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EDUCATION LABOUR RELATIONS COUNCIL

LABOUR BULLETIN

Education Labour Relations Council
in association with the
Labour and Social Security Law Unit of the
Nelson Mandela Metropolitan University

Nelson Mandela Metropolitan University
for tomorrow

In this Issue:

JANUARY 2016

1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its January 2016 issue of the *Labour Bulletin*. It contains notes on recent case law of relevance to the education sector. It further provides simple procedures for dealing with disciplinary enquiries.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Conducting an arbitration hearing in an application format: Can an arbitration hearing be dealt with based on written submissions only?

A case note on: Zuma and Another v Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and others [1]

1. Introduction

The Labour Relations Act[2] provides for the resolution of disputes through conciliation and arbitration, either held under the auspices of the Commission for Conciliation, Mediation and Arbitration ('CCMA') or Bargaining Councils.

The process of conciliation is straightforward. Briefly, it is a peremptory process in the dispute resolution mechanism of the LRA[3]. The proceedings remain exploratory in nature and are conducted on an off- the- record, without prejudice basis. The Presiding commissioner is not clothed with a decision

[1] (D914/12) [2015] ZALCD 53 (8 September 2015)
[2] No.66 of 1995 amended - Chapter 8 : Dispute Resolution
[3] Ibid

making role. The primary objective of conciliation is to assist Parties to find a win-win solution.

Arbitration on the other hand, is more formalistic and 'rules driven', than conciliation. It is a formal process which requires 3rd party intervention in the form of an arbitrator who has decision making authority in terms of sections 138 and 143 of the LRA[4]. An arbitrator is enjoined to ensure that an unrepresented applicant is given all necessary assistance in order to understand due process and to lead his/her evidence in a manner that does not prejudice his/her case. Trade union officials are allowed to represent their members and are generally comfortable to do so at conciliation / arbitration.

Section 138 (i) states that,

> "the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities." [5]
> (Emphasis added)

It is clear that the law advocates a speedy and less formalistic approach to dispute resolution compared to a formal court of law. Arbitrators are therefore, vested with discretionary powers to conduct proceedings in a manner that would receive this result at the same time ensuring that Parties do not suffer any form of prejudice by being denied an opportunity to present their case fully. To this end, an Arbitrator is expected to ensure that proceedings are conducted with the use of minimum of legal formalities.

The understanding, interpretation and application of the '*use of minimum of legal formalities'* means, may somewhat vary between commissioners when applying this principle. Suffice to say that it has become conventionally accepted that most commissioners would ensure that the following processes are followed:

(i) Parties are given the opportunity to present opening statements
(ii) In cases of unfair labour practice, the duty to begin to adduce evidence generally rests with the referring party, the applicant. The As part of presentation of its case, the applicant would rely on the use of documentary and oral evidence (witnesses);[6]
(iii) The opposing party has the right to cross examine witnesses and the leading party thereafter has the right to re-examine its witness. (The commissioner has the right to ask questions of clarity at any time during proceedings and Parties are afforded the right to ask further questions that may arise from the arbitrator's questions);
(iv) Parties are then afforded the right to address the commissioner in closing argument. (Summary of their respective cases)

The question arises as to what extent an arbitrator is vested with discretionary powers to the extent that she/he could deviate from the conventionally acceptable process, when directing proceedings? This issue was tested in the case of *Zuma and Another v Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and others*[7].

2. **Zuma and Another v Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and others (D914/12) [2015] ZALCD 53 (8 September 2015 ('The PHSDSBC case')[8]**

Facts of the Case

There were other issues which formed the basis of review proceedings. It is not necessary to delve into facts in much detail save that which is necessary with regard to the legal issue under discussion.

There were two applicants in this case, both employed by the Mahatma Gandhi Memorial Hospital. The first applicant was employed as a Senior Supply Management Officer, and the second as the Finance and Systems Manager.

