The Effect of Inordinate Delays in Finalising Disciplinary Cases in the Public Sector

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“But promptness…. is essential to ensure that the employee can present his case effectively since delay can lead to inadequate recall on the part of the employee or to the unavailability of his witnesses. Moreover, undue delay between the occurrence of the alleged misconduct in the employers’ disciplinary response blurs the impact of corrective discipline. From the employer’s point of view promptness is necessary for the additional reasons that dispatch of a disciplinary matter allows his enterprise to move forward unhampered by the anxieties, animosities and uncertainties which pending action may produce.” Cameron ‘ The Right to a Hearing Before Dismissal- Part One’ (1986) ILJ 183 at 200
“The requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion. If an employee is retained in employment for an extended period after the institution of disciplinary proceedings, it may indicate that the employment relationship has not broken down. An appeal procedure is a separate facet of the disciplinary procedure and must be conducted with the same alacrity for procedural fairness to be fulfilled.”

Grogan Dismissal 2nd edition (Juta: Cape Town at 283-301)
Presentation Outline

- Article 10 of the ILO Termination of Employment Recommendation No 166
- An overview of the Labour Relations Act 66 of 1995
- Legislative framework in the Public Sector
- Challenges with internal disciplinary processes
- Case law
- Comments & Recommendations
Article 10 of the ILO Termination of Employment Recommendation (No 166)

“The employer should be deemed to have waived his right to termination of employment if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct”

N.B. Importance of promptness in instituting disciplinary action
The Labour Relations Act 66 of 1995

- Section 188 provides that a dismissal must be substantively and procedurally fair (in line with the ILO Recommendation on Termination of Employment No 166)

- Remedies for an unfair dismissal (section 193)
  - Reinstatement, re-employment, compensation

- For a substantively unfair dismissal, re-instatement is the primary remedy unless certain circumstances are present. These include instances where:
  - the employees does not wish to be reinstated
The LRA (continued)

- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable

- it is not reasonably practicable to reinstate the employee

- the dismissal is unfair only because the employer did not follow a fair procedure

N.B. One of the primary objects of the LRA is the effective resolution of labour disputes
The Legislative Framework in the Public Sector

The Employment of Educators Act 76 of 1998 (Schedule 2 Principles

(b) Discipline must be applied in a prompt, fair, consistent and just manner;

(d) A disciplinary code is necessary….. and ensures that educators:…

(iii) receive written reasons for any decision taken; and

(g) Disciplinary proceedings must be concluded in the shortest possible time frame
The Legislative Framework in the Public Sector

The Employment of Educators Act 76 of 1998

(iv) have a right to appeal against a finding or sanction...

(d) disciplinary proceedings must be concluded in the shortest possible time frame

Steps after disciplinary hearing

(4) The employer may not implement the sanction during an appeal by the educator
The Legislative Framework in the Public Sector

The Employment of Educators Act 76 of 1998 (continued)

Appeals

(2) The educator or the employer must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be.

(6) The employer must immediately implement the decision of the Member of the Executive Council or the Minister as the case may be.
Education Labour Relations Council Constitution (2016)

8. Exhausting of Internal Procedures

8.1. A party may not refer a dismissal dispute, when the dismissal has been appealed against unless,

8.1.1 The appeal had not been concluded by the employer within 45 days;

8.1.2. The employer had been served with 7 days written notice to remedy the default
The Legislative Framework in the Public Sector

Resolution 1 of 2003 (Disciplinary Code And Procedures For The Public Service)

Principles

Discipline must be applied in a prompt, fair, consistent and progressive manner

A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:

- Receive written reasons for a decision taken
The Legislative Framework in the Public Sector

Resolution 1 of 2003 (continued)

If an employee commits misconduct that is also a criminal offence, the criminal procedures and the necessary dispute resolution procedures will continue as separate and different proceedings.
Challenges in the internal disciplinary processes

- Inordinate delays in instituting disciplinary action timeously
- Inordinate delays in finalising internal appeal processes
- Providing employees with reasons for the outcome

The effects of the delay

- Claims of waiver/ abandonment of the right to discipline the employee
- The potential to render the dismissal substantively and procedurally unfair
Challenges in the internal disciplinary processes

- Difficulty in arguing that the circumstances surrounding the dismissal are such that the employment relationship would be intolerable

- Potential adverse costs orders

In *Stokwe v Member of Executive Council: Department of Education* [2019] the court at para 91 held:

“*In the context of this case and having regard to the cumulative effects of the factors, such as the inordinate delay in the disposition of the applicant’s internal disciplinary appeal which has not been explained… it is my judgment that the conduct of the respondents is deserving of censure.*
An adverse costs order against the respondents would serve as an appropriate measure of this Court’s mark of disapproval of the respondents’ conduct,”

- The legislative conundrum

- A sanction may not be implemented until the appeal process has been finalised
Case law

In *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria* [1992] (1) ILJ 1563 the court held:

“Fairness, however, dictates that disciplinary action must be taken promptly. The failure to convene an enquiry promptly in casu is so grossly unfair that it vitiates the decision to dismiss.”
In *Department of Public Works, Roads and Transport v Motshoso [2005] JOL 14643 (LC)* the court held the failure by the employer to provide an explanation for a delay of almost 3 years in finalising the disciplinary proceedings rendered the dismissal procedurally unfair.
In *Moronyane v Station Commander of the South African Police Services, Vanderbijlpark* [2016] JOL 36595 (LC) the court observed:

“In the employment law context, the approach in dealing with whether disciplinary proceedings should be ended on the basis of a delay is firmly founded in the considerations of fairness….

