

DOUBLE JEOPARDY

1. Introduction

Is a municipality compelled to accept the ruling made by a disciplinary appeal tribunal?

2. Background

An employee was charged with two counts of misconduct. The case was heard by a disciplinary tribunal. The employee was found guilty on one of the charges and dismissed. After the hearing the employee appealed against the ruling of the disciplinary tribunal. An appeal hearing was scheduled. On appeal the finding of the disciplinary tribunal was upheld but penalty was overturned and substituted for a written valid for a period of six months.

The Municipality was not pleased with the outcome of the appeal hearing and considered the possibility of conducting a second hearing.

3. Relevant case law

3.1 Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC)

The facts of the case were briefly as follows: A number of employees of Carlton Paper were involved in a fight. Management investigated the incident and instituted disciplinary proceedings against four of the employees. Eventually three of the four accused employees were found guilty and given final written warnings. No appeals were lodged against the penalty. However, one of the trade unions (PWAU) whose members were involved in the disciplinary case objected that the accused employees belonging to the other union, the Amalgamated Engineering Union (AEU), had not been dismissed.

Two months later the management announced that, after hearing representations from PWAU, it had decided to cancel the original disciplinary enquiry and to institute a new enquiry. After the second hearing the three employees who had originally been given a final written warning were dismissed. AEU, on behalf of two of the dismissed employees, referred the matter to the industrial court.

The court had to decide whether the original investigation and enquiries were open to review in the manner and at the time that this was in fact done. The court was of the opinion that the first investigation and enquiry had been held in accordance with company policies. In handing down judgement the court made the following remarks that are relevant to the matter under discussion:

"That the initial tribunal might have come to a finding more lenient than the higher management or PWAU might have wished does not detract from its validity. The court therefore doubts whether there was in fact sufficient justification for the managing director to 'cancel' the original investigation and enquiry ...

... This court considers that it is unfair for senior management two months after a decision has been made by a properly constituted tribunal set up in terms of the company's disciplinary procedure to set it aside and to subject the employees concerned to a new enquiry, at least where the facts have been adequately canvassed and the

procedures in the company's code on the face of them followed. The outcome might not have been to the liking of PWAU. It might not indeed have been to the liking of senior management. The industrial peace at the respondent's works might well have been disturbed by the outcome of the original enquiry, but peace could not in fairness be restored by subjecting the two individual applicants to an unfair labour practice which prima facie is what the company's actions in setting aside the original enquiry and holding a new one appears to the court to have been. "(at 596AE)

It should be noted that the Court did not impose a general prohibition on the ability of the employer to rehear a case. A rehearing may take place where the facts had not been adequately canvassed at the original hearing, where the tribunal had not been properly constituted, or where the original hearing was not in accordance with company policies.

3.2 Maliwa v Free State Consolidated Gold Mining (Operations) Ltd SA (President Steyn Mine) (1989) 10 ILJ 934 (IC)

The original disciplinary enquiry found the charged employee guilty of assault and issued a final written warning. The employee was unhappy with the decision but decided not to exercise his right of appeal. Members of management were also unhappy with the decision and ordered a rehearing. The rehearing was conducted in the same manner as the first hearing and the employee was found guilty of assault and dismissed. This decision was upheld on internal appeal.

However, the industrial court found that the dismissal was unfair and that both the chairman of the second hearing and of the appeal proceedings had been biased. The court considered whether it was fair for the employer to set aside the original decision and to hold a new enquiry where no justification existed. In its decision the court referred to the **Amalgamated Engineering Union** decision cited above. It is interesting to note, however, that the court accepted that the setting aside of a decision and the rehearing of a matter could be justified in certain circumstances.

3.3 Botha v Gengold Ltd (1996) 4 BLLR 441 (IC)

A senior manager of Gengold was accused of committing certain irregularities with regard to travelling expenses. Disciplinary proceedings were instituted; he was found guilty and given a final written warning. The employer's audit committee that had recommended the institution of disciplinary procedures against the employee was unhappy with the decision on the grounds that in previous cases employees who were found guilty of this type of offence had usually been dismissed. It took the view that the disciplinary procedures followed had been irregular in terms of the company's disciplinary code.

New disciplinary proceedings were convened; the employee was found guilty and dismissed.

The court dealt with the question whether the original disciplinary proceedings were, in fact, irregular or unfair. The following extract from the judgement is important:

"The respondent's (Gengold's) disciplinary code does not make provision for the audit committee or any other official to set aside the finding of a disciplinary hearing. To allow such procedure would amount to powers of review, which would be unthinkable as it could lead to never-ending enquiries against an employee. Bearing in mind that a disciplinary enquiry remains a matter of fairness it is evident that a second enquiry on the same facts cannot be allowed, as it will amount to double jeopardy. We have

come to the conclusion that it was unfair for the respondent to subject the applicant to a second enquiry. "(at 459E-H)

3.4 Strydom v USKO Ltd (1997) 3 BLLR 343 (CCMA)

The employee had been charged with dishonesty, found guilty and had been given a final warning. A senior manager was unhappy with the outcome and decided to "review" the disciplinary decision. He called the employee and his representative to a meeting where they were informed of the manager's decision. After the employee and his representative had walked out of the meeting, the manager dismissed the employee.

The Commission for Conciliation, Mediation and Arbitration (CCMA) found that the dismissal, on the facts, was substantively unfair. The CCMA considered the question of the manager reviewing the decision of the chairman of the disciplinary enquiry. It rejected the argument that the employer's policies provided for such a review. It then went on to state that:

"To allow such a procedure, furthermore, would be tantamount to vesting powers of review in the hands of senior management; such empowerment would indeed be unconscionable since it would be nothing but a second enquiry against an employee ... The disciplinary enquiry is a matter of procedural fairness and any further enquiry, under the subterfuge of a review, on the same allegations or facts, cannot be countenanced since it exposes the employee to double jeopardy ...