The Applicants were charged with fraud and corruption arising from the processing of tenders at the hospital. Both Applicants

[4] Act 66 of 1995
[5] LRA Act. 66 of 1995 : Section 138 General provisions for arbitration proceedings

[6] In cases of unfair dismissal – Once the Applicant establishes dismissal, it becomes the duty of the Employer to adduce evidence. To prove the dismissal was fair.
[7] (D914/12) [2015] ZALCD 53 (8 September 2015 ('The PHSDSBC case')

[8] Ibid

initially pleaded not guilty but then changed their plea to one of guilty on all counts, during the disciplinary enquiry. Both Applicants were found guilty and dismissed. They subsequently referred unfair dismissal cases to the PHSDSBC.

The pre-arbitration and arbitration hearing

With the consent of all Parties, a pre-arbitration meeting was held. Both Parties were legally represented. The Parties agreed on a number of issues which were common cause. The Parties also agreed that the format proceedings would take the form of written submission, which would be exchanged between parties. The Respondents provided their founding submission to which the Applicants answered. The Respondent replied and the Applicants provided a further submission. No oral evidence was led.

At the conclusion of the arbitration hearing, the Arbitrator found that the Applicants' dismissal were found to be substantively fair but procedurally unfair. He ordered two months compensation for each Applicant. The Applicants sought to review and set aside the award.

Review Proceedings

The Respondents instituted a cross-review. They sought to challenge the award. One of the ground of their challenge was that the proceedings were defective in the manner in which it had been conducted. (On papers) The grounds of the Respondents' cross appeal as extracted from the judgment, were as follows:

> "The first ground is that, the commissioner committed a gross irregularity in dealing with the matter purely on written argument;
>
> The Respondents submit that disposing of an application on the basis of written representations *per se* does not constitute arbitration proceedings; and although the commissioner had the option available to set the matter down for oral evidence, he failed to do so.
>
> The Respondents admit that 'at the arbitration hearing it was agreed that the matter would be dealt with purely on the written argument submitted by the parties. The Applicants in turn emphasize that the parties were legally represented when this format was agreed.
>
> The Respondents claim that it was further agreed that should any evidentiary gaps be identified, the commissioner would set the matter down for oral evidence. The Applicants dispute that this additional term was part of the format agreement. They add that even if such a term existed it was not for the commissioner to decide what evidence should or ought to be led; and if the Respondents were of the view that evidence ought to be led, it was for them to raise this issue.
>
> The essence of the Respondents' attack is that the format adopted for the conduct of the hearing prevented factual disputes being properly resolved. Permitting the arbitration to proceed in this way was a material misdirection and thus constituted a gross irregularity. In the language of *Sidumo,* it is a decision no reasonable decision-maker would have taken." [9]

The findings of the court on Defective Proceedings based on the claim that the hearing was conducted on written submissions

The question before this court was whether the commissioner's decision to adopt an application format constituted a gross-irregularity and if so, was it a decision that no reasonable decision-maker would have made?

In a well-reasoned judgment, Witcher, J found that the Commissioner had not committed gross irregularity in the manner in adopting an application format. Key aspects of her findings as extracted from the judgment were:

(i) The Respondents had not provided any authority to support their argument that an arbitration hearing could not take the

[9] Zuma and Another v Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and others (D914/12) [2015] ZALCD 53 (8 September 2015) *Supra* - Paragraphs [36-40]

format of an application proceedings. The court found that:

> "Section 138 (1) of the LRA and Rule 16 (7) of the PHSDSBC are, in my view, wide enough in scope to encompass the adoption of the procedure the commissioner did."[10]

(ii) The Respondents also cited the authority in *Oakfields Thoroughbred & Leisure Industries Ltd v McGahey*[11]**,** in support of their argument that the commissioner had committed gross irregularity. In this case, the court found that the commissioner had not advised an unrepresented party of the implication of not leading important evidence which was material to the dispute. WItcher J found that:

> "In that case, the commissioner's rough-shod manner as well as his failure to assist an unrepresented party constituted a disordered manner of conducting a hearing; a reviewable irregularity. In contrast, the arbitration under review took place in an orderly manner." [12]

(iii) The court also denounced the Respondents reliance on the dictum in ***NUMSA & Another v Voltex (Pty) Ltd***[13]**,** in which the arbitrator had imposed the application format upon the parties. In that case, the arbitrator did not allow the parties the opportunity to reply or to supplement their arguments. The arbitrator was found to have deprived the applicant of an opportunity to present oral evidence in support of his case.

