DEVIATION BY THE EMPLOYER FROM ITS OWN DISCIPLINARY CODE WHEN CONDUCTING DISCIPLINARY INQUIRIES

1 Introduction

Is it expected of the employer to strictly adhere to the terms and conditions of its own disciplinary code when conducting disciplinary proceedings against an employee? The purpose of this note is to address this question and investigate the approach of the courts towards such a deviation by the employer from its own disciplinary code. It seems to be clear that no uniformity exists in the approach of the courts towards this issue.

2 *Highveld District Council* case

The Labour Appeal Court disposed of the matter of *Highveld District Council v CCMA* (2002 12 BLLR 1158 (LAC)), dealing with the consequences of such a deviation, in a fairly pragmatic manner.

As long as the rules of fairness and justice regarding the rights of the employee have been complied with, the content of the relevant disciplinary code of the employer was not regarded as being binding to the extent that non-compliance therewith necessarily rendered the proceedings invalid. Du Plessis AJA found on appeal "that where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as is contemplated in section 188(1)(b) of the of the Labour Relations Act 66 of 1995. The mere fact that the procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed, does not in itself mean that the procedure actually followed was unfair", and continued: "It does not follow this conclusion that a contractual procedure does not give rise to contractual rights that a contracting party can enforce in the appropriate forum and in the appropriate manner. In this case, however, we are not called upon to adjudicate a contractual right, but a statutory right to a dismissal that is procedurally fair" (1162 par 16).

The court differentiates between the employee's right not to be unfairly dismissed in terms of *inter alia* the Labour Relations Act, and his contractual rights in terms of the collective agreement. The court further makes mention of "contractual rights that a contracting party can enforce in the appropriate forum and in the appropriate manner" (1162 par 16*).* The question arises whether the employee would have been successful had he specifically called upon the court to enforce his contractual rights in terms of the collective agreement. And was the employee then expected to approach the High Court in order to have his contractual rights enforced? *In casu* the appellant

(the employer) and the respondent (the employee) were both parties to a collective agreement in terms of which a disciplinary code was agreed upon. Each and every provision of the disciplinary code was not adhered to but according to the arbitrator these provisions were not breached "such as to cause (him) to conclude that" the procedure was unfair. The court *a quo,* however, was of the opinion that the collective agreement was peremptory in its prescription of the disciplinary proceedings and that the procedure followed during the disciplinary hearing was not in accordance with the prescribed procedure and therefore the respondent's dismissal was procedurally unfair. The appellant thereafter appealed to the Labour Appeal Court, which court held the above rather more relaxed view.

It is important to establish whether such a code was incorporated into the employee's contract of employment. Even if a disciplinary code has not been incorporated into an employment contract, section 23 of the Labour Relations Act describes the legal effect of a collective agreement and *inter alia* provides in sub section (3) that where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement. It seems therefore that whether the disciplinary code was incorporated into the employment agreement *in casu* is irrelevant as the collective agreement had the very effect of transforming the code in to a binding contract.

3 *Khula Enterprise* case

In *Khula Enterprise Finance Ltd v Madinane* (2004 4 BLLR 366 (LC)) the Labour Court followed the above decision of the Labour Appeal Court and found that where an outsider was appointed to chair a disciplinary hearing, contrary to the provisions of the disciplinary code of the employer, the proceedings are not deemed to be automatically procedurally unfair. The court found that the real issues before the arbitrator were not addressed and that although the disciplinary code required a person from "an appropriate level of management" to chair disciplinary proceedings, this provision was merely a guideline and sufficient reasons existed *in casu* to appoint an outside advocate to chair the hearing.

It is interesting that considerations of fairness overruled procedural aspects in this matter. It is not clear whether the disciplinary code was incorporated into the contract of employment between the parties and no indication was given that the code formed part of a collective agreement. The matter was referred back to arbitration.

