PROCEDURAL UNFAIRNESS OCCASIONED BY UNREASONABLE DELAY IN FINALISING A DISCIPLINARY INQUIRY

Stokwe v Member of the Executive Council: Department of Education, Eastern Cape [2018] ZACC 3

1 Introduction

"Justice delayed is justice denied" is a legal maxim which denotes that if legal redress is available to a party that has suffered, or is suffering an injustice but is not dispensed timeously, it has the same effect as having no redress at all (see Steenkamp J sentiments in *Road Accident Fund v Commission for Conciliation, Mediation and Arbitration* [2016] ZALCJHB 139 par 5; see also the definition at Definitions and Translations https://www.definitions.net/definition/justice+delayed+is+justice+denied (accessed 2019-09-12)). In this context, the maxim is used to emphasise that delays in finalising employment disciplinary processes may amount to a denial of justice. Research shows that unreasonable delays in finalising disciplinary cases affect the health and can even cause excruciating distress on the employees concerned (Van der Bank, Engelbrecht and Strumpher "Perceived Fairness of Disciplinary Procedures in the Public Service Sector: An Exploratory Study: Empirical Research" 2008 6(2) *SA Journal of Human Resource Management* 8).

The purpose of the Labour Relations Act 66 of 1995 (LRA) as outlined in s 1(*d*)(v) is to promote an effective resolution of labour disputes. Disputes relating to unfair dismissal should as a matter of principle be resolved expeditiously and cheaply (*Road Accident Fund* par 5). This injunction does not, in any way, vitiate the employers' prerogative to discipline his or her employees where there's alleged misconduct provided that this power is exercised within the purview of the law (*SAPU v Minister of Safety and Security* [2005] 5 BLLR 490 (LC) 513; Manamela "Dismissal Based on an Unfounded Allegation of Racism Against a Colleague: *SACWU v NCP Chlorche*" 2008 20(2) *SA Merc LJ* 298 298). The Constitutional Court's judgment in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape* ([2018] ZACC 3, *Stokwe*) is concerned with a disciplinary proceeding which took almost four years to reach conclusion as a result of delays by the employer. The case is an important reminder to employers and all role players in the labour dispute resolution system that the spirit and purport of the LRA – to resolve labour disputes effectively –

should underlie all disciplinary processes. Failure to heed this principle compromises procedural fairness and inexorably, the consequent outcome.

This case note discusses the impact of unreasonably lengthy delays in finalising disciplinary proceedings on procedural fairness in the context of a dismissal. It aims to underscore the importance of effectiveness in labour dispute resolution and procedural fairness (as one of two legs of the fairness enquiry) as an indispensable test and not just a superfluous or a by-the-way criterion (see *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* [2006] 9 BLLR 833 841). The case note concerns itself with delays in finalising the internal disciplinary process by the employer and not delays in the labour dispute resolution system (delays at the CCMA and the labour courts) as shown by cases such as *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* ([2016] ZACC 49) and *Mogaila v Coca Cola Fortune (Pty) Limited* ((CCT76/16) [2017] ZACC 6) which took almost a decade to reach finality. A summary of the facts of the case is provided below. This is followed by the decision and rationale of the court; an analysis and a conclusion.

2 Facts of the case

Mrs Thandiwe Stokwe (the applicant) was employed by the Eastern Cape Department of Education (the Department) as a Deputy Chief Education Specialist stationed in the Uitenhage District Office. In January 2008 she was seconded as a Chief Education Specialist when the incumbent in that post was placed on sick leave. In August 2009, one of the transport service providers contracted to the Department to transport learners to school terminated their services with immediate effect. This service had to be replaced urgently, failing which learners who relied on the transport provided by the Department would be left stranded the following school day and that would remain the case until a replacement was appointed. The applicant decided to award a temporary service contract to a company owned by her spouse, who happened to be in the transport business. This company provided these services for four months and then a new service provider was appointed through a tender process.