In the present matter, the court found that the Parties themselves had agreed to the format of proceedings at a pre-arbitration hearing and later, by consciously placing issues which were common cause, before the arbitrator. To add to this, the Parties had also agreed that the rest of the evidence to be tendered would be done by written submission. To this extent, the court expressly noted that the format of the proceedings was not prescribed by the commissioner. The commissioner had also allowed for the right to reply and to supplement their respective cases with oral evidence had the need arose.

(iii) The court found that the Respondent's legal representative had made a conscious choice in agreeing to the format proceedings as he believed that he could place all relevant evidence before the court using this format. The court added that if at any point during proceedings, the Respondents representative had believed that he need to supplement his case with oral evidence then he was at liberty to do so and not relied on the commissioner to have done so on his own accord. Witcher,J made the following observation:

> "The fact that the commissioner did not set the matter down for oral evidence does not strike me as gross irregularity in the circumstances of this case. Setting the matter down for oral evidence would have been contrary to the express agreement among legal representatives as to the format of proceedings; a format I have found is permissible under section 138 of the LRA.
>
> While the commissioner certainly had the power to intervene in the flow of the case by setting the matter down for oral evidence, his exercise of discretion not to do so is understandable where the parties, who were both legally represented, made no moves to do so themselves.
>
> When Parties are legally represented, it is safe to assume that the procedural elections made on their behalf have a strategic basis.
>
> Indeed, unless there is a patent misunderstanding of legal principle or process, or an obvious incapacity in representing a client's interests, interfering with a trial strategy may well give rise to separate

[10] Ibid (par 44)
[11] [2001] 10 BLLR 1147)LC) at para 25
[12] Ibid 7 supra (par 45-46)
[13] [2000] 5 BLLR 619 (LC) at 623.

complaints of bias or over-reach."[14]

3. Conclusion

Evidently the courts interpreted section 138 of the LRA[15] not to prescribe the format of arbitration proceedings. In so doing, it is submitted that the court has reinforced the primary objective of an arbitration hearing, which is to ensure that disputes are dealt and dispensed with expeditiously with minimum of legal formalities.

To this extent the court has endorsed the use of written submissions as a form of arbitration proceedings, along similar lines to an Application Proceeding[16] in a formal court of law.

This case also serves to caution commissioners who would elect to use this approach to ensure that Parties agree and are afforded an opportunity to fully present their case, unlike the approach adopted in *Voltex*[17] *supra,* in which the commissioner denied the Parties the right to reply and supplement their arguments. The courts will only interfere and grant relief in similar disputes, if the Applicant Party could show prejudice.

An example of where this approach could be effective and help curtail proceedings and avoid unnecessary wasting of time, would be in a dispute relating to an interpretation of a provision of the law of a collective agreement. It can also be applicable in instances where there is common cause agreement on factual issues relating to the dispute, which would otherwise be reliant on the use of oral evidence.

The choice of the format of an arbitration hearing is a conscious one, which Parties must give serious consideration as part of their preparation before a pre-arbitration hearing / arbitration hearing.

Mr Dolin Singh
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[14] Ibid 9 supra (par 54-55)
[15] Act 66 of 1995, as amended
[16] Application Proceedings are prevalent in formal courts of law. It is specifically provided for in terms of the rules of the respective courts. It refers to the instance where no oral evidence is led. All pleadings and replies are done by way of written submission. A good example of an application proceedings would be an Application brought Ex-*Parte. (*single Party before the court*)*

[17] [2000] 5 BLLR 619 (LC) at 623.

To what extent can a disciplinary enquiry be informal without affecting fairness?

The facts of Avril Elizabeth Home for the mentally handicapped v CCMA

The question of substantive requirements of a disciplinary hearing and the standard of proof required in a disciplinary hearing has been the subject of *Avril Elizabeth Home for the Mentally Handicapped v CCMA.*[18] The facts of this case involve the employer who dismissed the employee after finding that she was implicated in theft. The employee being dissatisfied with the sanction of dismissal referred a dispute to the CCMA. At the arbitration, the employer relied on a videotape which revealed another employee stealing a plastic bag containing a pair of boots in the respondent employee's presence. The employer argued that the only inference to be drawn from the videotape was that the respondent employee was also involved in the theft because she was seen facing the thief at the time and talking to her, and that her "body language" indicated involvement. In other words, she was regarded as being an accomplice. During arbitration, the commissioner found in favour of the employee.

