current position is that a second disciplinary enquiry is permissible if it is fair to do so.

An opinion from the labour desk
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