



LABOUR LAW UPDATE

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CASE SYNOPSIS:

Conduct during arbitration can prevent reinstatement even where dismissal found to be unfair

Given the difficult position that employers find themselves in as respondents to unfair dismissal claims, it adds on to the challenges in persuading the arbitrator that the dismissal was fair and reasonable under the circumstances.

While the arbitration proceedings amounts to what is commonly known as a de novo hearing (hearing afresh), focus is still limited to the facts ultimately leading to dismissal. However, it is important for employers to know that there is something to be said about the conduct of an applicant during the course of the arbitration proceedings and where found to be undesirable must (at the very least) be taken into account when determining the appropriate relief to be awarded to an applicant in the event where the dismissal is found to be substantively unfair.

Recently in **Fipaza v Tsatsimpe & others (JR243/13) 2015 LC** (unreported), the Labour court confirmed that reinstatement of the applicant would not be appropriate despite the dismissal being found to be unfair. In this case the applicant was dismissed from Eskom in 2006 and reemployed by the same employer, Eskom, in 2008 only to be dismissed for failing to disclose that she was previously dismissed. The CCMA and Labour Court argued that while the dismissal is unfair, that there still vested a duty with the applicant to have disclosed her previous dismissal and failure to do so negatively impacted on any potential employment relationship. Reinstatement was therefore not possible.

Reference was made to the matter of **Maepo v CCMA & others 2008 8 BLLR 723 (LAC)** where the Labour Appeal court ruled that despite the fact that the applicant's (a CCMA commissioner himself) dismissal was substantively unfair, that his dishonesty while testifying during the arbitration proceedings had to be taken into consideration and influence the decision not to reinstate him. The court argued that the conduct of the applicant during the arbitration proceedings materially affected the trust relationship between the parties and therefore rendered reinstatement impossible.





LESSONS TO BE LEARNT:

Lesson(s) to be learnt

1. The aforementioned cases are important reminders to employers as respondents to dismissal disputes to place sufficient emphasis on cross – examination of the applicant and accompanying witnesses as any misconduct exhibited during such proceedings could be used to argue a much more diminished form of relief even in cases where the dismissal is ruled to be substantively unfair.
2. Just because the dismissal of an applicant may be substantively unfair does not always automatically entitle an applicant to reinstatement and is an aspect that employers must also place sufficient emphasis on when arguing any dismissal dispute.

