

Short notes on:

MAY AN EMPLOYER IMPOSE A SANCTION AGAINST AN EMPLOYEE WHERE THERE ARE PENDING CRIMINAL PROCEEDINGS ARISING OUT OF CHARGES UNRELATED TO HIS/HER EMPLOYMENT?

Introduction

It is a common labour practice that employers require a police clearance certificate to investigate whether or not any criminal offence has been recorded against the employee. Such a requirement may be contained in the employee's contract of employment or internal disciplinary code of the employer which the employee has agreed to abide by as part of their appointment and contract of employment. Such a certificate may be devised by the employer to mitigate security risks or reputational damage.

It is within the employer's right to compel the employee to produce a police clearance certificate. Failure or refusal by an employee to provide such a certificate, the employer may institute disciplinary proceedings against the employees.

Employment Equity Act 55 of 1998 (“EEA”)

This EEA prohibits unfair discrimination on listed grounds such as age, race and others. However, the Act does not prohibit discrimination of employees or job applicants about their past criminal record. However, if the criminal record is for a minor offence, and there is no inherent requirement associated with the position, discrimination in such may be unfair.

Improper practice

It is common cause that it is improper for an employer to grant a sanction against an employee where there are criminal charges against the employee in respect of the same matter which the employment sanction is founded.

This situation arises wherein the employee gets arrested for Driving under the influence, not during the performance of his/her duties. The employer upon finding out about the pending criminal case, institutes disciplinary proceedings and thereafter imposes a sanction against the employee for the charges unrelated to his/her work.

Is there any prejudice the employee might suffer?

If that is the case, the employee will suffer prejudice due to the disciplinary proceedings taking place before the criminal case is finalized, is that he/she will make statements in which he/she will be required to deal with the same issues to be traversed in the criminal case. This might serve to prejudice him/her and violate his/her section 35(1)(c) constitutional right not to be compelled to make any statements that could be used in evidence against him/her.

Is there a prejudice against the employer?

There cannot be any prejudice to the employer or any other person if the disciplinary proceedings are stayed. Because, the employee is, in the disciplinary hearing, presented with a hard choice either to make statements or not. If he/she elects to make statements against the charges against him/she, there exists a danger that he/she will suffer the risk that it may be used against him/her in the criminal matter.

He/she may also choose not to make answering statements and by doing so, obviate that risk. If he/she decided to remain silent during the disciplinary proceedings, he/she could be found guilty and face dismissal. He/she will, however, have to accept under those circumstances that the matter will be decided without his/her version.

Conclusion

What is of importance and has to be dealt primarily with the issue of whether or not the employer has the discretion to stay disciplinary proceedings pending the finalization of criminal proceedings, and if so, under what circumstances the employer will be entitled to exercise that discretion. Employers are advised not to jump the proverbial "gun" by instituting disciplinary proceedings prematurely.

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