

SUBSTANTIVE FAIRNESS IN TERMS OF THE NEW CCMA GUIDELINES: MISCONDUCT ARBITRATIONS

The CCMA guidelines for commissioners regarding misconduct arbitrations, effective from 1 January 2011, 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 guidelines supplement the provisions of the Code of Good Practice: Dismissal ('the Code'). The aim is to promote consistent decision-making in arbitrations dealing with dismissals for misconduct.

This contribution deals with the issue of substantive fairness.

How is guilt determined?

The guidelines confirm the provisions of the Code provides as far as determining guilt is concerned. Item 7 of the Code provides that the commissioner should consider whether or not -

- the employee contravened a rule or standard regulating conduct in, or relevant to, the workplace;
- if a rule or standard was contravened, whether
 - the rule was a valid or reasonable rule or standard;
 - the employee was aware, or could reasonably be aware of the rule or standard; and
 - if the rule or standard has been consistently applied by the employer.

This entails a factual enquiry into the substantive fairness of a dismissal. Evidence (verbal or documentary) or an admission from the employee is required to prove each of the elements mentioned above. Employers will have a much easier time proving their case at arbitration if they have written policies and codes in place regulating behaviour at the employer's place of business. These policies and codes must be readily available to all employees in a manner and form easily accessible and understandable. By providing appropriate induction and orientation training to all employees at the commencement of their employment, employers will have no difficulty in proving employee awareness of their codes and policies. It is trite that the employer should document steps taken against previous contraventions of the rule or standard by other employees. This will provide proof of consistent application of the rule or standard.

How is a sanction determined?

Because the Code of Good Practice: Dismissal promotes progressive discipline, it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, willful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal even in the event of a single contravention. In general the gravity of the contravention will determine the appropriate sanction.

The guidelines offer a very useful approach to the determination of an appropriate sanction. This involves two enquiries. The first is an enquiry into the sanction as a response to the contravention of the rule, i.e. relating to the gravity of the transgression, and the second is one into the circumstances of that contravention.

To support a dismissal, the employer will have to lead evidence about the seriousness of the misconduct; this should include evidence regarding the risk that the contravention posed to the employer and, the risk of further instances of misconduct in the future and the impact thereof on the employer's business. The circumstances of the transgression, e.g. the fact that it was planned, or that the employee failed to cooperate in investigations, as well as the cumulative effect of the employee's disciplinary record could be important aspects to highlight in evidence. It will not be sufficient for an employer just to argue at the end of the case about the impact of the transgression: actual evidence must be provided during the presentation of the employer's case.

An interesting aspect of the guidelines is that it specifically uses the risk management analogy as an aid to determine sanction. According to the guidelines, dismissal should not be seen as a punishment, but as a rational response to risk management in the workplace. The employer should therefore highlight why the employee's circumstances, the nature of the position the employee was appointed to and the circumstances of the contravention justifies a sanction of dismissal as a means of mitigating the risk of reoccurrence.

What role do an employee's personal circumstances play in deciding on a sanction?

According to the guidelines, personal circumstances should be work related, e.g. long service, a clean disciplinary record and a disability caused by an accident at work or the effect of dismissal on an employee close to retirement. Issues such as the size of the employee's family are not work related and therefore carry little, if any weight.

However, aggravating circumstances may have the effect of justifying a more severe sanction than one prescribed in the code or normally imposed by employers either generally or in the sector, or may offset personal circumstances which may otherwise have justified a different sanction. Employers should try and anticipate the various work related mitigating factors the employee will present at the disciplinary hearing (relating to the nature of the job, the circumstances of the contravention and the employee being close to retirement age or length of

service and clean disciplinary record). If possible, the employers should attempt to offset the employee's mitigating factors when presenting its aggravating factors by highlighting the risk of further instances of misconduct the employer might face if the employment relationship is continued.

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