



NTEU at NMMU



A second bite at the cherry may not taste as sweet

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Employers, dissatisfied with the outcome of a disciplinary hearing, often wonder if a harsher sanction can be imposed in an internal appeal hearing.

In the recent case of *Marina Opperman v CCMA and Others* (C530/2014 [2016] ZALCCT 29 (17 August 2016), the Labour Court was tasked with determining whether this was permissible.

The employee, Ms Opperman (**Opperman**) (who had an exemplary disciplinary track record with her employer for the previous ten years), was required to undergo a breathalyser test on the morning in question. She had consumed alcohol the previous night and tested positive for being under the influence of alcohol.

As a result, Opperman was called to attend a disciplinary hearing, where the employer alleged that she had contravened the disciplinary code by being under the influence of alcohol at work. She was found to have committed the misconduct as alleged. The chairperson issued Opperman with a severe written warning, which was valid for 12 months.

Opperman was displeased with the sanction imposed and lodged an internal appeal. The appeal tribunal took heed of Opperman's request to adjust the sanction but, imposed a harsher sanction of dismissal.

Opperman referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, where the Commissioner found Opperman's dismissal to be substantively fair, but procedurally unfair. In disagreement with the Commissioner's finding that the dismissal was substantively fair, Opperman took the Commissioner's award on review to the Labour Court.

The Labour Court considered the employer's disciplinary code with regard to the powers of the appeal chairperson. The disciplinary code did not provide that the appeal chairperson may reduce or increase the sanction imposed in the initial disciplinary hearing. In terms of the employer's disciplinary code, the appeal chairperson may only consider whether the disciplinary hearing was procedurally and substantively fair and whether further evidence is required.

The Labour Court considered the judgment in *Rennies Distribution Services (Pty) Ltd v Bierman N.O.* (2008) 29 ILJ (**Rennies**) in which the Labour Court expressly stated that it would be unfair to allow a chairperson in an appeal hearing (as part of a disciplinary process) to increase a disciplinary sanction, except in circumstances where the disciplinary code expressly allows for such a power. The Labour Court further held that, even where an appeal chairperson has the express power to increase a sanction, the employee *must* be afforded an opportunity to make submissions as to why a harsher sentence must not be imposed.



We do not have to agree on anything to be kind to one another.

TIPS TO KEEP SAFE WHEN CONFRONTED WITH PROTEST ACTION

Help by keeping yourself and fellow members of the campus community safe and campus workplaces secure.

- Please proceed with caution as you respond to events around you.
- Please report any suspicious behaviour to Protection Services rather than try to resolve a situation on your own.
- Do not engage in verbal confrontations, and do not physically engage the protestors.
- If you are personally confronted, remain calm and try not to raise your voice or escalate the situation.
- If you notice that a situation is escalating, and you are concerned about destructive behaviour or vandalism, your best tool is to remain calm whilst removing yourself from the area.
- In a difficult situation where you fear violence or property damage, the greatest value you can provide is to ultimately be a reliable witness and maintain your personal safety.
- If you chose to record video or photographs of protestors, do not put yourself in harm's way.

If you feel threatened by anyone or anything, call SOUTH CAMPUS Control room on 041 504 2482 or 911 from any campus telephone NORTH CAMPUS 041 504 3483 or 041 504 3636 and MISSIONVALE CAMPUS 041 504 1231 and GEORGE CAMPUS 044 801 5514.

PROTOCOL RELATING TO MINIMUM AND/OR CRITICAL SERVICES AND POSITIONS IN THE CASE OF A CAMPUS EMERGENCY AND/OR CLOSURE

The safety of all staff members on all campuses are the responsibility of Management. During the current shutdown period, the unions engaged Management to establish a protocol that will apply during periods when campus will be closed due to protests or other emergency situations.

The aim of the document is to identify critical services that will be required to continue whilst campuses are closed. This does not mean that those staff members will be left to their vices during protests. The employer remains obligated to ensure the safety of these staff members at all times.

Whilst the document is not completely fine-tuned, it will at least provide some guidance. We expect Management to communicate the document to all staff very shortly.

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The Labour Court *in casu* held that the Commissioner committed an error of law by referring to and then not following the decision in the *Rennie's* judgment, which led to an unreasonable result. Accordingly, the Labour Court set aside the arbitration award and held that Opperman's dismissal was substantively and procedurally unfair. The Labour Court ordered that she be reinstated retrospectively, with back pay.

Should an employer require that internal appeal chairpersons have the power to impose harsher sanctions then it is imperative that it includes this in its disciplinary code. Equally, if an employer seeks to appeal the outcome of a disciplinary hearing it must expressly allow this in its disciplinary code; more often than not disciplinary codes only envisage employee-instituted appeal proceedings. Without provision for these, a second bite at the cherry may not taste as sweet as the employer would have hoped.

SOURCE: <http://www.labourguide.co.za/most-recent/2356-a-second-bite-at-the-cherry-may-not-taste-as-sweet>