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Key role of the disciplinary chair

Labour court rules on whether an employer can overturn the sanction imposed by a disciplinary inquiry

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Eversheds

AN EMPLOYEE pleads guilty to committing fraud amounting to hundreds of thousands of rands. The chairperson of the disciplinary inquiry decides to impose a sanction of a final written warning. The employer is not happy with the sanction, as it feels that it cannot trust the employee anymore and that by retaining the employee in its employment, it might create a precedent among employees that if they committed fraud, they would get away with a final warning.

The question arises as to whether an employer in these circumstances can overturn the sanction imposed by the chairperson of the disciplinary inquiry. Usually in the context of labour law, employers are bound by the sanction that is imposed by the chairperson of the disciplinary hearing.

A case in point is *County Fair Foods (Pty) Ltd v CCMA and Others*. The employee was charged and found guilty for assaulting a fellow employee. The chairperson of the disciplinary hearing imposed a sanction of a final written warning and unpaid suspension. County Fair was not happy with the sanction and decided to overturn it. It dismissed the employee.

The Labour Appeal Court had to decide whether employers can overturn the sanction of a disciplinary chairperson, should they not be satisfied with the sanction. The Labour Appeal Court said if an employer's disciplinary code made provision for the decision of the chairperson of a disciplinary inquiry to constitute a recommendation, then the sanction could be overturned. County Fair's disciplinary code did not permit the employer to overturn the sanction imposed by the chairperson of a disciplinary inquiry. The Labour Appeal Court found that the dismissal was procedurally unfair and awarded 10 months' compensation to the employee.

The labour courts seem to be more lenient towards employers in the public sector. They have found in a number of cases that because the government as an employer deals with public funds and taxpayers' money, it should have the flexibility to overturn and second guess sanctions imposed by chairpersons of disciplinary inquiries. It, however, has to be in the public interest to do so.

Employers in the private sector can only overturn the sanction imposed by the chairperson of a disciplinary inquiry if their disciplinary code provides that the sanction constitutes a recommendation. Even if the disciplinary code provides for this, employers must provide well-motivated reasons as to why it was necessary to overturn the sanction to a more severe punishment, should the employee decide to approach the courts for relief.

Employers are therefore advised to carefully consider the role and powers they want the chairpersons to have in their disciplinary hearings and provide for in their disciplinary codes in order to avoid a situation where they will have to keep an employee in their employ who through his or her conduct has destroyed the trust relationship between them.

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TAX BITES

Get in the loop on the payment of provisional tax

Beric Croome

Registered provisional taxpayers must make at least two provisional tax payments in the tax year

The fourth schedule to the Income Tax Act, 1962, regulates the payment of provisional tax by taxpayers. Currently, any person, other than a company, deriving income other than from remuneration and allowances as reflected on an IRP5 certificate, constitute provisional taxpayers and must register within 30 days after the date from which the person becomes a provisional taxpayer. All companies, including close corporations, are defined as provisional taxpayers. The penalty for failure to register as a provisional taxpayer will be determined by taking account of the taxpayer's taxable income and can range from an amount of R250 to R16 000 per month or part thereof, while the taxpayer is in default, up to a maximum of 36 months where SARS is in possession of the taxpayer's current address, or up to a period of 48 months where SARS is not in the possession of the current address of the taxpayer.

Taxpayers that are registered as provisional taxpayers must make at least two provisional tax payments during the tax year. The first provisional payment is required to be paid no later than the end of six months after the commencement of the taxpayer's year of assessment. The taxpayer must make an estimate of income that is no less than the "basic amount" as defined, which is, typically, the taxable income as per the most recent assessment. Where the taxpayer can show that the taxable income is likely to be less than the basic amount, they are entitled to rely on a lesser amount of taxable income, provided they request that SARS accepts the lower estimate. In the case of newly formed companies or taxpayers that are commencing trading for the first time, it is unacceptable to submit a RNil estimate of taxable income when reference is made to Interpretation Note No 1 issued by SARS on September 30 2001. These taxpayers must assess their taxable income properly for the first six months of the year.

The second provisional tax payment must be paid no later than the end of the taxpayer's year of assessment and, historically, taxpayers were required to base their second payment on income as reflected on the most recent assessment received by the taxpayer, or 90% of the taxable income for the year of assessment in question. Where the taxpayer utilised an estimate of taxable income that was less than both the basic amount and 90% of the current year's taxable income, SARS could levy additional tax of 20% on the shortfall in the provisional tax paid. Unfortunately for taxpayers, the safety net of the basic amount was removed as a result of the enactment of the Revenue Laws Second Amendment Act, 2008. The effect of the amendment is that taxpayers are now required to submit an estimate of taxable income that is not less than 80% of the actual taxable income for the year of assessment in question. Where taxpayers submit an estimate that does not fall within the 80% requirement, the additional tax that will be levied by SARS equates to 20% of the amount by which the normal tax payable for that year of assessment exceeds the sum of the provisional tax, plus employees' tax paid during that year.

As a result of the fact that taxpayers must now accurately estimate taxable income for the second provisional tax payment to avoid the 20% additional tax, they must take account of all amounts of income derived, including capital gains and, in the case of individuals, lump sums received on retrenchment or retirement, as well as lump sums received from pension and provident funds. The amendment was introduced to paragraph 20 of the Fourth Schedule to the act with effect from the commencement of years of assessment ending on or after January 1 this year. Strictly speaking, therefore, taxpayers were required to apply the new rules to the second provisional tax payment that fell due on February 28. SARS subsequently issued a press release announcing an extra statutory concession, whereby taxpayers with year-ends of February and March 2009 could still submit provisional tax returns for the second period, taking account of taxable income as reflected on the taxpayer's most recent assessment.

However, those taxpayers with year-ends of 30 April 2009 and thereafter, were required to comply with the provisions contained in paragraph 20 of the Fourth Schedule, failing which, the 20% additional tax will be automatically levied by SARS. Where taxpayers can show they have seriously estimated taxable income for the second provisional tax period, SARS is can waive the additional tax levied.

The calculations required by taxpayers are far more onerous than what was previously the case and, unfortunately, will result in duplication of effort as taxpayers will still be required to undertake a detailed calculation of taxable income for the purposes of the third and final voluntary provisional tax payment to be made by September 30 2009 in the case of taxpayers with year-end of February 28 of each year, or within six months of the end of the taxpayer's financial year, for those taxpayers with a year-end other than February.

Taxpayers need to exercise extreme caution in calculating the amount of tax to be paid for purposes of submitting a second provisional tax return, failing which, additional tax of 20% will become payable where taxpayers do not estimate income within 80% of taxable income derived for the particular tax year.

It is important that taxpayers submit provisional tax returns timeously, failing which, SARS can impose a penalty of 10% on any late payment in respect of either the first or second provisional tax period.

Furthermore, paragraph 20A of the Fourth Schedule to the act, permits SARS to impose additional tax for the failure to submit a timely estimate of taxable income for purposes of provisional tax.

In addition, where the provisional tax payments are made late, interest under section 89bis is payable at the prescribed rate, currently 12,5% per annum, to be reduced to 11,5% per annum from August 1, is payable.

The Taxation Laws Second Amendment Bill, recently released by National Treasury for public comment, proposes allowing SARS to prescribe a method for determining an estimate of taxable income, other than that contained in paragraph 20 of the Fourth Schedule to the act. It would appear that this concession will be made available to less sophisticated taxpayers. It is intended to assist a large number of smaller taxpayers while requiring larger taxpayers to prepare accurate estimates of taxable income complying with the 80% requirement contained in paragraph 20 of the Fourth Schedule to the act.

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