Plea bargain arrangements in disciplinary cases

The issue of 'plea bargaining' arises where there are several perpetrators involved in a disciplinary transgression. The employer needs one or more co-perpetrators to give evidence at the disciplinary hearing. Can one agree to a lesser sanction in return for his testimony against the alleged accomplices? What about the principle that discipline should be consistently applied?

Plea bargains are widely used in criminal law, e.g. if the State requires evidence from an accomplice to use against his co-perpetrators. Section 204 of the Criminal Procedure Act governs plea bargains. How valid are such arrangements in disciplinary proceedings?

The recent decision of the Labour Court in *MEC, Department of Health, Eastern Cape v Public Health & Social Development Sectoral Bargaining Council & others* (2016) involved eight employees –all managers of the emergency medical services directorate of the Eastern Cape Department of Health – who had misused an aircraft and irregularly used departmental funds for travelling to a soccer match. Some of the employees later met and colluded to falsely represent that the trip had been for official business purposes. The employer subsequently discovered the employees' misconduct and misrepresentation and five out of the eight employees were subjected to disciplinary enquiries and dismissed. One of the eight resigned before being charged with misconduct; another was given a final written warning, but not dismissed; and, finally, a third was offered a plea bargain in terms of which he would plead guilty at the disciplinary hearing and testify against his remaining colleagues, all in exchange for a final written warning and two months' unpaid suspension, instead of dismissal.

The employees' guilt was common cause, yet the arbitrator held that the dismissals of the five employees were substantively unfair because the sanction of dismissal had been inconsistently applied among them. The plea bargain arrangement was one of the reasons for this finding. On review, the Labour Court saw no reason why such an agreement –subject to some constraints which are discussed below –could not be used in the labour law context. The court found that the testimony of accomplices is a tried and trusted method in criminal law, where a plea bargain may be attacked only if the accomplice had been selected in bad faith (for some ulterior motive). There was no evidence in this case that the department had unfairly selected the employee with whom it had concluded the plea bargain, or that the employer's conduct in this regard was inconsistent. A lesser sanction was necessary to strike a compromise and obtain the employee's co-operation and testimony. The dismissals were upheld.

In its findings the court stated that an employer's selection of an individual wrongdoer from the group is not in itself unfair. The employer has a wide discretion in considering who among a group of employees accused of misconduct it selects for purposes of concluding an accomplice plea agreement. It has no obligation to offer this to every one of the perpetrators because 'the object of securing evidence to discipline employees who misconducted themselves would be completely defeated if every one of the employees involved in the misconduct were offered a plea bargain to testify against the others'.

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However, the method of selecting a witness for the purposes of a plea agreement needs to be fair. In this regard the court held that an employer may consider factors such as the individual's availability to testify, credibility, personal knowledge of the misconduct, co-operation during the investigation, attitude of remorse before the offer to enter into a plea bargain and his or her previous disciplinary record.

Factors that might render plea bargains unfair include obvious favouritism; situations where the evidence obtained via a plea bargain was not reasonably necessary for a guilty finding (e.g. all the perpetrators pled guilty); situations where an employee who committed gross misconduct is preferred and thus unfairly enabled, by means of the plea bargain, to use the other 'less guilty' employees as his/her scapegoats; and unfair racial, gender or other discrimination.

This is not the first time the Labour Court has legitimised the use of plea bargains in disciplinary cases. In *SAMWU o.b.o. Abrahams & 90 others* (2009), for example, the arbitrator found that employees accused of collective misconduct (Cape Town traffic officers blocking a national road) had refused to accept a plea bargain arrangement 'at their peril'. He accordingly found the municipality's decision to dismiss them to have been fair. In subsequent review proceedings the Labour Court upheld his ruling.

While this case provides employers with a useful tool in group misconduct situations, we would caution against it being used as a first option, as it is open to abuse by both employers and perpetrators. It would be safer to reserve plea bargains for situations where evidence is difficult or even impossible to obtain without such an arrangement.

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