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Notices to attend a disciplinary enquiry - stating the facts is sufficient

by Jan Norval

The employee discipline process generally starts with an employee being given notice to attend a disciplinary enquiry. This notice usually sets out what act of misconduct the employee is alleged to have committed. The manner in which the allegation is framed is important, as it forms the basis of the subsequent disciplinary enquiry – the employee knows what allegations he or she faces and can prepare for the disciplinary hearing properly, and also provides direction for the chairperson of a disciplinary enquiry.

The Labour Appeal Court ("**LAC**") has, in recent judgments, indicated that overly formal notices to attend disciplinary enquiries have resulted in arbitrators following misguided enquiries detracting from the issue at hand: whether misconduct was committed.

In ***Mashigo v South African Police Service and Another***, the LAC dealt with the case of a policeman, Mr Mashigo, who was dismissed for assault and the attempted murder of two civilians. The two attempted murder charges referred to "the common law or statutory offence of attempted murder". He was found guilty of all three offences and dismissed. He alleged that he had been unfairly dismissed and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the "**CCMA**"). The commissioner accepted that, while off duty and driving a car, Mashigo stopped to talk to a relative, Mr Ntshane. An argument ensued between the two, which culminated in Mr Mashigo slapping Mr Ntshane, and pointing his firearm at Mr Ntshane. Thereafter, Mr Sefumba and Mr Goso arrived on the scene. Mr Mashigo fired several shots at them, shooting Mr Sefumba in the back and Mr Goso in the arm.

Mr Mashigo's version of events was that he had fired warning shots, which ricocheted, hitting Mr Sefumba and Mr Goso. The arbitrator accepted this version and found that Mr Mashigo's dismissal was substantively unfair, because he had not had the necessary intention to kill Mr Sefumba or Mr Goso. On review, the Labour Court found that the arbitration award fell well outside the ambit of reasonableness, and that the arbitrator had shown "little comprehension of the employee relations context". The award was set aside and referred back to the CCMA for a hearing *de novo*.

Mr Mashigo appealed to the LAC. His appeal was dismissed. Of interest was the comment made by the LAC with regard to the formulation of the charges levelled against Mr Mashigo:

"[14] The Labour Court cannot be faulted for its finding that the arbitration award evinced 'little comprehension of the employee relations context'. The arbitrator was faced with serious allegations of misconduct raised against the appellant. While these allegations had been framed in the language of a criminal charge, the task of the arbitrator in a hearing *de novo* was to determine the fairness of the appellant's dismissal, having regard to the allegations against him and the standard of conduct required of the appellant in the position of police officer. This enquiry was to be undertaken without adherence to undue formalism.

[15] The arbitrator, however, narrowed the focus of his enquiry to whether it had been proved that the appellant had the requisite intent to commit the charge of attempted murder. In doing so, the arbitrator misconstrued that the nature of the enquiry before him concerned a disciplinary complaint, which required the allegations raised to be considered against the employer's disciplinary code and the standard of conduct required of the appellant. In narrowing the enquiry to a focus on whether intent to commit attempted murder had been proved, and not whether the appellant's conduct constituted a breach of the SAPS code of conduct, the arbitrator adopted an unduly formalistic approach to the proceedings."

The Mashigo judgment highlights that even if the allegation against an employee is criminal in nature, the allegations against the employee need not be drafted as if they will be used at a criminal trial. The judgment also highlights that if allegations are drafted in an unnecessarily formal manner and try to characterise misconduct in a criminal manner, this may unintentionally skew the enquiry which a chairperson or arbitrator may undertake.

In ***Malapalane v Glencore Operations South Africa (Pty) Ltd (Goedevonden Colliery) and Others***, an employee was dismissed for misrepresenting information regarding the grade of coal produced by his employer. This had resulted in significant losses in revenue. He challenged the fairness of his dismissal in the CCMA. The commissioner found that the employer had failed to demonstrate how the employee misrepresented information and had failed to show an intention to misrepresent on the part of the employee. The dismissal was found to be unfair. The Labour Court set aside the award on review, but the employee was granted leave to appeal to the LAC.

The LAC dismissed the appeal. It found that the arbitrator had erred in deciding that it had been necessary for the employer to show that the employee had had an intention to misrepresent the quality of the coal. One of the issues considered by the LAC in dismissing the appeal was the formulation of disciplinary charges. It found that the arbitrator misconceived the nature of the enquiry by overlooking that the allegation was a disciplinary complaint, and not a criminal complaint. The LAC reiterated that charges do not have to be strictly framed in accordance with the provisions of a relevant Act. It is adequate that the allegations be set out with sufficient clarity to be understood by the employee.

These two recent judgments of the LAC reiterate that notices to attend disciplinary enquiries need not be drafted in a formalistic or legalistic manner. All that is required is that the employer formulates the charge in such a manner so that the employees know and understand what form of misconduct he or she is alleged to have committed. Unnecessary formalisation or characterisation in the notices to attend disciplinary enquiries, or the use of legal jargon, have the real likelihood of skewing the enquiry unnecessarily. Also, arbitrators and chairpersons should also not adopt too formalistic an approach, and should not adopt an approach that is akin to a criminal trial.

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