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# Disciplinary Action against Employees in the Workplace: Punitive or Corrective Measure?

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***Abstract:*** The primary object of this article is to reflect on the application of disciplinary action against employees in the work place in order to understand whether it is instituted as a punitive or corrective measure. Disciplinary action is regarded as an action instituted by the person designated by the employer against an employee for violating organisational code of conduct. This article provides a distinction between disciplinary action and other related concepts which may be construed as disciplinary action. The retributive justice theory and corrective justice theory are evoked to understand the application of disciplinary action as punitive or corrective measure against employees in the workplace. In line with the retributive justice theory, it is argued that employees should be penalised accordingly for their misconducts but care needs to be exercised to avoid unnecessary inconsistencies due to anger. On the other hand, corrective justice theory suggests that that the behaviour of errant employee must be corrected without applying a harsh penalty. In the process of applying disciplinary actions against employees, it is essential for employers to apply historical and contemporaneous consistency. International case law reviews demonstrate the extent to which employers could be inconsistent and unfair in applying disciplinary action against employers. Nevertheless, important lessons have been drawn from the international case law reviews. Although it is necessary to take firm actions against unruly employees in the workplace, disciplinary action has been applied inconsistently as a punitive measure against employees.

***Keywords:*** discipline, disciplinary action, dismissal, procedural fairness, substantive fairness

## I. INTRODUCTION

The employment relationship is supposed and expected to be reciprocal, that is, employers and employees have various rights and obligations towards one another. However, in practice, this relationship seems to be inherently unequal: the employer holds a position of authority whereas the employee's position is subordinate in nature (Bekker, 2013: 6). The obedience of an employee towards an employer suggests that the employer has control over the employee's conduct in the workplace (Bekker, 2013: 7). Having control

over the employee's conduct means that gives employer the right to discipline employees in case they commit offenses in the workplace. In this regard, Grobler, Warnich, Carrell, Elbert and Hatfield (2006:453) state that discipline should help to maintain mutual respect and trust between the employer and employees.

An organisation's disciplinary procedure outlines the principles, policies and actions which should be followed in certain situations, and it is important that this be in writing and readily accessible and available to all employees (Knight and Ukpere, 2014:592). In essence, the disciplinary procedure is used as an intervention when employees break the workplace disciplinary code in order to hold them accountable for their behaviour. The purpose of this intervention is to inspire, support, or direct the worker to be a dedicated and hardworking backer of the goals of the organisation (Sekgobela, 2015:4). According to Bendix (2010:377), an orderly disciplinary process is necessary in order to ensure that discipline is not applied in an irregular fashion. In fact, corrective action is necessary to avoid dismissal.

This article reflects on the application of disciplinary action against employees in the workplace to understand whether it is instituted as punitive or corrective measure. Finnemore (2006:220) states that "because of the desirability of consistency in disciplinary penalties, and the employees' need to have some expectations of the consequences of breaking rules, organisations should have a code which sets out possible offences, and the disciplinary action which may result." In an endeavour to combat inconsistency in disciplinary processes, disciplinary codes are can be used in assisting organisations to adhere to the fairness in the disciplinary process. These codes serve to ensure that employees know exactly what constitutes the offence in the organisation and the apparent disciplinary penalty. Essentially, the purpose of discipline is to ensure that employees adhere to established standards and regulations within an organisation (Erasmus, Swanepoel, Schenk, Van der Westhuizen and Wessels, 2005:503). On the contrary, Nel, Swanepoel, Kirsten, Erasmus and Tsabadi (2006:244) argue that discipline in perceived as a technique for punishing employees.

## II. CONCEPTUALISATION OF DISCIPLINARY ACTION

Disciplinary action refers to "some action taken against an individual when he [or she] fails to conform to the rules of the industrial organisations of which he [or she] is a member" (Greer & Labig, 1987:509). The above definition portrays disciplinary action as a form of action taken by the manager in reaction to employee misconduct at the workplace. Nevertheless, Greer and Labig (1987: 509) mention that the primary aim of disciplinary action is to reduce the frequency of misdemeanour by employees. In support of this idea, Klaas and Dell'omo (1991: 831) highlight that disciplinary actions are mainly determined by a desire to correct or rectify a problematic conduct. Disciplinary action could be negative or positive in approach. In terms of the negative approach, the employer tend to be more impulsive and take controversial decisions concerning the discipline, which may escalate tension in the organisation. On the other hand, positive disciplinary action involves cooperation between the employer and the employee whereby an employee is given further guidance in relation to correcting devious conduct (Nel *et al.,* 2006: 244).