The commissioner disregarded the argument by the employer and this evidence was not accepted as proof of her involvement. The employer was ordered to reinstate the employee.

In this particular matter, the Labour Court held that, when determining whether an employee is guilty of misconduct, the proper test is proof on a balance of probabilities not that of beyond reasonable doubt. In the criminal justice system the burden of proof which applies is beyond reasonable doubt. The commissioner has however used the beyond reasonable doubt test and this became a fertile ground for review.

[18] [2006] 9 BLLR 833 (LC); [2006] JOL 17623 (LC).

Schedule 8 of Code of Good Practice: Dismissal spells out the contents of the notion of procedural fairness, the nature and extent of this right. The code specifically states that the investigation preceding a dismissal "need not be a formal inquiry". The Code requires no more than that "before dismissing an employee, the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision". This approach is flexible and represents a significant change from what may be termed the "criminal justice" model developed by the old industrial court under the 1956 LRA.

The Labour Court has confirmed that the employer is not obliged to adopt a stringent approach for procedural fairness when conducting disciplinary enquiries. A less formal approach is envisaged by the Labour Relations Act. The Court held that on this approach there is clearly no place for formal disciplinary procedures that incorporate all the accoutrements of a criminal trial, including the leading of witnesses, technical and complex "charge sheet", requests for particulars, application of rules of evidence, legal arguments, and the like".

The courts have always been very strict on a commissioner who applies a standard that is stricter than proof of a balance of probability. The award in this case will then be reviewable[19]. What the Court emphasised is that the appropriate test to be established is whether sufficient evidence was led to confirm the guilt, whether there was a balance of probabilities test, and whether the only reasonable inference that could be drawn from the evidence is guilt. The commissioners will therefore err if they can decide by giving benefit of a doubt to the employee and such will be subject of review.

This less formal requirements have also been evident in the case of *Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom*[20] where the employee's dismissal was based on her inability to work with the Respondent's CEO. The employee lodged grievances against the CEO for racist, humiliating, undermining, harassing and victimising behaviour. The employee was eventually dismissed and the employment relationship was broken down beyond repair. She was afforded the opportunity to make representation regarding whether or not she should not be dismissed. In doing so, the employer contended that it fulfilled its obligations under the "*audi alteram partem rule"*. The employee rejected and refused that opportunity for making representation and she was subsequently dismissed.

In deciding on the matter, the LC held that "where an employee's conduct is manifest, common cause or not in dispute, a less formal process will suffice". An elaborate disciplinary enquiry is not required for every dismissal.

Basic legal principles to consider in misconduct cases

In assessing the fairness of any dismissal, the arbitrators and judges need to answer the following questions: whether or not there was a contravention of the rule regulating the conduct in the workplace or of relevance to the workplace; whether or not the rule is reasonable or valid; whether or not the employee was aware of the rule or is expected to have been aware of the rule; and whether the dismissal was the appropriate sanction for the contravention of the rule. These legal requirements are applicable to both formal and informal processes.

Existence of a rule

To determine the fairness of a dismissal, the core, basic requirement is that the employer must be able to prove that the employee contravened a rule applicable to the workplace. This is a question of law and fact. In a number of cases, employers rely on common law rules including the duty to obey reasonable and lawful instructions, to act in good faith and to work with due diligence and skill (Grogan, 2010). It is important to note that employers are not required to spell out every workplace rule in meticulous detail; it is sufficient that employees are made aware that certain forms of misconduct are proscribed, and of the consequences of committing such misconduct.[21]

The most common rule of the employer is the disciplinary code. A rule of the employer may be challenged by employees on various grounds. If the rule is reasonable and related to the workplace, it will often be valid, however unlawful rules will be invalid. It is also important to note that a rule will be accepted if it is

[19] *Potgietersrus Platinum Ltd v CCMA (1999) 20 ILJ 2679 (LC); Markhams (a division of Foschini Retail Group (Pty) Ltd v Matji NO [2003] 7 BLLR 676 (LAC).*
[20] *[2009] 6 BLLR 541 (LC).*
[21] *Motswenyane v Rockfall Promotions [1997] 2 BLLR 217 (CCMA.*

legitimate and valid if it is lawful and can be justified with reference to the operational requirements of the employer (Grogan, 2010).

