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## **NEWSLETTER SEPTEMBER 2010**

### **Samancor Tubatse Ferrochrome v MEIBC & others**

#### **[2010] 8 BLLR 824 (LAC)**

Disciplinary procedure – Incarcerated employee – Employer informing employee held in police custody for six months that he had been dismissed, then holding “post dismissal” inquiry on employee’s later release – Procedure unfair as employee denied right to state case before dismissal and because later hearing merely ex post facto justification of earlier dismissal, chaired by same manager who had taken decision to dismiss – Dismissal procedurally unfair.

Dismissal – Incapacity – Statutory notion of “incapacity” not confined to inability to work because of sickness, injury or poor work performance – Any reason that prevents employee from working potentially constituting incapacity that may justify dismissal – Dismissal of employee after six months’ incarceration by police commercially justifiable and fair.

### **Summary**

After being held in police custody for 150 days on suspicion of having been involved in an armed robbery, the respondent employee was dismissed. The respondent was advised of his dismissal by a letter addressed to the police station at which he was being held, and a “post dismissal” hearing was convened after the employee’s release some four months later. At the time, a criminal case against the employee was still pending. The dismissal was confirmed on the basis that the company

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could not be expected to keep the employee's post open indefinitely and because this was the second occasion on which the employee had missed work through being arrested. The respondent arbitrator found the dismissal substantively unfair as the employee had missed work due to circumstances beyond his control, and procedurally unfair because the employee had not been heard before his dismissal. These findings were upheld by the Labour Court on review.

The Court noted that the letter informing the employee of his dismissal stated that he had been dismissed for "operational incapacity" as he was physically unable to tender his services. The Court noted further that both the arbitrator and the court a quo had found that the notion of "incapacity" is confined to incapacity arising from ill health, injury or poor work performance, and both the arbitrator and the reviewing court had concluded that the charge against the employee fell outside the defined scope of that term. The Court held that so constricting the notion of incapacity was not in accordance with existing jurisprudence, which regards inability to work through any incapacitating cause as warranting dismissal in appropriate circumstances. Whether a dismissal for incapacity, so understood, is unfair depends on the facts of each case. In the present case, the employer had no idea how long the employee would be incarcerated, and there was a commercial need to fill the employee's position. While greater tolerance may be expected of a large employer with "deep pockets," there was no basis for elevating to an inflexible rule the proposition that incapacity for reasons outside an employee's control cannot be a valid cause for dismissal. Because of this error, the award was open to review. On the facts of the case, the arbitrator should have found that the dismissal was substantively fair.

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Turning to the arbitrator's finding that the dismissal was procedurally unfair, the Court found that, while it may have been impracticable for the employer to convene a disciplinary hearing while the employee was incarcerated, his being informed that he had been dismissed meant that he had been denied an opportunity to state his case. Furthermore, the later hearing was merely an attempt to rationalise the earlier decision ex post facto. The hearing had also been chaired by the same manager who had taken the earlier decision. The employee's dismissal was therefore procedurally unfair.

The employee was awarded compensation equivalent to six months' remuneration.

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