According to Nel *et al.* (2006:253), disciplinary sanctions may start with three progressive steps, namely: verbal warnings, written warning, and final written warning. Nevertheless, disciplinary actions could also take a form of transfer, suspension, temporary suspension, demotion and dismissal (Nel *et al.,* 2006: 253-254). Equally important, each case must be considered on its own merit in order to determine suitable sanctions against an employee. Greer and Labig (1987: 507) assert that disciplinary actions are essential to

ensure that employees conduct themselves in an appropriate manner. This implies that it could be difficult to enforce discipline in the workplace without appropriate disciplinary measures in place.

Disciplinary action can be distinguished from related concepts such as disciplinary hearing and disciplinary procedure. In the context of this article, disciplinary hearing can be defined as a meeting whereby a formal warning could be given to an employee or disciplinary action such as demotion, dismissal or suspension with or without pay could be instituted against an employee (Acas, 2003: 33). Moreover, the disciplinary procedure is a "structured approach which an employer uses to deal with ill-discipline at workplace" (Mzangwa, 2012: 6). This suggests that a disciplinary procedure outlines step by step procedures that have to be followed and consistently applied in addressing issues of ill-discipline within an institution. Most of the disciplinary procedure had a four stage pattern of oral (verbal) warning, first written warning, final written warning and dismissal (with the option of unpaid suspension for defined numbers of days in some cases) (Goodman, Earnshaw, Marchington & Harrison, 1998: 543).

The aim of the disciplinary procedure is to ensure that employees are dealt with equally and fairly, and that opportunities for improvement are provided (Goodman *et al.,* 1998:543). In fact, the presence of the disciplinary procedure in the institution creates an expectation on the part of an employee to be treated in a manner that is consistent with the disciplinary code in case of contravention of institutional rules and regulations (Goodman *et al.,* 1998: 544). However, the presence of disciplinary procedure does not guarantee that the disciplinary action by the manger would be a fair and just one (Goodman *et al.,* 1998:545). Disciplinary procedure helps managers to identify offences that require disciplinary actions and also assists in maintaining uniformity in terms of handling disciplinary matters of similar nature (Erasmus et al. 2005:503).

## III. RETRIBUTIVE JUSTICE THEORY

Retribution justice theory advances a view that those who do not comply with the rules should be punished in order to deter a recurrence of similar violations. In fact, Klaas and Dell'omo (1991: 815) state that retributive justice theory demands that the degree to which an offender should be punished must be determined by the severity of the offence committed. According to Mahony and Klaas (2008: 224), the retribution justice is normally applied in response to unacceptable behaviour or conduct by an employee. In relation to the punishment for misconduct, Greer and Labig (1987: 510) contend that severe disciplinary action is necessary and should be complemented by the application of different forms of punishment intervals in order to curb the levels of undesirable conduct while desirable conduct is increased. Furthermore, Klaas and Dell'omo (1991: 816) postulate that the severity of the disciplinary action taken against an employee who committed an offense is likely to discourage repetition of similar offenses by other employees. In essence, retributive justice theory holds that offending employees should be punished in order to deter non-offending employees from committing the same offenses while at work (Klaas & Dell'omo, 1991: 819).

Again, Klaas and Dell'omo (1991: 819) suggest that manager's attitude towards an offense play an important role in determining whether a disciplinary action against an employee should be punitive or corrective although this idea is not conclusively confirmed. In addition, a retribution approach can result in moralistic anger where the manager may transgress some basic norms and standards due to the degree of anger caused by employee's actions or violations (Mahony & Klaas, 2008: 225). An angry reaction to an employee's misconduct may lead to some inconsistencies in disciplinary decisions. Moreover, disciplinary

decisions that are based on angry emotions may also lead to unnecessary litigations against an institution or employer. Therefore, employee punishment for offences should be accompanied by sufficient and unambiguous reasons in order to achieve a desired degree of effectiveness (Greer & Labig, 1987: 511).

