Unfair Dismissals in South Africa: Lessons Learned in Court

Substantive fairness deals with the reason for a dismissal and is assessed according to the criteria listed in item 7 of the Code of Good Practice: Dismissal.

The question is whether the employee contravened a rule and, if so, whether such a rule is standard in the workplace. A second question is whether the employee was aware of or could reasonably be expected to be aware of such a rule, considering the consistency of how the law is applied in the workplace. Lastly, it needs to be determined whether the dismissal of the employee was the appropriate penalty in the circumstances.

Ultimately, it is about the infringement of company policies that you, as an employee, are or ought to be aware of.

In the recent case of *Mashilo and another v Commissioner of the South African Revenue Service*, the Labour Court stated that employers who wish to retrench their employees should do this based on economic, structural, and technical reasons. In this case, the applicants, Ms Mashilo and Ms Seremane, executive employees at SARS, were dismissed by the respondent, the newly appointed Commissioner of SARS, after the Commissioner announced a restructuring. The applicants refused to accept lower positions in the workplace. As a result of non-acceptance, they were retrenched, as they were the only two employees who refused to accept lower positions within the workplace. The applicants contended that their retrenchments were unfair as they did not meet the operational requirement threshold prescribed in the relevant labour legislation. Moreover, Ms Mashilo's dismissal related to her making a protected disclosure; in layperson's terms, she disclosed confidential information and was labelled a whistle-blower.

On this note, the Court held that Ms Mashilo stood firmly for justice for the benefit of SARS and this country. The court *obiter dictum* stated that if it were to turn a blind eye to what occurred at SARS during Mr Moyane's "restructuring", it would fail in its constitutional obligations.

After reports from the Nugent Commission and the Zondo Commission, the Court ordered the reinstatement of the applicants and that they receive back pay as was

due to them.

SARS applied for leave to appeal, but the Court dismissed SARS's application, as it held that it was a legal tact by SARS to defend the indefensible.

Regarding procedural fairness, the burden of proof rests on the employer to prove that it followed due process before the dismissal. In doing this, the labour law legislation sets the following guidelines to ensure due process and compliance with procedural fairness.

Firstly, the employer should inform its employees in a timeous and understandable manner about claims against them and provide them with the opportunity to have their side heard; this is also known as the *audi alteram partem* rule, which means to listen to the other side.

Secondly, the employer is duty bound to inform the employee, in writing and in an understandable manner, about any action of a disciplinary nature that is taken against such employee. The employee should be informed about the justifying reasons for his dismissal, and such procedures should be kept on record.

In the case of *More v Public Investment Corporation*, a CCMA matter, the employee, the previous chief financial officer, was dismissed due to adding the phrase "CFO must recommend" to a memorandum prepared by the CEO. This led to the conclusion of a revolving credit agreement that conflicted with policies as described by the small and medium enterprise committee. The employee was allegedly not allowed to do this. However, following a disciplinary hearing, it was recommended that the employee receives a final warning. However, the board immediately dismissed the employee.

In disagreement, the applicant contended that her dismissal was both substantially and procedurally unfair as it took the employer five years to inform the employee of such an offence. Furthermore, the applicant argued that such a claim had already prescribed.

The Commissioner held that there was an inordinate and unreasonable delay, which made the dismissal procedural and substantively unfair. The employer was ordered to reinstate the employee and pay the employee back pay.

It is, therefore, fundamental that the employee is afforded the right to a fair

procedure, even if the employee is dismissed for a valid, justifiable reason.

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