

PROCEDURAL FAIRNESS IN TERMS OF THE NEW CCMA GUIDELINES FOR MISCONDUCT ARBITRATIONS

What are the consequences of a failure to comply with an agreed or other disciplinary procedure?

The recently published CCMA Guidelines on Misconduct Arbitrations took effect on 1 January 2012. The guidelines are intended to assist commissioners in conducting misconduct arbitrations, but offer very useful pointers for employers, practitioners and others on how commissioners are required to deal with procedural and substantive issues in misconduct arbitrations and what kind of evidence might be required to challenge allegations of unfairness.

These guidelines deal with how an arbitrator should conduct arbitration proceedings; evaluate evidence for the purpose of making an award; assess the procedural fairness of a dismissal; assess the substantive fairness of a dismissal; and determine the remedy for an unfair dismissal.

The aim of the guidelines is to promote consistent decision-making in arbitrations dealing with dismissals for misconduct. This note aims to provide a brief summary of the guidelines' provisions dealing with the assessment of procedural fairness. A follow-up note will deal with the determination of substantive fairness of a dismissal.

There is no requirement that hearings should be formal and almost court-like

For a number of years now, the Labour Court has stressed that procedural fairness is not an end in itself, but a means to an end, i.e. to determine an employee's guilt and an appropriate sanction. Procedural non-compliance, the court has held, does not automatically mean that a dismissal is procedurally unfair: one needed to consider whether the extent of the non-compliance is such that it deprived the employee, in a material way, of the benefits of the *audi alteram partem* rule as encapsulated in item 4 of the Code of Good Practice: Dismissal.

The court's approach is now embedded in the new guidelines which, coincidentally, are binding on commissioners and cannot be deviated from except if good reasons exist. The guidelines state (par 60):

'The Code [of Good Practice: Dismissal] does not contemplate a criminal justice model incorporating formal charge sheets, formal procedures for the leading and cross-examination of witnesses, formal rules of evidence, legal representation and independent decision-making. The Code contemplates a flexible, less onerous approach'.

Which disciplinary procedure should the arbitrator refer to when deciding whether a dismissal was procedurally fair?

If there is a workplace disciplinary procedure in place, an arbitrator must have regard to *that* workplace procedure when assessing the fairness of the procedure followed by the employer in dismissing the employee. The procedures may be contained in a collective agreement or a contract of employment, or may be unilaterally established by the employer.

If there is *no* workplace disciplinary procedure, item 4 of the Code of Good Practice: Dismissal ('the Code') must be applied subject to any departures that may be justified by the circumstances.

What are the consequences of a failure to comply with an agreed or other disciplinary procedure?

If a commissioner finds that the employer did not comply with an existing internal procedure, he/she should not merely on the basis of that find that the procedure was unfair. The commissioner must assess the fairness of the process that was actually followed against the requirements of item 4 of the Code. Only if the deviation is 'material' should a hearing be found to have been procedurally unfair.

For example, if the internal procedure provides for 48 hours' notice of a hearing to be given, but only 24 hours' notice was actually given, the commissioner must determine whether in the circumstances of the case 24 hours' notice constituted 'reasonable notice' (as required by item 4) and not hold that the hearing was unfair simply because of inadequate notice.

This does not give employers carte blanche to disregard the provisions of its disciplinary procedures, but it does allow for some flexibility when it comes to disciplinary hearings. If met with an allegation that it did not comply with its own procedures, the employer will be able to try and show that while this may be so, the procedure that was in fact followed was nevertheless still fair as it complied in material respects with the requirements of item 4 of the Code.

The employer may be slapped with an arbitration fee and a cost award by the commissioner if the procedure is found to be procedurally unfair.

On a practical note

If an employee in a referral to the CCMA or bargaining council alleges procedural unfairness, employers should ensure that they can either prove that the hearing was compliant with internal procedures or, if it was not, that they have evidence to show that the deviation did not deprive the employee of any of the rights provided for in item 4 of the Code. Appropriate questions should also be asked of the employee in cross-examination to demonstrate that the employee did not suffer any prejudice.

Barney Jordaan & Andrea de Jongh

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