Mahony and Klaas (2008: 225) admits that harmful and unjustified reactions to employee's misconduct may also tend to be viewed negatively, particularly in case of employees who have previously demonstrated great commitments in advancing the interest of the employer. As a matter of fact, an employee's previous contribution to the institution needs to be considered thoroughly as a mitigating factor before reaching a decision to punish an offending employee. Although an evaluation of employee's contribution to the institution need to be considered prior to a decision to take intense disciplinary measures against an errant employee. It is also necessary to consider the element of consistency and inconsistency when handling similar incidents (Goodman *et al.,* 1998: 545). If the manager decides to be more lenient in consideration of the circumstances surrounding the employee concerned, such an approach would have to be applied consistently as a precedent in the future.

As pointed out above, punitive disciplinary action may also have some positive consequences, especially if it is used to deter substandard performance by employees (Greer & Labig, 1987:508). In this regard, Greer and Labig (1987: 508) also recognise the fact that disciplinary actions may also have some negative consequences for an institution which can ultimately lead to "deterioration in in relationships and undesirable emotional reactions". However, managers who do not perceive a punishment as a solution to incorrect employee conduct would be reluctant to rely on retributive justice theory (Klaas & Dell'omo, 1991:819).

## IV. CORRECTIVE JUSTICE THEORY

According to corrective justice theory a disciplinary action against an employee should be conducted in such a manner that the behaviour of errant employee is corrected while he or she retains his or her job. Any possible misconduct by an employee should be seen as a problem that can be addressed or corrected, not as a punishable act (Klaas & Dell'omo, 1991:816). Corrective justice is about mending the broken relationship (Coleman, 1995:18). In essence, the employer should be appeased by the offending employee. One appropriate way of appeasing the employer is to cease from misconduct. More importantly, corrective justice theory maintains that offending employees who are willing to change their conduct and improve from misconduct should be granted an opportunity to do so. However, a failure to change should also be reciprocated with a penalty (Klaas & Dell'omo, 1991: 817).

Furthermore, Klaas and Dell'omo (1991: 817) argue that a failure by an offending employee to change from ill-discipline is an indication of unwillingness embrace constructive and just measures initiated by the manager. Essentially, corrective justice suggest that an employee should be willing to take responsibilities for damages and act in such a manner that demonstrate a desire to change or fix damages incurred by the employer (Coleman, 1995: 18). This could be attributed to the fact that corrective justice theory "has a rectificatory function" (Weinrib, 2002: 350). In the context of this article, this could imply that the employees should mend the injustice caused to the employer. To this end, an employee should not be penalised in the process of searching for appropriate ways for resolving or correcting offenses. On the contrary to widely held views of corrective justice, Weinrib (2002: 350) argues that the actions of the wrong doer and injustices inflicted upon the victim cannot be viewed or considered independently from one another. Therefore, this

view requires that the notion of corrective justice be approached and applied with utmost caution. In this regard, it would mean that corrective justice should not favour one party at the expense of the other. In other words, if corrective justice is applied in favour of an employee in disciplinary action and decisions, it should not be to the detriment of the employer.

## V. INCONSISTENCIES IN THE APPLICATION OF DISCIPLINARY ACTION

Knight and Ukpere (2014:593) define consistency as "the reliability or logical adherence of successive events or results". In the context of disciplinary processes, Knight and Ukpere (2014:593) argue that consistency refers to the same set of laws and regulations that are being applied to all employees within the organisation, irrespective of age, sex, type of job, position or any other similar measures. Therefore, disciplinary consistency is a special technique for assessing whether or not the disciplinary actions taken against the guilty employee are substantively and procedurally fair (Wilsenach, 2006). In this regard, it is essential for employers apply the same rules to all employees in a consistent manner. The inconsistent application of workplace policies and regulations is prevalent, especially within the big organisations with subsidiary offices or branches (Walasan, 2010:1). This unfortunate activity of inconsistent application of disciplinary action extends to the public sector institutions as well. For instatnce, In South Africa, the Office of the Public Service Commission (2008:53) report that there are some inconsistencies in relation to the manner in which the discipline is applied in the public service. This report revealed the need for the different public sector institutions to apply sanctions evidence emanating from the disciplinary process in a consistent and equitable fashion.

