



DELEGATING

The power to preside over disciplinary appeals

Bester v Sol Plaatje Municipality and Others [2004] 9 965 (NC) High Court of Northern Cape Division 19/12/2003.

The Constitution provides that “everyone has a right to administrative action that is lawful, reasonable and procedurally fair”. This entitlement extends to municipal employees and must therefore be reflected in municipal labour and administrative practices. The Northern Cape High Court considered whether a municipal council could delegate the power to preside over an appeal process which stemmed from a disciplinary hearing.

Background

Following a lengthy disciplinary inquiry against a senior section 56 manager, the Sol Plaatje municipal council accepted the recommendation from its internal disciplinary committee that the employee be dismissed. The municipality’s disciplinary code clearly provides that employees have the right to institute an appeal against such a council decision.

The council decided to appoint an appeals sub-committee from within its ranks to preside over the matter. In response, the employee unsuccessfully applied to the Labour Court to stop the appeal process until an external chairperson who was “an independent legal practitioner with substantial experience” and who was “politically neutral” was appointed to chair the appeal.

key points

- A section 56 manager was dismissed and appealed against this decision to the Council.
- The Council delegated the right to hear the appeal to a sub-committee but reserved for itself the right to make the final decision.
- The Court resolved that this was legally possible; a municipal council cannot be expected to have the specialised knowledge and expertise to conduct disciplinary hearings.

Every organ of state must comply with the constitutional directive that ensures the right of everyone to just and fair administrative action.

Following this unsuccessful application, the employee then brought an application to the High Court challenging the council's decision to delegate its appeal function to the sub-committee. He argued that this not only breached the council's disciplinary code but was also in contravention of the collective agreement, which clearly provided that disciplinary appeals must be heard by the *full* council.

Issues

The Court had to deal with a number of issues, including whether a council can delegate to a sub-committee the power to preside over appeals flowing from disciplinary hearings. Furthermore, the Court had to examine whether a council can delegate the power to dismiss an employee to a sub-committee.

The High Court

Delegations

In terms of section 59 of the Municipal Systems Act, a municipal council must develop a system of delegations that will maximise administrative and operational efficiency. Consequently, a municipal council has the power to delegate appropriate powers by directing any political structure or office bearer, to perform certain of its duties. The Court cautioned, however, that the power to delegate must be clearly provided for, either expressly or implicitly.

Where the law does not say in so many words that the power may be delegated, it must be shown that the law implicitly allows for those powers to be delegated. In this case, neither the disciplinary code of the council nor the collective agreement provided for the power to delegate the right to preside over disciplinary appeals. The Court thus had to assess whether the law implicitly permitted the Council to delegate the power to hear the internal disciplinary appeal. Using the following criteria, the Court came to the following conclusions:

- 1 *The nature of the power that was delegated:* The power to hear an appeal did not confer unlimited discretion on the sub-committee of council.
- 2 *The extent of the transfer of power:* The discretion to implement the decision of the sub-committee still rested with the Council.

- 3 *The importance of the person to whom the powers have been delegated:* The Court stated that considering the character and composition of the Council, it was not intended to hear internal appeals. The Council has no specialised knowledge that equips it to hear technical disciplinary appeals. The majority of council members may never have been to law school so as to understand matters of law and procedure. The delegation of powers was therefore permissible in this case to ensure that the appeal was heard by a competent person or body of persons

- 4 *Practical necessity:* The Court observed that if the appeal was to be heard by the full Council it would have led to immense logistical and practical difficulties. For example, the disciplinary record (consisting of more than 1,000 pages) would have to be given to each councillor.

The Court thus resolved that the delegation by the council of the power to hear the disciplinary appeal was legitimate.

On the question of whether a council can delegate the power to dismiss an employee to a sub-committee, the Court cautioned that a resolution that completely confers such power to a sub-committee would in all likelihood amount to an "unlawful abdication of power" by a council. However, because no final decision had been made by the appeal committee and the employee was yet to go through the appeal process, the Court could not make a judgment on something that had yet to happen.

Comments

The judgment highlights the fact that every organ of state must comply with the constitutional directive that ensures the right of everyone to just and fair administrative action. It is also noted that for an organ of state to delegate any powers, the delegation of such power must be authorised by the law, unless there is an implied power to delegate. In reaching its decision, the Court however was careful to engage the specific facts and circumstances of the case and found that in this case, the Municipal Council could delegate its appeal functions to a more competent body for the purposes of fairness and smooth running of its business.

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