Contravention of the rule

This relates to whether or not the employee had contravened or breached the rule as interpreted. The inquiry entails examining evidence and determining the exact nature of the offence. The other questions relating to the rule is whether or not the employee is aware or can be expected to be aware of the rule. Often the rule is in the disciplinary code, however this is not always the case as some are common law rules, including theft.

Procedure for conducting disciplinary hearing

Investigation

Section 188 of the LRA provides that for dismissal to be fair, and not automatically unfair, it must be for a fair reason and in accordance with a fair procedure. This requires an employer to conduct the investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer need to inform the employee of the allegations in a form and language understandable by the employee.

The employee, in terms of the rules of natural justice, must be afforded the opportunity to state his/her case in response to the allegations. The employer must give the employee a reasonable time to prepare a response to the allegations with the assistance of trade union representative or fellow employee. When the enquiry is finished, the employer should communicate the decision taken, and preferably, furnish the employee with a written notification of that decision (Grogan, 2010).

It is also important that the disciplinary action does not become prejudicial to employees. In other words, the employee cannot be subjected to a disciplinary hearing unless a prima facie grounds for suspecting that the employee has indeed committed the misconduct for which he/she is charged.

The rights of the employee

The notice given to the employee for a disciplinary hearing must be comprehensible. The employee must also be given sufficient time to prepare for his/her case. Often the period allowed in-between to prepare for the charges is in the employer's disciplinary code. The employee must be allowed representation by a fellow employee or can represent him/herself. The employee can be afforded an interpreter if he/she so wishes. The employee should however note that should he/she not attend the hearing without just cause, the hearing can continue in his/her absence.

Decision

The decision that the employer take against the employee who is found guilty of misconduct must be preferably in writing and in a language and form which is understandable by the employee.

Appropriate sanction

Discipline is a managerial prerogative. Dismissal as a sanction can be meted out to employees for serious offences. Serious offences including theft have an element of dishonesty.

The LC in Avril Elizabeth Home for Mentally Handicapped case indicated that pre-dismissal inquiry need not be formal. The decision discourages protracted and legalistic disciplinary hearings in that they go beyond the grasp of the average manager or supervisor; they distract them from the task of managing the business and getting on with the jobs for which they are appointed to do.

The issue that a high standard of procedural fairness is not required at the pre-dismissal stage was also expressed in *Semenya SC v CCMA.*[22] This is because employees are afforded a second fair and formal hearing at the CCMA or the bargaining councils for that matter.

Avril Elizabeth Home reminds commissioners that workplace disciplinary hearings should not be assessed as if they are criminal trials and that procedural irregularities which do not cause demonstrable or material prejudice to the employee are not in themselves sufficient to render a dismissal procedurally unfair (Grogan, 2010).

Lesson learnt from the Avril Elizabeth Home

The Code of Good Practice: Dismissal states that the investigation preceding a dismissal 'need not be a formal enquiry; the employer must conduct investigation before dismissing an

[22] *(2006) 27 ILJ 1627 (LAC).*

employee; the employee must be given the opportunity to respond to the allegation after a reasonable period; the employer must take a decision and inform the employee of the notice of the decision.

It is also very clear that the approach is moving away from the criminal justice model developed under the 1956 LRA. The rationale for introducing the rules in the code is based on the idea that "true justice for workers lies in a procedure for expeditious and independent review of the employer's decision as elaborate, onerous procedural requirements developed prior the current LRA were inefficient and inappropriate. The informal disciplinary processes in the workplace have been seen to balance the interests of employees and employers as requested by the Constitution and the applicable ILO Convention.

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Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton.

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