According to Walasan (2010) and Phala (2016) there are two types of consistency noted by the labour courts and arbitrators, namely:

The historical consistency requires the employer to apply the sanctions of dismissal consistently, thus, the manner in which it was applied to other employees in the past. Furthermore, if the employer has not applied a sanction of dismissal for the infringement of a particular rule in the past, discharging an employee for disobeying the rule could be unfair if the employer has not given earlier notice to employees that the rule and its related penalty will in future be applied more strictly. On the other hand, contemporaneous consistency requires the employer to apply the penalty consistently between two or more employees who have committed the same offence, particularly if there are not exceptional mitigating circumstances existing in respect of one that is absent in the case of the other. This means that it is fundamentally unfair to apply disciplinary action against, for example, only one of two employees who are guilty of similar offenses and in respect of whom the employer has satisfactory proof against both.

Furthermore, Knight and Ukpere (2014:589) state that ensuring that the organisation's disciplinary processes adhere to both substantive and procedural fairness is a difficult thing for managers within the organisation. However, in the study conducted by Sekgobela (2015:75), approximately 32 participants interviewed, only three of them held that their supervisors displayed favouritism when implementing disciplinary actions. This implies that the majority of the respondents perceive fairness in their organisation's disciplinary processes. If the disciplinary action is applied inconsistently, its primary object would be undermined; employees may also lose confidence in the system; and an impression that certain types of misconducts are approved of by the managers would be created (Bellizzi & Hasty, 2001:189). Additionally, the disciplinary systems become less credible and questionable (Klaas & Dell'omo, 1991:831). More

importantly, the variations in disciplinary rules within an organisation increase the chances of inconsistencies in disciplinary actions taken by managers (Klaas & Dell'omo, 1991:832). Therefore, it is essential to identify the causes of such variations in order to escape a trap of on inconsistent disciplinary decisions.

Greer and Labig (1987:511) maintain that although consistency in the application of disciplinary action may be associated with positive employee reactions, it is important for the manager to ensure uniform administration of disciplinary actions to all employees. According to Goodman *et al.* (1998:543), the disciplinary rules should clearly specify the significance and relevance of disciplinary action in addressing undesirable behaviour, to an extent that the whole process should be considered to be fair, just and consistent. Again, the other issue is that disciplinary action needs to be timely because the longer the manager takes to discipline an employee, the likelihood of ineffective disciplinary action increases (Greer & Labig, 1987:511). In support of this view, Grobler *et al.* (2006:454) assert that if delayed intervention relationg to disciplinary matters leads to deterioration of the situation.

Bellizzi and Hasty (2001:189) indicate that it is not unusual that employees are treated differently after committing an offense or engaging in illicit activities at work. In addition, Bellizzi and Hasty (2001:189) point out that some inconsistencies in this regard could be attributed to personal characteristics of an employee rather than the actual offense or misconduct. In essence, employee behaviour contributes to the variation of disciplinary action taken against an employee. Stereotype influences also create some inconsistencies in disciplinary action. For instance, Bellizzi and Hasty (2001:190) state that managers may tend to discipline obese people more harshly than less obese people. In addition, females tend to be treated less severely despite the magnitude of their misconduct relative to their male counterparts. Nonetheless, Bellizzi and Hasty (2001:190) note that managers may have to ensure that they discipline their subordinates appropriately in order to comply with institutional policies.

## VI. INTERNATIONAL CASE LAW REVIEWS: DISCIPLINARY INCONSISTENCIES

There is sufficient evidence that demonstrate abuse of disciplinary hearing and procedure. Different international case laws are summarised and discussed below to demonstrate the extent of inconsistencies in disciplinary actions.

### 6.1. South Africa

Monte Casino v Commission for Conciliation, Mediation and Arbitration & Others (Labour Court: JR314/2011).

#### *Background*

The employee concerned was employed as a Casino dealer at Monte Casino and was dismissed on 23 August 2010. The employee was dismissed for gross misconduct based on the allegation that he was rude to one of the customers at the casino.

At the Commission for Conciliation, Mediation and Arbitration hearing, the Commissioner did not accept an explanation that Monte Casino penalised who committed a simyilar offence as the employee.

