Basic guidelines to unfair dismissal

What constitutes an unfair dismissal?

The first question to establish in any case involving an alleged unfair dismissal is whether a dismissal actually occurred. A dismissal takes place when an employment contract is terminated at the instance of the employer and entails communication by the employer to the employee that the contract has come to an end. This communication can either be in words or by conduct. It is important to note that the Labour Relations Act ("LRA") does not confer on employees the right not to be dismissed, but only not to be dismissed unfairly. Therefore, the next question begging an answer is whether the identified dismissal is unfair.

The LRA makes provision for what we call an automatic unfair dismissal. Section 187 of the LRA contains a list of circumstances which will always constitute an unfair dismissal. Dismissals related to pregnancy, unfair discrimination, transfer or reasons related to transfer and participation in supported strikes are examples of such automatic unfair dismissals. A full list can be found in the said section.

A dismissal, that is not automatically unfair, may be unfair if the employer fails to prove that the reason for dismissal is:

· a fair reason related to the employees conduct or capacity; or

· a fair reason based on operational requirements; and further

· that the dismissal was effected in accordance with a fair procedure.

It should be emphasized that no matter how compelling the reason for a dismissal may have been, a dismissal will be unfair if a fair procedure was not followed.

The procedure to follow to challenge the unfair dismissal

This procedure is set out in section 191 of the LRA.

A dismissed employee may refer the dispute in writing to the CCMA or relevant bargaining council within 30 days from the date of dismissal. This referral is

effected by completing a form from the CCMA or any office of the Department of Labour, which form can also be found on their respective websites. Should the employee be out of time, he may still refer the dispute. He will, however, have to make an application for condonation confirming the reasons for the delay.

After the form has been served on the employer, conciliation is the first step in the dispute-resolution process. The sole function of conciliation is to settle the matter. If the employee accepted a settlement offer, he cannot normally proceed to litigate against the employer. This is because acceptance of the offer constitutes a waiver of his rights to proceed with legal steps against the employer because of the unfair dismissal. If the dispute remains unresolved, the dispute may on request of the employee be referred to arbitration.

Remedies for unfair dismissal

If it is found that the dismissal was unfair, the court or the arbitrator may order that

- the employer reinstates the employee on the same terms and conditions of employment as those that were applicable before the dismissal;
- the employer re-employs the employee on new terms and conditions of employment; or
- employer pays compensation to the employee.

To conclude, it is important to take immediate action if you are under the impression that you were unfairly dismissed. Take further note that an attorney or your relevant trade union will be able to assist you during the abovementioned proceedings. The CCMA is open to the public and should assist you to the best of their abilities.

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