On his return to work, the Chief Education Specialist received a request to approve the payment to the applicant spouse's company. The Chief Education Specialist noted that the applicant had contravened the National Treasury Practice (Note Number 7 of 2009/2010 clause 2.2) which required the applicant to disclose her interest and to withdraw from participating in the process of awarding the contract. The applicant submitted a report in September 2009 explaining the emergency and context within which she awarded the contract to her spouse and further indicated that she did this as a gesture of support to her husband who felt sick because of his unemployment.

In July 2010 (10 months later) the Department charged the applicant with four counts of misconduct in terms of s 18(1)(*a*)–(*b*) and (*f*)–(*g*) of the Employment of Educators Act 76 of 1998 (EEA) respectively. A disciplinary

hearing was convened in March 2011, and the applicant was advised between June and August of the same year that she was found guilty of charges 2 and 4 and was dismissed. The applicant requested reasons for the finding and also noted an internal appeal against the sanction. The applicant remained in the employ of the Department as per Item 8(4) of Schedule 2 of the EEA which stipulates that a sanction may not be effected pending an appeal. The applicant sent written requests for the reasons for dismissal on 17 October 2011; on 6 March 2013 and again on 3 May 2013. On the two latter occasions, the applicant informed the Department that she viewed the delay and silence as an abandonment of the disciplinary process. This was almost two years since the Department last communicated with her in this regard.

On 5 December 2013, the Department finally responded and furnished the applicant with reasons for the sanction of dismissal. Even in this attempt, the response merely supplied an excerpt written by the chairperson of the disciplinary hearing stating that the applicant's dismissal was based on her bad faith and overstepping of boundaries in terms of the code of conduct. The dismissal was effected in February 2014. The applicant turned to the Education Labour Relations Council (ELRC) seeking to challenge both the substantive and procedural fairness of her dismissal. She raised the delay in finalising the disciplinary process after she noted an appeal and argued that it indicated an abandonment of the disciplinary process by the Department. Arbitration under the auspices of the ELRC was held in August 2014. The arbitrator accepted the Department's response that it had not abandoned the process, that the applicant's continued employment with the Department was based on Item 8(4) Schedule 2 of the EEA and that it removed the applicant from the scholar transport section to a different section.

The arbitrator conceded that the delay was unreasonably long but found that any prejudice suffered by the applicant was ameliorated by the fact that she remained gainfully employed throughout the protracted process. With regards to the substantive aspect of the inquiry, the arbitrator found *inter alia* that the applicant was not guilty of breaching policy because she had no knowledge of it, but that she was guilty of breaching the Revised Policy Guidelines for Scholar Transport (Revised Guidelines). This is because she was the custodian of the Revised Guidelines and had intimate knowledge of them. For current purposes, it suffices to say that the arbitrator found the dismissal substantively fair but was silent on procedural fairness despite having considered this aspect and making a finding on it.

The applicant approached the Labour Court to have the award reviewed and set aside. She contended that the arbitrator based his finding on an incorrect understanding of the Revised Guidelines; that the arbitrator overlooked the unreasonably long delay and challenged the appropriateness of dismissal as a sanction for her offence. The Department explained that there were prescribed time limits within which to finalise disciplinary proceedings but that the Department was placed under administration by National Government in terms of s 100 of the Constitution (the "section 100 defence").

The court found that the arbitrator's understanding of the Revised Guidelines was correct, and that the dismissal was therefore reasonable and fair in substance. The court also accepted the explanation for the delay justifying procedural fairness of the dismissal. The review application was then dismissed. Both the Labour Court and the Labour Appeal Court refused the applicant leave to appeal. The applicant then turned to the Constitutional Court on the same ground that the award was unreasonable and should be set aside. Regarding substance, the applicant argued that the finding was based on an incorrect understanding of the Revised Guidelines by the arbitrator. With regards to procedure, she argued that the process was tainted by the undue delay and that the Department had abandoned the disciplinary process (waiver of right to discipline). The Court was called upon to apply the *Bato Star Fishing* test to determine if the decision reached by the arbitrator was one that as reasonable decision-maker could not reach (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; *Stokwe* par 56).