However, the Commissioner argued that the employer acted inconsistently by dismissing the employee. Based on this argument, the Commissioner emphasised that "like cases should be treated alike." The Commissioner established that a case that the employer relied upon in making a decision to dismiss the employee was different from the case under consideration. One distinguishing factor is that an employee in the Mntambo's case had been rude and subsequently assaulted a customer. Apart from the Mntambo's case, Ms Tritsi's matter was cited as a fitting example to the case under consideration whereby the employee was found guilty of being rude to a customer and was subsequently issued with a final written warning by the Casino.

### *Pronouncements*

Citing the case of SACCAWU v Irvin & Johnson, the Labour Court stated that "consistency is simply an element of disciplinary fairness. Every employee must be measured by the same standards. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair." The Court went on to say that the gravity of misconduct needs to be considered rigorously prior to imposing a penalty against an employee.

Moreover, the Court noted that the offence for which the employee was dismissed was clearly recorded as a dismissible offence in accordance with item 53 of the Casino's disciplinary code. Nevertheless, the Casino's failure to apply the code consistently because in Ms Tsitsi's matter, the Casino only issued a written warning. Following this, the Court maintained that the Commissioner of CCMA applied his mind appropriately when he stated that the employer acted inconsistently and ordered reinstatement of the employee.

### *Discussion*

This case indicates that historical consistency in imposing disciplinary penalty is imperative. Besides, the disciplinary chairperson must endeavour to treat each case on its own merit and make appropriate disciplinary decision. Of great importance, the disciplinary chairperson should avoid being capricious whenever called upon to handle disciplinary cases. In essence, a thorough investigation as to whether or not the employer-employee relationship has collapsed needs to be considered.

## 6.2. Malaysia

Intan Sofia Binti Zainuddin v Toi Toi Services SDN. BHD.
(Industrial Court of Malaysia:3/4-106/15)

### *Background*

Ms Intan Sofia Binti Zainuddin had been employed as an Account and Admin Executive since 19 March 2012 until 15 January 2014, when she was dismissed for sleeping on duty. The dismissal letter read as follows:

> "We are very disappointed with your disciplinary attitudelately. We did found out on 08 January 2014, between 10am to 12pm you are sleeping at your table during working hours. We have a right to take an action due to your disciplinary attitude. Therefore, I want you to reply to me why action should not be taken."

The employee was given the first letter which required her to make submissions as why disciplinary action should not be taken against her on 15 January 2014. On the same day, the employee was served with a second letter that informed her of the company's decision to dismiss her.

## *Arguments*

The company alleged through its witnesses that the dismissed employee's performance was below standards or unsatisfactory and that she reported late for duty until her dismissal. Further, the company argued that the employee slept on duty and neglected her duties. In this regard, the company maintained that the employee's conduct of sleeping on duty as well as insubordination were in breach of company's code of conduct and therefore warranted dismissal. On the other hand, the employee argued that the issue of her punctuality was never raised with her before. Again, the employee pointed out that she was not afforded sufficient opportunity to present her side of the story or respond to the allegations against her. In addition, the employee was never given warnings pertaining to her alleged misconduct. In relation to poor performance standards, the employee argued and produced evidence before the Court that she was awarded performance bonuses five times for her outstanding performance at work.

## *Pronouncements*

The Court tool note of the fact that the letter of dismissal dated 15 January 2014 contained only one charge of sleeping on duty. Besides, the decision to dismiss the employee was made within 30 minutes after she was informed of the alleged misconduct of the sleeping on duty. Furthermore, the company added charges of poor performance and failure to report for duty in time in order to strengthen a dismissal decision. Additionally, the employee was not given warning for the alleged misdemeanour. The allegations of poor performance contradicted evidence produced before the Court which indicated that the employee was rewarded more than once for outstanding performance.

