Unlocking labour laws

Workers and organisers have started to send labour law queries to *SALB*. Keep these queries coming as we are able to provide useful answers from some highly skilled and experienced labour lawyers – in this case from advocate **Robert LaGrange**.

A union member at my workplace was dismissed for insubordination. It was the first time he had been found guilty of this kind of misconduct. We referred the case to the CCMA and won. The commissioner said the sanction was too harsh for a first 'offence' of this kind. The employer is now taking the decision on review because it says the commissioner should have respected the employer's decision on the sanction. But surely, the commissioner is entitled to change a sanction if the commissioner thinks it was too harsh?

A 'win' in the CCMA is no guarantee of a 'win' if the matter gets taken on review.

A recent case went all the way to the Supreme Court of Appeal (SCA) on the issue of the correct sanction. The dismissed worker was a mine security guard who failed to conduct searches of workers properly, or at all, when they were leaving the mine. In 24 searches over a three-day period, he conducted only one search properly in accordance with compulsory search procedures, which required him to search everyone leaving according to the search procedure. On eight people he conducted no search at all. On 15 the search was not in accordance with the work's instruction. A video revealed that he allowed some people to sign the search register without conducting any search at all. The guard had 14 years service with a 'clean' disciplinary record. The company found him guilty of negligence and that his conduct could have caused it financial loss as theft of platinum was a serious problem.

At the CCMA a commissioner agreed that the worker was guilty but decided that dismissal was inappropriate. He reasoned that (a) the mine had suffered no losses (b) breaking the rule was not intentional (c) the level of honesty of the employee was something to consider and (d) the offence committed did not go to the heart of the trust relationship between employer and employee. The commissioner reinstated the worker with three month's pay and a written warning valid for six months. The company took this decision on review to the Labour Court.

The Labour Court agreed that the case did not warrant dismissal for a first offence, taking account of the worker's service and that no dishonesty was involved.

The matter then went on appeal to the Labour Appeal Court (LAC). The LAC was critical of the findings (a) to (d) of the commissioner, and accepted that the misconduct was serious. However, the LAC found that there was still enough basis to justify the commissioner's decision. The LAC held that the lenient sanction was justified because of the worker's long service and clean record.

The SCA however overturned the LAC decision on appeal. In particular, Cameron JA was critical of the Commissioner's failure to take account of the employer's decision on what was an appropriate sanction. The SCA praised earlier decisions of the LAC that had said a commissioner should be reluctant to interfere with the sanction imposed by an employer. Cameron JA stressed that under the LRA a commissioner's role is only to decide if that sanction was fair. The right to impose the sanction lies primarily with the employer. The only requirements are that the discretion must be exercised 'fairly'.

Unfortunately the Supreme Court did not expand on what it means

for an employer to decide on a sanction 'fairly', except to say the decision on sanction should not be arbitrary or implausible. Having spent so much space on emphasising that commissioners should be reluctant to interfere with sanctions imposed by employers, it is a pity that the court did not devote more effort to explaining when it would be appropriate to interfere with the sanction.

In practice, this decision will make it extremely hard for workers and unions to challenge what they believe are harsh decisions where the worker's guilt is accepted. So even if you succeed at the CCMA in obtaining a less harsh sanction in a case of dismissal for misconduct, if the employer has 'deep pockets' it will probably get it overturned on review in the light of this recent SCA decision in *Rustenburg Platinum Mines v. CCMA and Others.*

The SCA decision is the second major labour decision it has made since it assumed jurisdiction over labour matters that will be welcomed by employers but not by workers.

At this stage the decision has not been published but the full decision can be read at http://www.law.wits.ac.za/sca/

When a worker is accused of being under the influence of alcohol, must the employer give the worker a breathalyzer test to prove the worker was 'under the influence'?

There are generally two types of breathalyzer tests. One type uses crystals that change colour if the alcohol is detected on the person's breath. This test cannot show exactly how much alcohol is in the person's system, but does show the presence of alcohol. The other test measures electronically the amount of alcohol in the worker's system and shows the level of alcohol concentration.

If an employer does conduct a breathalyzer test and the test results indicate the presence of alcohol in the worker's system, that is enough evidence to establish the worker was under the influence of alcohol. The employer does not have to prove how much alcohol was in the worker's blood stream. It is enough to show that there was alcohol in his system to establish that the worker was 'under the influence' of alcohol. This means that a test that does not show the precise level of alcohol in a person's system is still good evidence in a case of being under the influence of alcohol.

What if the employer does not conduct any type of breathalyzer test or blood test?

If the employer has an established procedure *that requires* a breathalyzer or blood test then a failure to conduct the test might provide an opportunity to challenge the fairness of a finding that the employee was 'under the influence of alcohol'. The basis for this challenge would be that the employer has set a certain standard for establishing this type of misconduct and cannot deviate from it without good reason. This defence would not apply if the reason for not doing the test is that the worker refused to cooperate.

However, an employer might still prove a worker was under the influence of alcohol relying on eyewitness evidence of the worker's physical state at the time. So, evidence of the following can be used to prove a worker was under the influence of alcohol: the worker's speech was slurred, the worker was unsteady on his feet, his eyes were bloodshot.

Two recent cases relevant to this issue are *Exactics-Pet (Pty) Ltd v Patelia NO & others (2006) 27 IIJ 1126 (LC)* and *Moleveld and De La Rey 1001 Building Material (Pty) Ltd. (2006) 27 IIJ 1237 (CCMA).*

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