…I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion of unreasonableness and fairness."
A disciplinary hearing cannot be directed to be aborted just because there is a long delay. More is needed.”

Then court then listed the following factors that must be considered when deciding whether to finish off disciplinary proceedings because of an undue delay:

- Whether the delay was unreasonable

- Whether the employee has taken steps in the course of the process to assert his or her right to a speedy process
- Whether the delay caused material prejudice to the employee and establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.

- The nature of the alleged offence must be taken into account.

N.B. All these factors must be considered not individually but holistically.
In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2016] (3) BCLR 374 (CC) at para 1, the court observed:

“any delay in the resolution of labour disputes undermines the primary object of the LRA.”
The Facts of the case:

- The applicant was employed by the Department of Education as a Deputy Chief Education Specialist in the Learners With Special Needs Education section

- She was then seconded to the Scholar Transport Section where she served as the Co-ordinator

- She was charged with misconduct relating to awarding a temporary service contract to a transport company owned by her spouse
The misconduct occurred in August 2009

An investigation was done and the applicant submitted an internal report wherein she stated:

She awarded the contract because she had to deal with an emergency situation

She also awarded the contract to her spouse in “support of his ill-health because it was difficult for him to accept his fate of being unemployed. He felt very sick and inferior to get hand-outs from her”
Stokwe v Member of the Executive Council: Education [2019] 40 ILJ 773 (CC)

- Despite being aware of the misconduct as early as August 2009, the disciplinary hearing was only held on 30 March 2011 (almost 2 years after the incident)

- The outcome was only issued (without reasons) on 17 August 2011

- She requested reasons for her dismissal 3 times (as early as 17 October 2011)

- She was only provided with reasons for her dismissal on 6 March 2013—the basis for her dismissal was her “bad faith” and that “she had overstepped her boundaries in terms of the code of conduct.”
She appealed against the dismissal sanction in 2011 but only received the outcome of her unsuccessful appeal on 14 December 2014.

In the meantime her representative had written to the employer on 3 May 2013 averring that the Department had abandoned the disciplinary action.

Upon receiving the outcome of the appeal process the applicant referred an unfair dismissal dispute to the Education and Labour Relations Council contending that her dismissal was unfair.
The applicant challenged her dismissal on 3 grounds:

- That the department, through its extensive delay in finalising the disciplinary process and her continued employment, had abandoned the disciplinary process

- The outcome of the appeal process constituted a “fresh dismissal” and was thus substantively and procedurally unfair

The arbitrator held that the Department had not abandoned / waived its right to discipline the employee

The arbitrator further held that the dismissal was substantively fair
Stokwe v Member of the Executive Council: Education  
[2019] 40 ILJ 773 (CC)

- On review, the Labour Court concurred with the arbitrator that the dismissal was substantively fair and that the Department had not waived its right to discipline the applicant.

- Leave to appeal was denied by both the Labour Court and the Labour Appeal Court.

- The applicant then approached the Constitutional Court.

- The Constitutional Court held that the dismissal was substantively fair and also rejected the contention that the Department had waived its right to discipline the applicant.
Stokwe v Member of the Executive Council: Education
[2019] 40 ILJ 773 (CC)

- Most importantly, the CC held that the unexplained extensive delay rendered the dismissal **procedurally unfair**

- The CC remitted the matter to the Labour Court to determine the appropriate remedy

- The CC awarded costs against the respondent to show its disapproval of the respondent’s conduct
The CC at para 85 provided guidance on the factors that the Labour Court could consider when determining the appropriate remedy

“Some of the factors include: (a) the interests of justice; (b) the effect of the delay; (c) the fact that: the applicant acted in an emergency, (ii) the temporary contract was only for a short period; and (iii) the applicant continued with her employment without any further blemish and the feasibility of reinstatement or re-employment.”
Comments/ Recommendations

- Inordinate delays in finalising disciplinary processes may have adverse consequences
- Disciplinary processes must be conducted promptly
- Employees must be provided with reasons for sanctions
- There might be a need to reconsider legislation and collective agreements regulating discipline
- The importance of Item 8 of the ELRC Constitution
- The need for a paradigm shift regarding resolution of disputes