The Court was satisfied that the employee did not wilfully sleep on duty but there were compelling circumstances. Moreover, the Court noted that the company's witnesses presented contradictory evidence during cross-examination in relation to the time the employee was found asleep on duty. In this case, the Court concluded that it does not encourage sleeping on duty but rejects unwarranted and harsh punishment for the employee. The Court held that the employer's attitude towards pregnant women was detestable and callous. The Court maintained that cases of misconduct must be handled with a great degree of circumspection, wisdom and fairness. In fact, the Court emphasised that the doctrine of proportionality must be applied appropriately in each case of misconduct. In this matter, the punishment preferred against the employee was found to be severe and disproportionate to the alleged misconduct. Therefore, the dismissal overturned on the basis that it was substantively and procedurally unfair.

## *Discussion*

In this case, the Court sought to establish whether the dismissal was substantively fair or constituted a just cause. This case reveals the significance of following the correct procedures and process when dealing with disciplinary matters. Employer should have considered giving the employee a fair hearing to defend herself against allegations brought against her. Equally important, after a thorough investigation and intense consideration of the nature of offence committed by the employee, a warning could have been a plausible

penalty. The employer attempted to add new charges in Court which were not brought to the attention of the employee before. This practice is contrary to the "doctrine of condonation" because it appears that the employer overlooked issues concerning the employee's performance standards and late arrival on duty.

### 6.3. Kenya

Fred A. Odhiambo v The Honourable Attorney General and Postal Corporatin of Kenya
(The Industrial Court of Kenya: 312 of 2010)

#### *Background*

Mr Fred A. Odhiambo had been employed by the Postal Corporation of Kenya, as the Postmaster General since 8 November 2006, after signing a three-year renewable contract. In terms of the provisions of the contract, his performance was going to be reviewed and appraised on an ongoing basis. The Minister, Honourable Samuel L. Paghiso, terminated. Nevertheless, Mr Odhiambo's employment contract on 25 May 2009. The letter of termination of employment contract read as follows:

"The Postal Corporation of Kenya's Board, in its deliberations, which you attended on Friday May 22nd , 2009 noted several instances of mismanagement on your part. In their review, you have lost credibility and therefore cannot be entrusted with the stewardship of the organisation any more. I therefore, terminate your services as Postmaster General with immediate effect. Please hand over to the General Manager, Human Resource Management, Mrs Ado Al Kama."

#### *Arguments*

Firstly, the employer maintained that the employee was lawfully dismissed. Moreover, the employer indicated that the draft forensic audit report showed that the procurement processes within the Corporation's Postal Pay System have been undertaken without following proper acquisition procedures and established standards. In fact, the acquisition practices were irregular and non-compliant.

On the other hand, the employee (Mr Odhiambo) argued that the Minister did not have the powers to dismiss him but the Postal Corporation of Kenya's Board of Directors. Further, the employee alleged that the employer failed to appraise his performance as per contract of employment. Additionally, the employee pointed out the he improved Corporation's overall performance during his tenure as Postmaster General and corroborated his assertions with evidence. The employee had recovered more than Kshs 2.4 million which was fraudulently stolen from the Postal Corporations of Kenya. The employee maintained that the Minister relied on spurious or incomplete forensic audit report of the Postal Pay EFT System, which was compiled by Deloite and Touche.

#### *Pronouncements*

The Court noted that with the interest the achievements of the employee which were accomplished within a short period, in particular, the improvement of the financial circumstances of the Postal Corporation of Kenya. At the same time, the Court noted that when Mr Odhiambo took over as the Postmaster General, the Postal Pay System was already encountering challenges relating to fraud. This could be attribute to the fact that the product was not under the control of the Corporation. In this regard, the Court took cognisance

of the fact that the employee had responded to the concerns raised by the Board of Directors concerning the audit report and subsequently indicated the steps he intended to take in order to remedy the challenges.

Moreover, the Court took note of the following: Firstly, there was no evidence submitted to prove that the employee's performance was reviewed and found to be poor. Secondly, the employee responded satisfactorily to all concerns that were raised in connection with the audit report. Thirdly, the board failed to conduct a proper disciplinary hearing which implies that the employee did not have an opportunity to state his case. Fourthly, the minutes of the Board of Directors do not reflect that there were charges preferred against Mr Odhiambo.

In conclusion, the Court quoted from Article 7 of the International Labour Organisation Convention 158 as follows: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity." Similarly, the Court read Section 41(1) of the Kenyan Employment Act No. 11 of 2007, which provides that "Subject to the subsection 42(1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation." In respect of the aforementioned requirements, the employer was found to have failed to comply with statutory provisions. As a matter of fact, the Court stated that the Minister exercised his authority to terminate the employment contract of Mr Odhiambo unlawfully and procedurally unfair.

