

The important role of an Independent Chairperson in Disciplinary Enquiries



Employers in South Africa are unfortunately often faced with instances where an employee must be disciplined due to misconduct.

Every so often, disciplinary enquiries are dealt with in a manner that constitutes non-compliance with the procedural aspects due to a biased and inexperienced Chairperson, which results to the matter being referred to the CCMA.

Although there are no guidelines in South African Labour Legislation that require a Chairperson to have any formal legal training, it is, however, a requirement that enquiries should be procedurally fair and that the Chairperson must be independent and impartial.

What is the independent function of a Chairperson?

- An independent Chairperson is not influenced by any relationship between him/herself and the employer or employee and is preferably not an individual who is also an employee of the Employer that initiates the Disciplinary Enquiry. Apart from having knowledge of applicable law and procedure prior to chairing a disciplinary enquiry, he/she must also have a clear understanding of how a CCMA Commissioner will interpret the facts of the matter and what ruling might be made if same is to be referred.
- Furthermore, a Chairperson must base his or her decision solely on the evidence submitted by the parties during the enquiry (be able to distinguish between facts and opinions) and provide reasons for his/her decision; therefore the Chair should have no prior knowledge of the details of the case.
- A decision made by a Chairperson must also be in line with the disciplinary code of the Employer and not based on his/her opinion of what an appropriate sanction would be in the specific circumstances.
- If an Employee appeals the Chairperson's decision, a different Chairperson must conduct the second Enquiry, and if a Chairperson recommends dismissal as sanction for reasons unrelated to the charges against the Employee, the outcome shall be thoroughly investigated and scrutinised by the CCMA if such a matter is referred.

Case Law example **SARS v CCMA and others:**

In **SARS v CCMA and others (C683/11) [2015] ZALCCT**, the Court had to decide whether the Employer (being SARS) can overturn a decision given by a Chairperson in a disciplinary enquiry. In this specific case, the Chairperson ruled that a Final Written Warning be issued after the Employee was found guilty of downloading pornographic material. The Employer, however, felt that the sanction was inappropriate and accordingly dismissed the Employee after he was allowed ample opportunity to explain why dismissal was not appropriate. The CCMA found in favour of the Employee, namely that the dismissal was in fact unfair.

SARS appealed to the Labour Appeal Court which found that an Employer cannot change a Chairperson's decision but could take it on review if they are not satisfied with the outcome. The Employee was compensated.

Case Law example **BMW vs Van Der Walt :**

In essence, an Employer cannot simply overturn a Chairperson's decision as it would be procedurally unfair. This principle, however, is not set in stone as the Labour Appeal Court found in **BMW vs Van Der Walt (JA10/99) [1999] ZALAC** that a second disciplinary enquiry may be held only if it would be fair to the Employer and the Employee, for example if the Chairperson made the wrong decision regarding a sanction.

It must also be taken into consideration that, if a Chairperson's decision is blatantly wrong, an Employer can overturn such a decision. Courts and Arbitrators will interfere with decisions if–

- two or more employees, charged for the same misconduct, are treated differently by the same Chairperson;
- the Chairperson was bribed;
- a Chairperson imposes a sanction which deviates from the accepted norms and standards;
- a Disciplinary Enquiry is inconsistent with the Employer's Disciplinary Codes and if the relevant facts were not investigated.

In conclusion

An Employer must give a Chairperson a specific mandate to either make a decision with regard to the sanction, or merely a recommendation in order to avoid confusion. In **Gubeve v NCR (21151/2018) [2018] ZAGPPHC 288**, the Employer overturned the Chairperson's decision based on their policy which makes provision for such. The Court held that if an Employer can overturn a decision of an impartial Chairperson, there would be no point in conducting a Disciplinary Enquiry.

Employers must consider the costs involved if an award is made by the CCMA against them based on an untrained and incompetent Chairperson's decision.

The designated route is therefore to appoint an independent Chairperson.

SERR Synergy assists businesses to *ensure that the correct procedure is followed during a Disciplinary Enquiry as well as to avail a competent and independent Serr Synergy chairperson* in order to minimize the chances for the matter to be referred to the CCMA due to procedural defects.

About the Author: Burger Myburgh completed his LLB at the Northwest University Potchefstroom and was admitted as an attorney in 2015. He was involved in general litigation in Limpopo province and joined the SERR Synergy legal team in 2019 as a Legal Advisor.