3 Proceedings at the Constitutional Court

At the Constitutional Court, the Department conceded that their understanding of the clause in the revised guidelines was incorrect and sought to base the charges on a different clause. The court noted that the arbitrator's reasoning was not beyond criticism but that the award was substantially fair because the applicant had conceded that she knew that her conduct contravened the employer's policy. With regards to procedural fairness, the court considered two factors regarding the delay in finalising the disciplinary process. Firstly, the argument that the delay was unexplained and an unjustified departure from the employer's own disciplinary procedure and therefore unlawful. Secondly, it considered that argument that the delay went against the spirit of the LRA to resolve labour disputes with effectiveness (par 34). The court further considered Schedule 2 of the EEA and noted conspicuous features regarding dispute resolution. It noted that the Schedule provides that discipline must be prompt and should be concluded in the shortest possible time frame; that a disciplinary hearing must be held within 10 working days after the service of charges and that a decision of an appeal should be made and communicated within 45 days by the ELRC. The applicant raised a principle from the Labour Court in *Riekert v Commission for Conciliation, Mediation and Arbitration* ([2005] ZALC 90 par 22) that where an employer subverts or flouts his own disciplinary procedure, it has a duty to justify non-compliance and to establish that the procedure was still substantially fair, reasonable and equitable (par 37). The applicant also argued that the delay subverted the LRA's objective to promote effective dispute resolution.

The applicant relied on *Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark* ((J1672/2016) [2016] ZALCJHB 330) for the claim that undue delay in finalising disciplinary process can manifest a waiver of the right to discipline an employee. Further reliance was placed on *Department of Public Works, Roads and Transport v Motshoso* ([2005) 10 BLLR 957 (LC)) where the court held that a delay of almost three

years in finalising a disciplinary process rendered the proceedings procedurally unfair. In response to these contentions, the Department argued that the disciplinary code was merely a guide and not rigid rules that had to be followed blindly. It was argued on behalf of the Department that there were no time frames in the EEA within which to conclude disciplinary proceedings although conceding that ordinarily they should be concluded within the shortest time possible. It was explained that the cause for the delay was that the Department was placed under administration. The applicant argued that a "section 100 administration" applies only to executive functions of a province and that administrative functions such as disciplinary processes remain vested with provincial authorities and that this argument was raised for the first time at the Labour Court.

The court considered s 23(1) of the Constitution (the right to fair labour practices) and s 1(*d*)(iv) of the LRA which highlight the purpose of the LRA to promote effective labour dispute resolution system and held that its jurisdiction was engaged and granted leave and condonation. The court considered that there was a space of over four and a half years between the commission of the misconduct and the final determination of her internal appeal and subsequent dismissal. The Department took nine months before a disciplinary hearing was held despite policy requiring that it be convened within 10 working days. In *Toyota SA Motors v CCMA* ((CCT228/14) [2015] ZACC 40), the court held that any delay in the resolution of labour disputes undermined the primary object of the LRA (par 69). The court noted that the applicant relied on the delay to finalise the disciplinary process rather than to initiate/ institute it. However, the requirement for promptness extended to both the institution and completion of the disciplinary process. The court said that, the fact that the employer retained the employee in its employment after the guilty finding and dismissal for an extended period may indicate that the employment relationship had not broken down irretrievably.

A delay on its own is not inherently unfair. Therefore, unfairness must still be determined separately and on a case by cases basis (*Bothma v Els* [2009] ZACC 27 par 35). To do this, the court employed six factors propounded in *Sanderson v Attorney-General, Eastern Cape* ([1997] ZACC 18 par 25) and reiterated in *Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark* (*supra* par 42) as follows:

a) The delay has to be unreasonable. In this context, first, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.
b) The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.
c) It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.
d) Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what

impact the delay has on the ability of the employee to conduct a proper case.

e) The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

f) All the above considerations must be applied, not individually, but holistically.

The court dismissed the "section 100 defence" and found the delay to be unfair and that it rendered the process procedurally unfair. The court also found that the applicant's claim of a waiver by the employer could not succeed because there was not enough supporting evidence. The matter was remitted back to the Labour Court for an appropriate remedy.