### *Discussion*

This case indicates the importance of identifying valid and legitimate reasons for disciplining an employee. The employer failed to conduct a proper disciplinary hearing against the employee. This indicates that the *audi alteram partem rule* was not applied in this case. The charges against the employee were unclear. In fact, the employee was not aware of the charges against him. Again, there was no warnings issued against the employee before. Therefore , in the process of instituting the disciplinary hearing against the employee, the just cause rule must be applied. At the same time, it is also necessary to accurately record the proceedings of the disciplinary hearing and the disciplinary action taken.

## 6.4. Canada

Marting Richard Mckinley v British Columbia Telephone Company & Others
(The Court of Appeal for British Columbia: 27410)

### *Background*

The appellant, Mr Martin Mckinley, employed British Columbia Telephone as a chartered accountant. Unfortunately, in 1993, Mr Mckinley was diagnosed with blood pressure due to hypertension. Mckinley 's condition deteriorated to such an extent that he had to take a sick leave in June 1994. In July 1994, Mr Mckinley's supervisor raised the possibility of terminating his services citing incapacity as major reason. This proposal was directly rejected by Mr Mckinlry. Instead, Mr mckinley expressed his desire to return to

return to work provided he was given a position which did not carry huge responsibilities. The company promised to find an appropriate position but the alternative was never given to Mr Mckinley. Consequently, on the 31 August 1994, Mr Mckinley was summoned to his superior's office where he was informed that his services had been terminated.

### *Arguments*

The employee, Mr Mckinley, argued that "his employment was terminated without just cause and without reasonable notice or pay in lieu of reasonable notice." The employee insisted that the employer had inflicted upon him a mental distress. Furthermore, he maintained that he forfeited salary and other benefits due to unfair dismissal. The employee postulated that he was divested of his disability and pension benefits.

On the other hand, the employer maintained that Mr Mckinley was offered a proper compensation package and benefits. Moreover, the employer mentioned that suitable alternative position was sought for the employee but could not be found. Surprisingly, when the matter of just cause for dismissal was raised in Court, the employer alleged that the employee was "dishonest about his medical condition, and the treatment available for it." The assertion was based on the fact that the employee did not inform the employer about the tablets recommended by a medical doctor for high blood pressure.

### *Pronouncements*

The Court noted that although the employee had not been frank or open about his alternative medication, this may not be construed as dishonesty. Moreover, the Court held a strong view that dishonesty warrant termination of employment but only if such dishonesty is "incompatible with the employment relationship." In this case, the Court ruled in favour of the employee and ordered payment to the employee for damages incurred.

### *Discussion*

The employer failed to establish reasonable grounds for dismissing the employee. In this regard, it essential for the employer to dissect reasons for wanting to dismiss an employee before such a decision could be made. Employers should refrain from raising peripheral issues in an attempt to strengthen a weak case of unfair dismissal. Perhaps, the employer should have sought legal opinion before taking a decision to dismiss the employee.

## 6.5. United Kinngdom

Ramphal v Department of Transport
(Employement Appeal Tribunal: UKEAT/0352/14/DA)

### *Background*

The employee, Mr Ramphal had been employed as an Aviation Security Compliance Inspector by the Department for Transport. The employee was dismissed for gross misconduct in relation to the irregular expenditures and misuse of hire vehicles. Prior to the dismissal, the employer appointed Mr Goodchild to undertake investigations and chair the disciplinary hearing into the matter. Noteworthy, Mr Goodchild did

not have experience in handling disciplinary matters. Nevertheless, Mr Goodchild initiated the investigation and compiled a draft report regarding the employee's conduct. Shortly thereafter, the Human Resources Directorate within the Department for Transport sent Mr Goodchild an "advice" pertaining to the matter under investigation. The advice that was given to Mr Goodchild was not curtailed to issues of law, procedure and processes but overlapped to other issues concerning the employee's culpability and credibility.

