

Work performance and sales targets

It is not often that a dispute about dismissal for poor work performance reaches the Labour Appeal Court. Yet this is what happened in the case of **Damelin (Pty) Ltd v Solidarity obo Parkinson** (2017). What made this case interesting is that it was about an employee who had failed to meet sales targets.

Dismissing an employee for poor work performance is more challenging than dismissing an employee for misconduct. The first hurdle the employer has to overcome, is to prove that the employee failed to meet a performance standard. This is not always easy to determine. Many employers tend to stumble over this hurdle. However, when it comes to sales persons, it is relatively easy to overcome. One can simply set sales targets. To make it even easier, one might even be tempted to characterise the failure to reach targets as misconduct. But the Damelin case shows that matters are not that simple.

The facts

Damelin operates in the tertiary education sector. It has several campuses throughout South Africa. Parkinson was appointed as a general manager of the Boksburg campus on 3 January 2011. One of his performance goals was to find ways of getting new students to enrol. Only 168 students enrolled at the start of the 2011 academic year. The national sales director made an estimate of the number of students in the catchment area and set a target of 420 students to be enrolled by February 2012. Parkinson objected on the basis that the estimate was incorrect. He was also of the view that several other assumptions in determining the target were wrong. In Parkinson's view the target was unattainable. He felt that he was being set up to fail. Various communications regarding the achievement of targets were exchanged during the year.

On 1 February 2012 the Group Chief Commercial Officer sent a letter to all general managers, stating that if they failed to achieve at least the enrolment figures achieved for 2011, action would be taken to dismiss or redeploy them. Parkinson would therefore have to achieve 168 new enrolments by the end of February 2012. Only 117 new students enrolled, which meant Parkinson had failed to meet the reduced target. A disciplinary inquiry was held and Parkinson was charged with poor work performance relating to his failure to reach sales targets. He was dismissed, but disputed his dismissal and took his case to the Commission for Conciliation, Mediation and Arbitration (CCMA).

CCMA

At the CCMA arbitration, Parkinson explained the steps that had been taken to boost enrolment at his campus: schools were visited, presentations were made and data collected, all the learners were contacted, advertisements were placed, flyers were distributed, and a request for the secondment of a sales manager was made and granted, but the database provided was exhausted by February 2012. The CCMA commissioner nevertheless found that higher standards were expected of senior employees. The communications Parkinson had received (including the one of 1 February 2012) were sufficient and formal warnings were not needed. The CCMA commissioner found that dismissal had been the appropriate sanction.

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Labour Court

The Labour Court (LC) disagreed. The LC examined the appellant's disciplinary procedure and code and inquired from Damelin's representative what the nature of its complaint *vis-à-vis* Parkinson was. The representative responded that the issue was one of misconduct and not incapacity (poor performance). The LC considered that the appellant could not willy-nilly depart from the procedures specified in its code. The communication of 25 January 2012 had been ambiguous and had not been a warning. In any event, dismissal could only be considered as a fourth step in terms of Damelin's code. Other considerations were also taken into account, but the net result was that the LC set aside the arbitration award and reinstated Parkinson.

Labour Appeal Court

The Labour Appeal Court (LAC) came to the same conclusion, but followed a different approach. It declared that, at the outset, it was necessary to characterise the matter as one of incapacity (poor work performance) and not misconduct. That meant a different set of requirements applied. The Code of Good Practice on Dismissals provides the following guidelines in cases of dismissal for poor work performance:

'Any person determining whether a dismissal for poor work performance is unfair should consider —

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard, whether or not —

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

Meeting the first requirement in this case was simple. However, the LAC pointed out that the inquiry into whether Parkinson had been given a fair opportunity to meet the targets depended to a great extent on whether the targets were fair, i.e. reasonably achievable. Past experience of enrolment numbers provided a guideline. But there was and is no infallible way to predict the number of potential first-year students in a given area. If the parameters on which the estimates were made, change (as happened in this case), the guidelines may be defective. This explained why so much of the evidence by Damelin was opinion based. The formula that was presented as a method of arriving at a target was no better than the estimate on which it is based. The LAC added that, even accepting that the letter of 25 January 2012 constituted a final warning, the period of some 27 days within which to achieve the reduced target showed that either the period was too short or that the target could not be achieved.

Parkinson provided convincing and uncontested evidence of his efforts. On the other hand, persuasive evidence on the part of Damelin was lacking. Several potential witnesses did not testify. The LAC concluded that Damelin had failed to prove that dismissal was fair and agreed with the LC that Parkinson should be reinstated.

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Conclusion

The above case illustrates that employers should not be overhasty in categorising matters of incapacity (poor work performance) as misconduct. Furthermore, simply setting targets does not necessarily make matters easier. The employer must also show that the targets are reasonably achievable.

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