

The importance of timely disciplinary action

Some employers make the mistake of delaying instituting disciplinary action without any reasonable justification. The consequences of this delay can be far reaching as confirmed in the recent matter of *PSA obo Bawa / Department of Social Services & Population Development [2009] 6 BALR 575 (PHSDSBC)*.

The employee was charged with misconduct (related to dishonesty) for an incident that occurred during August 2003. The employee was only presented with a disciplinary charge sheet on 5 May 2004, almost a full year after the incident had occurred. She was subsequently dismissed on 8 November 2004. Dealing with the procedural fairness of the dismissal the bargaining council ('the council') confirmed that it was trite law that an employer "*must effect discipline in a prompt manner*". The Oxford Dictionary defined "*prompt*" as "*act without delay*". The council further held that the legal position that disciplinary action must be taken promptly or within a reasonable time after the employer became aware of the act constituting misconduct has been confirmed in a number of cases of, amongst others, the Supreme Court of Appeal and the Labour Court. These courts have held that an unexplained or unjustified delay in instituting disciplinary action was grossly unfair and vitiated the decision to dismiss.

In the present matter the employer did not provide any reasons for the delay in charging the employee with misconduct. The commissioner held that there was an evidentiary burden on the employer to explain or justify this delay. Where employers were slow in instituting disciplinary action, the inference could be drawn that they in actual event waived their right to do so or that they in fact reconciled themselves with the continuation of the employment relationship with the specific employee. In the present matter it was not fair to proceed against the employee and to dismiss her. The dismissal was held to be both procedurally and substantively unfair for this reason.



Employers would therefore be well-advised to keep the following principles in mind when it comes to instituting disciplinary action:

1. act promptly, i.e. ensure that the investigation is done as soon as possible and that the employee is provided with the charges (preferably in the form of a charge sheet) and called into a disciplinary hearing as soon as reasonably possible; and
2. if there is some delay in instituting disciplinary proceedings, the employer should be able to provide reasons for this delay and proof that the delay was not unreasonable.

However, employers should guard against acting prematurely with the result that a proper investigation is sacrificed and that any finding of guilty and a sanction of dismissal could be set aside due to the lack of a proper case being presented. Where there is therefore some delay in the process, the employer should be able to prove that the delay was for a valid reason and as such reasonable and justifiable.

September 2009