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“LABOUR LAW UPDATE”

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The Labour Court's power to intervene in disciplinary proceedings

CASE 1

CASE SYNOPSIS

In the **Booyesen v Minister of Safety & Security and others {CA 09/08} ZALAC 21 (1 October 2010)** the LAC found that the real issue in this case was whether the Labour Court was correct in concluding that it lacked jurisdiction to intervene in disciplinary proceedings. The LAC carefully considered the decisions the Labour Court had concluded in that it decided it lacked jurisdiction. The effect of the Labour Court's decisions was that it lacked jurisdiction to interdict disciplinary proceedings because the legislature provided detailed procedures and mechanisms for employees to vindicate their right to a fair pre-dismissal process – but only after they have been dismissed. The approach meant that the Labour Court could not come to the assistance of an employee before he or she was dismissed and, unless there was a dismissal, there was no remedy.

The Labour Appeal Court did not agree and listed many instances where the Labour Court itself has seen fit to intervene in the context of unfair labour practices.

The LAC also attached some importance to its own decision in **Nxele v Chief Commissioner, Corporate Services, Department of Correctional Services & others {2008} 12 BLLR 1179 (LAC)**. In this case, the Court, recognising that the LRA imposes a general obligation on employers to treat their employees fairly, concluded that the transfer of an employee would breach that duty – the LAC accordingly found that the manner in which the employer implemented the decision was unfair and it was set aside.

There is no provision in the LRA, that expressly gives the Labour Court the power to interdict or intervene in any way in pending disciplinary proceedings or incomplete disciplinary proceedings. But given the expansive view taken by LAC regarding the Labour Court's jurisdiction, this no longer appears to make that much of a difference.

The LAC simply issued an order stating that the Labour Court does have jurisdiction to grant appropriate relief in relation to pending disciplinary hearings. The Court remitted the matter back to the Labour Court for any outstanding issues to be dealt with.

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An employee facing disciplinary charges specifically at a senior level will want to throw every technical defence to avoid the employer proceeding with the disciplinary inquiry. Here the Labour Appeal Court gives such employees the option to approach the Labour Court to stop such disciplinary inquiries. A worrying development for the efficiencies of disciplinary inquiries at an enterprise level.

Dismissal for making online remarks

CASE 2

CASE SYNOPSIS

In **Media Association of SA obo Mvemve v Kathorus Community Radio (2010) 31 ILI 2217 (CCMA)** the employee, a content manager on a community radio station, posted a statement on his Facebook page alleging that the Board of his employer was protecting that station manager, that the station manager was a criminal and that the employer should never have employed the station manager. A disciplinary enquiry followed and the chairperson of the enquiry recommended that the employee be dismissed. But the Board, taking a more lenient approach, decided not to implement this recommendation, they felt that the radio station, being a community station, should give the employee another chance.

Instead of being dismissed, the employee was given the option of apologising to the Board within 24 hours, apologising to staff, and posting a retraction of his allegations on his Facebook page. He was also to be issued with a final written warning.

Finally, the employee was also required to shut down his Facebook page after he had done so. These conditions were presented to the employee at a meeting where he was represented by a union official. But the employee failed to present the apologies concerned and two months later the Board decided to implement the decision of the chairperson and to dismiss the employee.

There was no dispute that the employee had posted the Facebook comments; but when it came to the dismissal that eventually followed, there was a disagreement. The employer's position was that the employee had failed to comply with the conditions set and the employee claimed that he had indeed complied with all the conditions and had taken all the steps required of him.

When it comes to taking disciplinary action against an employee for posting comments on a social networking site, the focus of the disciplinary charges will fall squarely on the nature of the comments and, to a lesser extent, perhaps, the effect these comments will have on workplace relationships. Dividing lines may be difficult to draw: while it is one thing to call a manager a criminal, it is something completely different for an employee to post messages of workplace anger, frustration, disappointment and even despair on one of these sites. Responding to employees' postings in online forums or social networking sites it is an immediate challenge that employers will need to be able to deal with effectively and consistently. But this may be harder to do than one would think, given the fact that most users seem to believe that what they do on a social networking site is beyond the domain of the employer. The employees dismissal was found to be fair.

WHAT THIS MEANS FOR YOU

Employees beware your employer pays you and expects loyalty towards the organisation that you work for. More and more employees feel that they have more “rights” than they actually do.

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