4 Comments

4 1 Effective labour dispute resolution

The EEA regulates the terms and conditions of employment of educators. The LRA aims *inter alia* to promote the effective resolution of labour disputes (s 1(*d*)(v)). In line with this, the guidelines in Item 2(g) of Schedule 2 of the EEA provides that disciplinary proceedings must be concluded in the shortest possible time frame. This means that an employer must initiate and conclude disciplinary proceedings within a reasonable period. Jafta J notes that employment disputes are urgent matters that require speedy resolution as undue delays in finalising them, even for a period of three years may have catastrophic ramifications to both the employer and the employee (*Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus supra* par 33). In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* ([2008] ZACC 16) Nkabinde J expressed the court's disapproval of the delays in finalising unfair dismissal disputes and noted the adverse impact this had on those involved (par 52). This sentiment is further echoed by Judges Navsa and Ponnan in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* ([2009] ZASCA 24 par 34) wherein it was stated that, the philosophical underpinning of the entire scheme of the LRA is easy access to dispute resolution and one of its clear intentions is the speedy outcome of disciplinary processes (par 34).

Section 188 of the LRA requires the employer to prove that a dismissal satisfies both the substantive (fair reason) and procedural fairness tests. The Code of Good Practice provides that failure to do this on the part of the employer may render the dismissal unfair (Code of Good Practice: Dismissal Schedule 8: Item 2). Although an employer is not bound to follow the code inflexibly, he may not depart from it arbitrarily (Du Toit, Godfrey, Cooper,

Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 443). The Code of Good Practice provides that after a disciplinary enquiry, the employer should communicate its decision preferably accompanied by written reasons. The use of the "after", indicates a period within which the decision should be reached and made known to the employee. An unreasonable delay in either instituting or finalising disciplinary proceedings may render the procedure and a dismissal unfair. It is submitted that therefore that unreasonable delays are a stark contrast of an effective dispute resolution. The court in *Stokwe* was correct to hold that it was unreasonable for the employee to wait for over four years for the outcome of her disciplinary enquiry.

4 2 The effect of delay on fairness

An unreasonable delay in prosecuting or finalising a case vitiates the credibility of the resultant outcome and could even border to abuse of process (*Cassimjee v Minister of Finance* (455/11) [2012] ZASCA 101 par 10). In some instances, the effect of a delay may be the inability to recall material facts surrounding the alleged misconduct. Potential witnesses could also be lost as a result of circumstances outside the control of the employee (Cameron "Right to a Hearing Before Dismissal" – Part 1 1986 7 *ILJ* 183). An employee awaiting a disciplinary outcome for a lengthy period may suffer from anxiety and this could create a hostile working environment and affect the business of the employer (*Mohlala v South African Post Office* (JR 737/10) [2013] ZALCJHB 244 par 47, see also Van der Bank, Engelbrecht and Strumpher 2008 *SA Journal of Human Resource Management* 6 where it is stated that employees in the security sector suffer depression and even experience suicidal thoughts during protracted disciplinary processes). Depending on the circumstances of each case, lengthy delays in finalising disciplinary proceedings render the whole process unfair, even if substantially, the employer had a solid case (*Mohlala v South African Post Office supra* par 47).

4 3 Waiver of the right to discipline an employee

An employer should be able to discipline their employees where there's alleged misconduct (*Poya v Railway Safety Regulator* [2018] ZALCJHB 354 (6 November 2018) par 37; Basson, Christianson, Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 6ed (2017) 127; see also Manamela 2008 *SA Merc LJ* 298). However, there are circumstances where delay in institution or finalisation of the disciplinary process may indicate a waiver of the employer's right to discipline or where it even thwarts the institution or continuation of disciplinary proceedings. A waiver is defined as the legal act of abandoning a right to which one is otherwise entitled (expounded by Cameron J in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* (2015) 36 ILJ 363 (CC) par 60).

An employee pleading a waiver on the part of the employer bears the burden to prove that the employer knew that it had waived its rights (*Moroenyane v Station Commander of the South African Police Services* –

Vanderbijlpark supra par 44). In *Van Eyk v the Minister of Correctional Services* (2005, 6 BLLR 639), an employee was charged with misconduct almost two years after the alleged offence. The employer's disciplinary code prescribed three-and-a-half months within which an employee could be charged after discovery of the offence by the employer. The court found that the employer had waived his right and that the charges had fallen away.

