What constitutes exceptional circumstances when interdicting disciplinary action?

By Tracy Robbins

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When should the Labour Court prevent an employer from exercising its right to take disciplinary action against employees? In *Booysen v Minister of Safety and Security [2011] 1 BLLR 83 (LAC)*, the Labour Appeal Court stated as follows:

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"... the Labour Court has jurisdiction to interdict any unfair conduct, including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive." [own emphasis]

On 18 October 2017, in the matter of *Golding v Regional Tourism Organisation of Southern Africa and Others [case no J2501/17]*, the Labour Court provides guidance on what constitutes "exceptional circumstances" when interdicting disciplinary proceedings.

On 4 September 2017, the employer's board of directors purportedly resolved to institute disciplinary proceedings against the employee. The employee instituted urgent proceedings to stay the disciplinary action pending a High Court application to declare unlawful or invalid, and set aside, the resolutions taken by the board.

The requirements for interim relief of this nature are (i) the existence of a prima facie right, (ii) the apprehension of irreparable harm, (iii) the absence of alternative relief and (iv) the balance of convenience.

The employee submitted that should the disciplinary hearing proceedings continue and he be dismissed, the outcome of the High Court application would become moot and purely academic.

Regarding alternative relief, the employee submitted that the Labour Relations Act 66 of 1995 (LRA) does not make provision for applications to challenge the unlawfulness of resolutions instituting disciplinary proceedings. The Court disagreed with the employer's contention that even if dismissed, the employee can challenge his dismissal at the CCMA.

Furthermore, the employee submitted that should the relief be granted, the employer will not suffer any undue prejudice as it would still have recourse to discipline him after the High Court hearing.

The Court held that whilst the employee may have remedies in the LRA, this will not address the injustices that he will suffer should the High Court find the resolutions unlawful and invalid.

The Court further held that its failure to intervene would result in an injustice that would not be addressed by any subsequent unfair dismissal remedy and that the employee had thus shown that exceptional circumstances exist for the Labour Court to intervene and grant the relief sought.

The judgment highlights one set of exceptional circumstances. There are bound to be other examples. The principle remains, though, that the court will not lightly interfere with an employer's prerogative to discipline, even dismiss, staff. Our employment legislation, tribunal and courts provide more than adequate remedy to employees aggrieved by the conduct of employers.

In exceptional circumstances, though, the court will come to the assistance of an employee where these remedies may provide cold or academic comfort only.

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