4 *Vorster* case

The issues of fairness, procedure in accordance with the stipulations of an employers' own disciplinary code and contractual rights and obligations were considered by the Supreme Court of Appeal in *Denel (Edms) Bpk v Vorster* (2004 4 SA 481 (SCA)). The appellant dismissed the respondent from its employment and the respondent sued the appellant in the Transvaal Provincial Division for damages for breach of contract arising from his dismissal. The respondent first approached the Industrial Court in terms of

section 46(9) of the now repealed Labour Relations Act 28 of 1956 but abandoned these proceedings and then approached the High Court. The respondent's claims were dismissed. On appeal to the full bench, the trial court's decision in relation to the first claim was reversed and its order was substituted with an order declaring that the plaintiff succeeded on the merits. The appellant then brought an appeal confined to the claim for damages for breach of contract against the finding of the full bench, to the Supreme Court of Appeal. The parties agreed that proper substantive grounds for summary dismissal existed in this matter. The respondent's complaint was therefore confined to the procedure that was adopted.

Specific terms were set out in the appellant's disciplinary code in relation to authorized persons who were allowed to take disciplinary action.

The terms of the disciplinary code were incorporated into the conditions of employment of the respondent, assuming contractual effect. These specific stipulations were not adhered to during the disciplinary proceedings.

On behalf of the appellant it was advanced that section 27(1) of the interim Constitution (in force at the time of this appeal), guaranteed to everyone the right to fair labour practices. (This section was succeeded by s 23(1) of the present Constitution). Section 39(2) of the present Constitution furthermore requires of the courts to, when developing the common law, promote the spirit, purport and objects of the Bill of Rights. As the appellant respected the respondent's right to fair labour practices it would be an infringement of the appellant's right to fair labour practices, if the dismissal was regarded as unlawful. The court understood the above argument to convey that the Constitution introduced into the employer-employee relationship a reciprocal duty only to act fairly towards one another and that contractual terms requiring anything more must give way. The court did not agree with this contention.

Nugent JA was of the opinion that unfair or harsh contractual terms in the employment relationship may be softened or supplemented in this manner if necessary but that a fair contract could not be deprived of its legal effect.

It is to be noted that reciprocal fairness in the employment relationship has been a well-established principle in labour law before the introduction of the interim Constitution and the final Constitution of 1996 and section 23(1) of the aforementioned act. The question seems to be whether long-developed Labour Law principles and remedies or those of the law of contract should be applied and which forum would be the most favourable choice in litigation.

The next question is whether the calculation of the successful respondent's damages would be according to the common law principles in regard to the assessment of contractual damages or according to section 194 of the Labour Relations Act 66 of 1995. The court found that:

(i) The appellant contractually undertook to follow a specific route before terminating the employment of an employee.

(ii) The appellant could not unilaterally substitute something else.

(iii) The order of the court *a quo* was therefore set aside and replaced with an order declaring that the respondent's employment had been terminated in breach of his contract of employment.

5 *Mahumani* case

In *The MEC Department of Finance, Economic Affairs and Tourism: Northern Province v Mahumani* (2005 2 BLLR 173 (SCA)), the High Court set aside the decision of the chairperson of a disciplinary committee in terms of which an employee in the public sector was refused legal representation at a disciplinary hearing. This matter caused considerable furore in the media and raised speculation as to whether this decision will apply in the private sector. As the chairperson of the disciplinary committee based his decision on a clause in the disciplinary code and procedure for the public service of the employer, specifically prohibiting representation by a legal representative unless the employee is a legal practitioner, this decision is also relevant for purposes of this discussion (Le Roux "The Right to Legal Representation at Disciplinary Hearings" 2005 *Contemporary Labour Law* 14; and Van Jaarsveld "Weer Eens die Reg op Regsverteenwoordiging by Dissiplinêre Verhore" 2005 *THRHR* 479). Also of importance is the fact that the disciplinary code relevant to this dispute constituted a binding collective agreement between the parties. The chairperson was of the opinion that he was not allowed a discretion in the matter and based his decision on the decision of the Labour Court in *Mosena v The Premier: Northern Province* (2005 2 BLLR 173 174 (SCA)).

