

# WIKUS VAN RENSBURG

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### NEWSLETTER 10

#### **Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC)**

*Disciplinary code – Status – Provision for progressive sanctions in code nothing more than guideline – Employer permitted to dismiss employee in appropriate circumstances even if last formal final warning has lapsed, notwithstanding requirement in disciplinary code that offence requires warning before dismissal.*

*Disciplinary procedure – Warnings – Misconduct – Prior warnings – Employer may dismiss employee even if last formal final warning has lapsed, notwithstanding requirement in disciplinary code that offence requires warning before dismissal.*

*Dismissal – Consistency – Evaluation of consistency challenge entails careful comparison of gravity of misconduct in each case and respective employees' disciplinary records, as well as finding that employer was aware of other case.*

*Dismissal – Misconduct – Appropriate penalty – Employer entitled to take into account cumulative effect of employees' disciplinary record even when employee is not on final warning – Dismissal for final act of gross negligence fair if employee was warned and counselled.*

*Dismissal – Misconduct – Gross negligence – Employee committing negligent act after repeated warnings and counselling – Employer entitled to dismiss even in absence of final warning.*

*Dismissal – Poor work performance – Employee with appalling record of inefficiency and negligence for which numerous warnings issued failing to prove that he had not been warned and counselled sufficiently – Dismissal fair.*

#### **Summary**

The appellant, a fitter, was dismissed for gross negligence after a string of warnings for incompetence, negligence or inefficiency. A CCMA commissioner upheld his dismissal, as did the Labour Court on review. The appellant argued in both the review proceedings and on appeal that the commissioner had erred by taking into account a lapsed final warning against him, and that the employer had acted inconsistently.

The court held that employers are entitled to dismiss employees in appropriate circumstances even if there is no final warning on their record. Although there was some doubt about whether a final warning had just expired at the time of the final offence, the appellant was on a current warning at the time, the effect of which was to place him on terms. Moreover, the appellant had a deplorable record, which the employer was entitled to consider when deciding on appropriate action for the final transgression.

The court noted further that the employer's disciplinary code provided for a "hierarchy" of progressive sanctions. In cases of repetitive negligence or inefficiency the code provided for written and final written warnings and dismissal where all else failed. Like the Code of Good Conduct: Dismissal, the disciplinary code was expressed in general terms, and specifically provided that it was a guideline.

Noting further that in cases of poor work performance, employees must be counselled and given an opportunity to meet required standards, the court held that the appellant had been properly trained and counselled, and that he was aware of the standards required of him. Furthermore, the last in the series of warnings given to the appellant had been intended to warn him that he might be dismissed if he relapsed.

Turning to the appellant's plea of inconsistency, the court held that the parity principle requires that employees be measured by the same standards, and that discipline should not be capricious or give rise to a suspicion of bias. When cases are compared for the purpose of gauging consistency, care must be taken to ensure that the gravity of the misconduct in each case is evaluated and the disciplinary record of each employee assessed. The arbitrator had taken these considerations into account when rejecting the inconsistency challenge. Furthermore, the appellant had not raised inconsistency at his internal appeal, and the evidence indicated that at the time, the employer was unaware of the other case.

As to the appellant's argument that he should have been transferred to another department with less onerous duties, the court noted that the evidence indicated that no other department was prepared to accept him because of his poor work record.

The court accordingly held that the appellant had failed to prove that the arbitrator had committed any reviewable irregularity. The appeal was dismissed with costs.

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