Interdicting Disciplinary Hearings

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Disciplinary hearings are part and parcel of the workplace and form an integral part of maintaining discipline amongst employees. It is the vehicle through which progressive discipline is applied and can take various forms ranging from informal to formal hearings. Smaller employers tend to prefer the informal model of disciplinary hearings, whereas the bigger employers tend to venture towards the formal model with a chairperson, accused employee and representatives, discovery of documents and cross examination. These hearings can very easily turn into long drawn out battles, bogged down with points *in limine,* postponements, delays and a further break down of the trust relationship between manager and employee. During this time the employee is often suspended and feels ostracized and suffering reputational damage.

When seriously aggrieved by the disciplinary action against them, an employee may ask what remedy is available whilst the disciplinary hearing is still pending or not finalised yet? In essence, can the employee approach the court to interfere or stop the disciplinary hearing or must the employee go through the process and fight the unfair conduct in the CCMA after a finding and sanction has been metered out. Many employees feel that the unfair dismissal remedy in the CCMA can become a hollow remedy as the employee stands to suffer financially whilst waiting for the CCMA award and compensation or reinstatement can even be delayed for longer when the employer chooses to take the award on review.

Discipline is widely accepted, also by the Labour Court, as an employer function and the courts will not easily interfere with the employer's unfettered authority to discipline its employees and to maintain order in the workplace. The employer is also expected to deal with discipline in a swift and efficient manner and not to deal with the matter as if it is a mini court case. Managers are not expected to act as prosecutors nor are chairpersons expected to act as judges. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*[1] the court set out the requirements for employers when holding disciplinary hearings. In this case the court specifically applied schedule 8 of the LRA as follows:

"To some extent, Chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in Schedule 8 to the LRA. It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision."

This approach represents a *significant and fundamental departure* (my italics) from what might be termed the 'criminal justice' model that was developed by the industrial court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial."

The Court made it clear that the current dispensation of disciplinary hearings, as envisaged by schedule 8, is a drastic departure from its predecessor in the 1956 LRA (repealed):

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

Resulting from this new model as supported by Schedule 8, the test for procedural fairness are not as onerously applied and should support workplace fairness and efficiency when managers discipline employees. The process is one of discipline which belongs to managers, not the court. Should the manager fail to apply a fair process, the employee has recourse to the CCMA. The CCMA is a *de novo* process and the CCMA commissioner is the ultimate decision maker to determine fairness: The Labour court found as follows:

The balance struck by the LRA thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee."

It is in against this hallmark judgement, that employees should consider the procedural complaints in their case, when approaching the labour court for interference in the procedural part of the process. The Labour court[2] found that "On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like".

Various cases in the past have looked at the question as to whether the Labour court has the jurisdiction to interfere in the disciplinary process, against the backdrop of *Avril Elizabeth*, and if so, under what circumstances the court should do so. The Labour Appeal court considered the requirements in the case of *Booysen v Minister of Safety and Security and others*[3]. The court *a quo* found that the labour court does not have jurisdiction to interfere in disciplinary hearings. The matter then went on appeal, where the LAC again looked at the question as to whether the

court can interfere in disciplinary hearings and whether interdictory relief can be granted to an accused employee. The LAC considered the LRA, sections 157 and 158, section 77 of the BCEA as well as various pervious *dicta* such as the *Chirwa*[4] case, dealing with the labour court's jurisdiction. The LAC then referred to the case of *Mantzaris v University of Durban-Westville & others*[5] where the court found that**:**

"it had jurisdiction to interdict incomplete disciplinary proceedings and that the Labour Court can only do so in the most exceptional of circumstances, where a grave injustice or a miscarriage of justice might otherwise occur, or where justice might not by other means be attained.

The LAC confirmed that it has jurisdiction to interdict disciplinary hearings *prior* to the decision being made, and such judicial intervention can even be time conserving and less costly, therefore, the employee is not without remedy until the matter is finalised. This remedy however, is limited as set out in the *Mantzaris* case.

This brings forward the question as to which instances will result in a grave injustice or exceptional circumstances, that a court may consider interdicting. The court quoted circumstances such as a disciplinary inquiry which for instance, is about to commence or was conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in Law the enquiry.

The LAC in *Booysen,* summed it up as follows:

"To answer the question that was before the court *a quo*, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive."

Many of these cases are brought on an urgent basis due to the disciplinary hearing being imminent. Just as many of these cases failed based on urgency alone. Rule 8 of the rules of the Labour court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules. The applicant must also establish a clear right and show that there is no alternative remedy available to the applicant[6].

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[1] [2006] 9 BLLR 833 (LC)

[2] Avril Elizabeth Homes for the mentally handicapped v CCMA *supra*

[3] CA 09/08 Unreported case. See also the Labour court judgement of the court a quo at (2009)30 ILJ 301 (LC)

[4] Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007)

[5] [2000] 10 BLLR 1302 (LC); (2000) 21 ILJ 1818 (LC)

[6] A useful decision to read is that of Snyman AJ in SJ Zondo v Uthukela District Municipality and another: Case number D 631/2014