The employer took the decision of the High Court to the Supreme Court of Appeal relying on the express provisions of the disciplinary code.

Clause 2 of the disciplinary code provided that the code and procedure are guidelines and may be departed from in appropriate circumstances. In the *Mosena* case (*supra*), Wallis AJ rejected this approach as to allow departure from the code in certain circumstances. *In casu* however the Supreme Court of Appeal took the following stance:

(i) The matter relates to the public sector. Therefore the Promotion of Administrative Justice Act is applicable.

(ii) The above Act together with the principles of the common law requires of disciplinary proceedings to be fair.

(iii) The parties to the Public Service Co- coordinating Bargaining Council who agreed on the code had the aim of devising a fair disciplinary procedure.

(iv) There is no indication in the disciplinary code that it would not have intended the chairperson of the hearing to have a discretion to allow legal representation at the proceedings should he have been of the opinion that it would be unfair not do so.

(v) Section 1 of the disciplinary code makes it clear that the norms set by it can be departed from in "proper circumstances" (Le Roux 2005 *Contemporary Labour Law* 14).

The Supreme Court of Appeal referred the matter back to the chairperson with certain guidelines to consider in exercising his discretion in order to decide whether it would constitute unfair proceedings should a legal practitioner not be allowed to represent the employee.

6 Evaluation and conclusion

It appears that *in casu* considerations of fairness, the fact that the matter related to the public sector causing administrative law to be applicable, and the stipulation in section 1 of the code stating that the code and procedure are guidelines and may be departed from carried considerable weight. It is however not inconceivable that the given guidelines will in future also be considered in the private sector in regard to the affording of legal representation during disciplinary inquiries notwithstanding the fact that the disciplinary code and procedure of the employer may specifically state something to the contrary.

The role of certain aspects appears to remain unclear in regard to the disciplinary code and procedure of the employer and the application thereof when disciplinary enquiries are conducted, for example:

(i) Has the code been incorporated into the employment agreement of the parties and/or is it part and parcel of a collective agreement?

(ii) Is there a clause in the code to the effect that the stipulations of the disciplinary code merely guideline to "cure all ills" and allow lawful deviation in appropriate circumstances?

(iii) What role do issues of "fairness", as contemplated in chapter viii of the LRA and the Constitution (s 23 (1)), as well as established labour law, play in the contractual relationship between employer and employee in circumstances where the code is regarded as part of the contractual employment relationship?

(iv) In which manner are damages to be calculated in the aforementioned circumstances?

(v) How do these issues impact on the choice of forum in the process of dispute resolution?

(vi) How will the result of the dispute be affected by whether the matter originates in the private or public sector?

It is to be noted that in *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* (2005 5 BLLR 430 (SCA)) the Supreme Court of South Africa finally staked its claim in regard to adjudicating upon appeals from the Labour Appeal Court and litigants would in future be well advised to keep the stance of the Supreme Court of Appeal in regard to these issues in mind when embarking upon the journey of litigation.

It is submitted that the time may have come to conduct disciplinary inquiries according to a fixed set of rules, generally applied across the board in order to be fair to employers and employees alike. Such rules should be in accordance with the provisions of the Constitution, should promote Administrative Justice according to the Promotion of Administrative Justice

Act (*supra)* and should clearly make provision for further recourse by an aggrieved party in a specific and uniform manner. Specific provision should be made for the same rules to apply to parties from either the public or the private sector.

These proposed rules in the form of legislation may then *inter alia* deal with aspects such as the role of the disciplinary code of the employer, the right to legal representation of the employee, the right to prior access to relevant documents of the employee, formalities during the course of the hearing, minimum time periods between the date of the alleged misconduct and the date of the hearing, whether uniform hearings for different levels of employees are appropriate and any other relevant factors. The issue of uniform further recourse by the aggrieved employee in regard to not only the law applied, be it labour law principles or law of contract, and the choice of forum may be addressed.

R Jordaan-Parkin
University of Pretoria