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NEWSLETTER 11

Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC)

Material error of law sufficient ground for review. Arbitration award – Review – Commissioner applying criminal law standards when assessing substantive and procedural fairness of dismissal – Award set aside.

Bias – Test for bias adopted by criminal courts not applicable in internal disciplinary proceedings – Fact that presiding officer is subordinate to initiator not in itself sufficient to prove reasonable apprehension of bias Disciplinary procedure – Form – “Criminal model” of disciplinary procedure no longer applicable to internal disciplinary proceedings by employers – Employers merely required to conduct investigation, give employee or representative opportunity to respond to allegation after a reasonable period, to take decision and to give the employee notice of decision. Dismissal – Theft – Employee caught on videotape talking to colleague who was stealing goods – Video sufficient to prove on balance of probabilities that employee was accomplice to theft.

Sections of the LRA considered:

Section 203
Schedule 8, item 4

Summary

The applicant, a facility for the care of the mentally and physically disabled, dismissed the respondent employee after finding that she was implicated in theft. She referred a dispute to the CCMA. At the arbitration, the applicant relied on a videotape which revealed another employee stealing a plastic bag containing a pair of boots in the applicant’s presence. The applicant argued that the only inference to be drawn from the videotape was that the respondent employee was also involved in the theft because she was seen facing the thief at the time and talking to her, and that the employee’s “body language” indicated involvement. The respondent commissioner found that the video footage did not conclusively prove the employee’s involvement because her face could not be seen and her movements did not necessarily indicate involvement. The commissioner also found that, since the bag had been returned, the conclusion could not be drawn that a theft had actually occurred. The commissioner also found that the dismissal was procedurally unfair because the presiding officer at the disciplinary inquiry was subordinate to the initiator, which created a “perception of bias”. The commissioner ordered the applicant to reinstate the employee.

The **Court held** that when determining whether an employee is guilty of misconduct the proper test is proof on a balance of probabilities. While purporting to apply that test, the commissioner had in fact applied the test of proof beyond reasonable doubt. This was in itself a ground for review.

As to the commissioner’s finding of procedural unfairness, **the Court noted** that the authorities on which the employee relied to support the argument that the subordinate position of the presiding officer created a “reasonable apprehension” of bias all preceded the enactment of the current LRA. While the Act is silent on the contents of the notion of procedural fairness, the nature and extent of that right is spelled out in the Code of Good Practice: Dismissal in Schedule 8. The Code specifically states that the investigation preceding a dismissal “need not be a formal inquiry”. The Code requires no more than that before dismissing an employee the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision. Informal disciplinary procedures in the workplace also balance the interests of employees and employers, as required by the Constitution. This is the standard commissioners are required to apply when they judge the procedural fairness of dismissals, unless the parties have agreed to more rigorous procedures or, perhaps where administrative law applies, which was not the case in casu.

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