In *Jonker v Okhahlamba Municipality* ([2005] 6 BLLR 564 (LC)), the court held that the time limits and procedure set out in the employee's employment contract were a mere commitment to deal with disciplinary matter expeditiously and but were not cast in stone (par 20). Failure to adhere to these by the employer did not necessarily amount to a waiver of the right to discipline the employee. The court found that neither the contract nor the conduct of the employer amounted to a waiver in the circumstances (par 20). In *Department of Public Works, Roads and Transport v Motshoso* ((JR795/03) [2005] ZALC 62), the court agreed that a waiver of the right to discipline may, in certain circumstance, be inferred from an unexplained and unreasonable delay on the part of the employer.

The applicant's submission was that there was an unexplained delay (over four years) in the period between her dismissal and the decision on her internal appeal from which a waiver could reasonably be drawn. Both the initial disciplinary hearing leading to the dismissal and the appeal were dealt with and fell to be decided by the same employer. Moreover, the fact that the employer was prohibited from effecting the dismissal pending the appeal does not in itself explain or justify the delay between the two events. The court itself, found the delay inexcusable (par 91). Therefore, the employer's reliance on Item 8(4) of Schedule 2 was excluded by the unreasonableness. Even if it was not excluded, still it did not remedy the situation and should have been rejected. It is submitted that should the court have enquired in-depth into the waiver, it would have possibly upheld the inference. This would have certainly bolstered the precedential value of its judgment.

4 4 International and foreign comparators

Although not considered in *Stokwe*, it is prudent to draw comparisons from other jurisdictions and gauge South African legislation against international standards to glean lessons. Section 233 of the Constitution of South Africa, 1996 encourages courts to prefer an interpretation of law that is more consistent with international law than other inconsistent alternatives. This part draws comparators from the foreign jurisdictions and the International Labour Organisation.

4 4 1 United Kingdom

The Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures (ACAS code) issued in terms of s 199 of the Trade Union and Labour relations (Consolidation) Act 1992, provides disciplinary process guidelines in the United Kingdom (ACAS Code https://www.acas.org.uk/media/1047/Acas-Code-of-Practice-on-Discipline-

andGrievance/pdf/Acas_Code_of_Practice_on_Discipline_and_Grievance.PDF (accessed 2019-11-09)). The ACAS code is not legally binding on employers, however, the Employment Tribunal considers its guidelines when dealing with cases and are predisposed to award up to 25 per cent more compensation to employees where employers failed to adhere to the code. The ACAS code may be said to be the United Kingdom's equivalent of the LRA Code of Good Practice. It encourages employers and employees to raise and deal with issues promptly and to not unreasonably delay meetings and decisions or confirmation of those decisions. Employers must carry out necessary investigations of potential disciplinary matters without unreasonable delay. The ACAS code lays down steps which must be followed before and during a disciplinary hearing. The employer must first start by conducting its own investigation into the alleged misconduct and then send a letter to the employee to inform him/her about the allegation and to invite the employee to a hearing. A meeting must be convened to discuss the allegation and to provide the employee with an opportunity to state their side of the case. The employer must then decide on the outcome of the enquiry and lastly, the employee must be advised about his/her right to appeal the decision. A recurrent factor in all these steps is that they must all be carried out without unreasonable delay (see ACAS https://beta.acas.org.uk/code-of-practice-on-disciplinary-and-grievance-procedures (accessed 2019-11-09)). These guidelines are akin to the guidelines contained in Item 4 of the LRA's Schedule 8 Code of Good Practice: Dismissal.