With regard to the initial draft report compiled by Mr Goodchild, it is essential to point out that the report included several findings which were in favour of the employee. The draft report indicated that the employee's actions were not intentional and there was no incontrovertible evidence to that effect. Further, the report revealed that the employee's explanations regarding petrol expenditures were acceptable despite the fact that such expenses exceeded the expectations of the line manager. In view of the reasons put forward by the employee in response to the alleged misconduct, Mr Goodchild recommended that the employee could be charged with misconduct rather than gross misconduct.

However, after Mr Goodchild had received "advice" from the Human Resource Directorate, he changed the version of his findings in the final report. Mr Goodchild's final report stated the following:

> "Having given careful consideration to all the facts of the case, I am minded to conclude that on the balance of probability, the claimant is guilty of gross misconduct in respect of both misuse of corporate cards and the misuse of hire cars funded by the respondent. My recommendation is that he should be dismissed from his post."

## *Pronouncements*

The Employement Appeal Tribunal failed to comprehend a sudden change of recommendations to that of summary dismissal. Additionally, the Appeal Tribunal noted that Mr Goodchild did not provide any reason for his sudden change of findings. Unfortunately, this question was not raised by the Employment Tribunal when the matter was first heard. The Appeal Tribunal noted with concern that the Human Resource Directorate wanted to influence the findings of the disciplinary chairperson. In fact, the Appeal Tribunal insisted that Mr Goodchild was inappropriately influenced by the Human Resource Directorate to change his findings. Equally important, the Appeal Tribunal acceded that consultation between the disciplinary chairperson and the Human Resource Directorate was essential but such deliberations should only relate to issues of law, procedure and processes. In this context, the Human Resource Directorate was found to have exceeded these parameters. The Appeal Tribunal emphasised that an employee facing disciplinary actions has the right to anticipate that the matter will be handled in a manner which is fair, procedural and just. Further, an employee can expect the disciplinary officer to be more objective and independent. In this case, the dismissal was found to be procedurally unfair.

## *Discussion*

The independence of the person who is given the responsibility of investigating an employee's misconduct is important. In this regard, it is essential to make sure that no within the organisation interferes with the disciplinary investigation processes or no individual makes any inappropriate attempts to influence this process. The disciplinary officer need to have adequate experience and training on discipline, particularly if assigned to handle complicated incidents of misconduct. In addition, the disciplinary chairperson must

understand the disciplinary procedures, process and the law regulating such matters. Besides, the disciplinary officer must be consistent in his findings and should not compromise the credibility of the disciplinary process.

## VI. CONCLUSION AND RECOMMENDATIONS

On the basis of foregoing discussion, a disciplinary action needs to be instituted against any employee who violates an organisational code of conduct. Noteworthy, it is not uncommon for a disciplinary action to be handled in a negative fashion. Nevertheless, is essential to ensure that a disciplinary action is handled with great circumspection. In terms of retributive justice theory, the employees who breach organisational rules and policies must be penalised in order to deter recurrence of similar offences. In contrast, the corrective justice theory requires that an employee should be assisted to improve or correct the unacceptable behaviour. While the arguments emanating from the aforementioned theories are valid and legitimate, it is also imperative to strike a balance when dealing with offending employees in order to handle each incident based on its own merit. This means that the principle of proportionality must be correctly understood and applied by the disciplinary officers.

The international case laws indicate that there is persistent lack of consistency and justice in terms of how some of the disciplinary issues are handled by disciplinary officers or employers. However, important lessons that could be drawn from the international case laws are as follows: firstly, disciplinary chairperson should avoid be capricious. In other words, the disciplinary chairperson must not approach disciplinary process with a purpose of punishing an employee. Secondly, employers should follow correct procedures and processes when disciplining employees. This implies that the processes and procedure must be fair. Besides, such procedures must be within the parameters of the law. Thirdly, the *audi alteram partem rule* should be applied consistently by the disciplinary officers in order to ensure that employees accused of misconduct are granted a proper opportunity to state their cases. Fourthly, the basic principle of substantive fairness must be upheld and sustained. Fifthly, the disciplinary officers should be independent and not allow a situation where they could be easily influenced to act unethically in handling disciplinary matters. Indeed, disciplinary action is an indispensable tool for ensure that employees are held accountable for their misconducts but it is appears that it incorrectly applied as a punitive tool rather than corrective technique.

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