Disciplining an employee after resignation

An employee resigns with immediate effect after receiving notice of a disciplinary hearing. May the employer proceed with the hearing?

In legal terms, resignation is a so-called 'unilateral' act. Once an employee has resigned, whether lawfully or otherwise, the resignation cannot be undone without the employer's agreement. Different consequences follow for the employee, however, depending on whether or not the resignation is lawful, i.e. complies with the notice requirements of the employee's contract or, in the absence of that, the provisions of the Basic Conditions of Employment Act (the BCEA) – see the box below. But what happens if the employee resigns in the face of a pending disciplinary process? May the employer, for example, proceed with disciplinary action against an employee who has resigned?

Breach of contract

The contract of employment requires the parties to give notice of termination of employment. The BCEA prescribes the minimum notice period and says that such notice should be in writing, unless the employee is illiterate. So, an employee who resigns with immediate effect is in breach of contract. One would think that an employer should be able to proceed with disciplinary action against the employee, as long as it is done within the contractual notice period. But in a recent case the Labour Court expressed a different view.

Taking disciplinary action

In the Labour Court case of ***Mtati v KPMG Services (Pty) Ltd (2017)***, the company was investigating allegations of serious misconduct against an employee. The employee decided to resign by giving notice. When the company indicated its intention to take disciplinary action, the employee resigned again, this time 'with immediate effect'. The company held the view that it could proceed with disciplinary action before the expiry of the contractual notice period. At the disciplinary hearing the employee raised the point that the chairperson did not have jurisdiction to continue with disciplinary proceedings, as she had resigned. She indicated that, if the company intended to continue with the disciplinary hearing, she would take steps to interdict the proceedings. The chairperson ruled that the hearing would continue. The employee walked out and the disciplinary proceedings continued in her absence. She was found guilty of the allegations against her and dismissed. The employee approached the Labour Court on an urgent basis to obtain an interdict.

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The court concluded as follows:

'In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent (company). This means that the termination of the employment contract with immediate effect took away the right of the first respondent (company) to proceed with the disciplinary hearing against her.'

The court declared the disciplinary hearing null and void and set it aside. The company was ordered to pay the costs of the application.

Conclusion

Although we disagree with the reasoning and outcome in the *Mtati*-judgement, employers should consider themselves bound by it – at least until another court comes to a different conclusion. It is, therefore, not advisable for an employer to continue with disciplinary proceedings once an employee has chosen to resign.

Discussion: The two meanings of resignation

We believe that the court in the *Mtati*-judgement got it wrong, leading to an unfair outcome for the company. In our view, the flaw in the reasoning might have its origin in what is meant by 'resignation'. The BCEA does not use the term, but simply refers to termination of employment. In colloquial language we tend to talk about resignation whenever an employee takes the initiative of terminating employment. It could have two meanings. Let's tease these apart for the sake of better understanding. This is the way we see it:

Resignation in the first sense is where the employee validly terminates employment by giving notice in terms of the contract of employment. The employee's right to give notice arises from the contract or the BCEA; it is a unilateral act; there is no requirement for the resignation to be accepted by the employer; the employee cannot withdraw it without the employer agreeing to such withdrawal; and the contractual relationship comes to an end at expiry of the contractual notice period.

Resignation in the second sense is where the employee resigns 'with immediate effect' or without giving proper notice. This amounts to a breach of contract, which, in our view, the employer does not have to accept. If the employer chooses not to accept the breach, the employer could insist that the employee works out the notice period. If the employee refuses to tender her services, the employer can – at least in theory – approach the court to order the employee to work for the remainder of the contractual notice period (referred to as 'specific performance'). This route is seldom, if ever, worthwhile pursuing in practice. It follows, though, that the employer should also be able to do whatever else it is entitled to do in law and fairness until the contractual notice period has expired – including the right to exercise its authority to take disciplinary action. If, on the other hand, the employer 'accepts' the employee's breach (or 'repudiation' as it is referred to in legal terms), the employer's acceptance immediately brings the contract to an end. The employer would then no longer be able to pursue disciplinary action. In this case, the only course of action available to the employer would be to institute a claim for damages suffered as a result of the employee's breach of contract.

Acknowledging the distinction above would preserve the common law underpinnings that apply to all contracts, including the contract of employment.

It would seem that the court conflated the two meanings, which, unfortunately, perpetuates the confusion surrounding the issue of resignation.

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