In *Yorkshire Housing Ltd v. Swanson* ([2008] UKEAT 0057_07_1206 (12 June 2008)) an employee was dismissed for misconduct following a disciplinary hearing. However, there was a delay of about five months between the disciplinary hearing and the dismissal of the employee (par 19). The Employment Appeal Tribunal considered *inter alia* the provisions of Part 3(12) of Schedule 2, Employment Act of 2002 which required that every step of a disciplinary action be taken without unreasonable delay read with s 98A of the Employment Rights Act of 1996 which provided that a dismissal is regarded unfair if the procedures set out in Schedule 2 of the Employment Act 2002 are not fully observed (par 56–58 and 60). The dismissal was found to be unfair (par 70). Honourable Mrs Justice Cox DBE observed that "[…] delay is always the enemy of fair dispute resolution in the workplace, leading as it does to fading memories, prolonged anxiety, the entrenchment of parties' positions, prejudice to a fair hearing of the issues, and thereby to injustice" (par 69).

4 4 2 Malaysia

In Malaysia, there is a doctrine called the "doctrine of condonation" which operates as an equivalent of a waiver in South African law. In terms of this doctrine, an employer who has full knowledge of an employee's misconduct elects not to punish the employee (Dahlan, Romli and Ahmadat "Doctrine of Condonation: Challenges in the Management of Disciplinary Cases in Public University" 2016 7 *UUM Journal of Legal Studies* 139 142). An employer who delays inordinately to make the election whether to discipline the

employee or to overlook the misconduct is deemed to have waived his right by forgiving the employee (Dahlan *et al* 2016 *UUM Journal of Legal Studies* 144). In the case of *M Sentivelu R Marimuthu v Public Service Commission Malaysia* ([2005] 3 CLJ 778) where there was a delay of seven years in prosecuting misconduct charges, Gopal Sri Ram JCA (the Judge in the case) observed that the fact that the law is silent on time limits does not mean that the employer is free to act slowly or to delay proceedings as this was procedurally unfair and could cause an injustice (*M Sentivelu R Marimuthu v Public Service Commission Malaysia supra* 783). In *Telekom Malaysia Bhd. v Subramaniam Ahyahio* ([1998]1ILR 476) the court upheld a condonation where the employee was asked to report for duty whilst waiting for the disciplinary outcome (*Telekom Malaysia Bhd. v Subramaniam Ahyahio supra* 479).

4 4 3 The ILO

Section 1(*b*) of the LRA states that one of its purposes is "to give effect to obligations incurred" by South Africa as a member state of the ILO (see Smit and Van Eck "International Perspectives on South Africa's Unfair Dismissal Law" 2010 43(1) *CILSA* 46 48). Chapter VIII of the LRA entitled "Unfair Dismissal and Unfair Labour Practice" is inspired by the Termination of Employment Convention No 158 of 1982 (Convention 158) (See *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration supra* 839–840). Article 7 of Convention 158 provides that a dismissal related to an employee's conduct may not be effected until procedural fairness has been observed in line with the *audi alteram partem* principle (*Old Mutual v Gumbi* [2007] SCA 52 (RSA) par 5, 7; see also *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration supra* 839–840). The *audi alteram partem* principle forms part of the guidelines under the Code of Good Practice (Basson *et al The New Essential Labour Law Handbook* 143; see also Du Toit *et al Labour Relations Law: A Comprehensive Guide* 457). Article 10 of Recommendation 166 provides that an employer should be deemed to have waived his right to dismiss an employee for misconduct if he has failed to do so within a reasonable period of time after he has learnt of the misconduct.

5 Conclusion

Stokwe has highlighted the importance of procedural fairness in disciplinary enquiries and serves as a deterrence to unreasonable delays in finalising proceedings. This note has shown the effects of these delays on procedural fairness. Furthermore, it has highlighted the importance of effectiveness in labour dispute resolution. The employer's failure to act promptly may in certain circumstance amount to a waiver of the right to discipline his employees and this proscribes him from instituting disciplinary proceedings against them in this regard. The ILO Recommendation 166 demonstrates that this principle is internationally recognised. Furthermore, the foreign jurisprudence regarding procedural delays and "waiver" attests to the

undesirable effects of delays in labour dispute resolution and that the principle of waiver is not peculiar to South Africa. Apart from Petse AJ's abstinence from dealing with the waiver in detail, *Stokwe* is a commendable and judicious judgment and therefore welcome.

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