The present arbitration proceeding is not concerned whether the original penalty imposed by the chairman of the disciplinary enquiry on the Applicant (Strydom) was adequate or not. From the Applicant's point of view the enquiry was conducted in a bona fide manner and its findings had been accepted by him. It was procedurally and substantively fair, therefore, once that was the end of the matter as far as he was concerned and any further enquiry under the guise of a review was unfair ... I conclude that it was unfair for the Respondent to subject the Applicant to review proceedings in the form of a meeting ... It was ultra vires the disciplinary code and invalid, accordingly the Applicant's dismissal was substantively and procedurally unfair. "(at 35I G -3.51H)

3.5 Branford v Metrorail Services (Durban) & others (DA 19/2002)

The Labour Appeal Court recently considered the application of the double jeopardy rule and appears to have relaxed the application of the rule, to some extent at least.

The facts of the case were as follows: During the course of August 2000 Metrorail's Financial Accounts Manager discovered irregularities in certain invoices that she had been inspecting. Mr Branford was implicated in the irregularities. After conducting further investigation, the Financial Accounts Manager informed her superiors of her conclusions and the Regional Manager sanctioned an investigation.

Before the investigation ordered by the Regional Manager was completed and a report issued a meeting took place between Branford, his immediate superior, a Mr Palmer, as well as other managers. During the course of this meeting, he was given a "dressing down" and a recorded oral warning was imposed. This relatively lenient disciplinary sanction appeared to be influenced by the fact that Branford's work performance had been excellent.

Subsequently the investigators concluded their investigation and submitted their report. From the report it was evident that Branford had made eight fraudulent petty cash claims amounting to some R 834.00. The alleged fraud involved forging the authorising manager's signature and making false statements. The report recommended that Branford be charged with fraud, forgery and dishonesty.

Having received the report, Branford was formally charged and a disciplinary inquiry convened. During the enquiry Branford argued that he had already been disciplined in respect of the alleged misconduct. However, the chairperson of the hearing held that he was not being disciplined twice for the same incidents of misconduct because the disciplinary code provided for more severe penalties for misconduct. At the conclusion of the enquiry Branford was found guilty and dismissed.

In the CCMA the arbitrator invoked the double jeopardy rule and found the dismissal was unfair because Branford had been disciplined twice for the same disciplinary infringements. He was reinstated without retrospective effect.

Metrorail took the arbitration award on review. The Labour Court upheld the review application. It found that the arbitrator did not take into account that the employee was subjected to formal disciplinary processes for fraud, but when the oral warning was given it was for a mere irregularity. It went on to state that –

"... the arbitrator committed a gross irregularity in not taking into account the fact that the first sanction by the line manager was without any charge being proffered against the third respondent. It resulted, from a discussion regarding the irregularities. No charges were proffered against the third respondent. I would have taken a different view, if there were charges proffered against the third respondent and that, as a result of these charges, the line manager gave the respondent a verbal warning. When the proper disciplinary hearing was held the third respondent was subjected to three charges and in my view that was a proper hearing that was held by the applicant. "

The Labour Court's judgement was upheld on appeal in a majority judgement of the Labour Appeal Court (LAC).

In the LAC attention was directed to an earlier LAC decision in BMW (SA) (Pty) Ltd v Van den Walt [2000] 21 1U 113 (LAC). In BMW the following principles were set –

- Whether or not a second disciplinary inquiry may be opened against an employee would depend on whether, in all the circumstances, it was fair to do so.
- The principles of *autrefois acquit* or *res judicata* should not be imported into labour law.
- In labour law fairness, and fairness alone, is the yardstick.

The above was subject to two cautionary remarks, as follows –

- A second inquiry must be permitted in terms of the employer's disciplinary code.
- It would probably not be considered fair to hold more than one disciplinary inquiry save in rather "exceptional circumstances".

4. Conclusion

Back to the question posed in the introduction: Is a municipality compelled to accept the ruling made by a disciplinary appeal tribunal?

Review of the decision will require that the Municipality have to subject the employee to a second disciplinary hearing. The intended review of the ruling in the appeal case will probably be unfair for the following reasons –

- On the face of it, it appears that the employee was subjected to proper and fair disciplinary hearing. Subsequent to the disciplinary hearing an appeal hearing took place. It appears that the appeal hearing was properly constituted and conducted.
- In terms of the SALGBC Disciplinary Code Collective Agreement the presiding officer of the disciplinary appeal tribunal has the power to confirm or set aside any decision, determination or finding and to confirm, set aside or reduce any sanction imposed by the disciplinary tribunal. The only limitation placed on the disciplinary appeal tribunal is that it may not impose a more severe sanction if he/she feels that more severe action was warranted.
- Rehearing the matter will only be allowed if it will in all circumstances be fair to do so. With regard to this issue, the question remains in which circumstances it will be fair to subject an employee to a second hearing? The test that the Municipality should apply to conclude this question is the same as that for reviewing an arbitration award, namely –
 - the disciplinary appeal tribunal committed misconduct;
 - the disciplinary appeal tribunal committed a gross irregularity in the conduct of the appeal proceedings;
 - the disciplinary appeal tribunal exceeded its powers; or
 - the outcome of the appeal hearing was improperly obtained.

In addition, a second enquiry can only be hold if -

- a second inquiry is permitted by the disciplinary code; and
- there clearly are exceptional circumstances that prompt the rehearing of the matter.

If the abovementioned criteria are used to assess the employee's case a fair reason why the decision of the disciplinary appeal tribunal should be reviewed or changed could not be found.