

To Allow or not Allow External Representation at Disciplinary Hearings

Article by CA LABOUR LAW & ASSOCIATES

A lot of employers lose cases at the CCMA or Bargaining Councils due to the dismissal being procedurally unfair.

Even though the employer had a disciplinary hearing it could be that the hearing itself was unfair.

Reasons why the hearing was unfair could be as follow:

- The person chairing the hearing was biased
- The employee was not given a fair chance to have an representative of his/her choice due to the fact that the company argues having external representation will **"set a precedent"**
- The employee was not given an opportunity to state his/her case
- The employee did not get a chance to challenge the evidence presented by the company
- Mitigating circumstances were not heard

Although the reason for dismissal was fair and the company did not follow the right procedures, the company could end up losing the case and pay a large amount of money to the employee.

In order to prevent this we recommend that you have a formal disciplinary hearing and get a chairman/lady with legal experience in the LRA to chair the hearing.

In this way the sanction will be substantively and procedurally fair. It will be unlikely that the employee will be able to win the case at the CCMA or Bargaining Council.

- **In the case of Chirwa v Transnet Ltd (2009 4 BALR 350) the dismissal was found by the CCMA to be procedurally unfair. This was due to the biasness of the presiding officer of the disciplinary hearing, whose relationship with the accused employee was fraught with animosity. This example shows that employers are still falling short when it comes to regarding the employee's right to an impartial hearing or chairperson.**

The reasons for this include:

- The employer's intention is to hold a "kangaroo court" and make sure that the employee is dismissed, irrespective of fairness or substance and regardless of the possible consequences.
- Those employees assigned the task of chairing hearings are not properly trained.

- The employer normally does not understand what constitutes bias in terms of the law.

In the case of Fawu obo Sotyato v JH group Retail Trust (2001, 8 BALR 864) the employee confessed to having stolen two bottles of beer from the employer and to drinking one of them during working hours. The arbitrator did not accept the confession as valid and also found that the chairperson of the hearing was biased.

This was because the chairperson had caught the accused employee with the beers and had been involved in drawing up the charges. This created a reasonable apprehension of bias and rendered the dismissal procedurally unfair.

Legal representation at Disciplinary Hearings

At disciplinary hearings a company normally allows the employee to be represented either by a fellow employee or by the trade union.

The company also disallows the employees to have external legal representation at a hearing arguing that the company disciplinary code does not allow this. Companies should remember that a disciplinary code (if they have one) is merely a guideline and not a law.

It is further very uncommon and unfair to have the company to argue that this is an internal matter but in the same breath argue that they will make use of the CCMA rules during the hearing.

The question should be asked – **why not allow the employee to have external representation?** The answer is simple keeping in mind that:-

- The employee chooses his/her own representative
- The employee has to pay his/her own legal cost
- The employee cannot later on argue that his/her hearing was not fair as the representative will oversee this
- **The external representative cannot change the mind of an chairperson but merely assist in asking the right questions ensuring that the correct basis of the hearing is dealt with**

In the following cases the company should allow external legal representation:

- The complexity level of the case is high
- The consequences of an adverse finding could be serious
- There would be no significant prejudice to the employer if legal representation would be

allowed

- The employee's ability to deal with the case is low in comparison to that of the employer

In the case of *Blaauw vs Oranje Soutwerke (1998 3 BALR 254)* the employer was represented at a disciplinary hearing by an attorney. However, the employee was not allowed to bring an attorney and or a legal representative to represent him. The CCMA decided that the employee should have been allowed an attorney for two reasons:

- There was nobody suitable amongst the employee's colleagues to represent the employee
- The employer was represented by an attorney who prosecuted the case for the employer.

Due to the employer's failure to allow such representation the CCMA found the employee's dismissal to be procedurally unfair and awarded the employee seven months' remuneration in compensation.

Way back in November 2004, there was a landmark ruling by the Supreme Court of Appeal (SCA) in the matter of *MEC Department of Finance, Economic Affairs and Tourism: Northern Province and another v Muhami*.

The employer's disciplinary code stated that in a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner.

In the light of this, the employee was refused legal representation at the disciplinary hearing.

The matter ended up at the SCA. The SCA determined that although the above-mentioned clause in the employer's disciplinary code should not be lightly departed from, there may be circumstances in which it would be unfair not to allow legal representation.

Why are you sceptical to allow legal representation?

I have been in the situation to preside over many hearings over the past few years and have always encouraged Companies to allow external representation if there was a request for it. This in my view will assist the employer in the event that this case is referred to the CCMA or Bargaining Council.

I have also in some cases been allowed to represent accused employees in matters where I have found that they were not guilty of the offense but have fallen victim to a situation in the workplace of being wrongly accused of a disciplinary charge normally based on the following:

- The supervisor has a unknown dislike in the employee

- The employee is a threat to his superior of a probable promotion
- The wrong person is charged
- The employer wants to decrease staff decides on the wrong advise to follow this route

In many of these cases I was able to show to the presiding officer by asking the right questions and or by testing the evidence correctly that the matter was actually a set up or in the event that there was a certain amount of guilt on the side of the employee that the incorrect sanction will have an adverse effect on the company. Therefore we have not only assisted in the process of a fair hearing but also have saved the company the possibility of having to pay the employee a hefty amount of money had the matter been referred to the CCMA or Bargaining council on a unfair dismissal case.

In our view we would encourage the employer to allow external legal representation to give the worker a fair disciplinary hearing.

The question is always asked – what is a legal representative. This is a simple answer. In my view this is a person chosen by the employee with the relevant legal experience in the LRA and not necessarily an Attorney or Advocate.

For further information please do not hesitate to contact our offices to assist you a making the right decision.

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