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What role does each party play in a Workplace Disciplinary Hearing?



In terms of section 188 of the Labour Relations Act 65 of 1995, an employee should not be dismissed without following a fair procedure and ensuring the procedural and substantive fairness of such a dismissal.

In terms of procedural fairness, an employee may not be dismissed without being afforded the opportunity to “defend” him/herself.

The case of *National Union of Furniture & Allied Workers South Africa obo Javulani / Dreamworx Bedding (Pty) Ltd and Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC)*, stressed that a workplace disciplinary hearing is not a criminal trial but simply an opportunity for an employee to be heard and to defend him/herself against the relevant charges.

In a previous blog, we discussed *how to deal with constructive dismissal when resignation is the last resort*, while in this blog we will look at the employee's rights when facing a disciplinary hearing and also discuss the important role that each party plays during a disciplinary hearing.

What are the rights for an accused employee when facing a disciplinary hearing?

In order for a fair procedure to take place, an accused employee has certain rights when facing a disciplinary hearing.

- Firstly, the right to be heard, and to be present at any hearing/enquiry/investigation as per the scheduled date and time. The accused employee must be provided with sufficient notice and be informed of the charges against him/her in order to prepare his/her defence.
- The right to an interpreter.
- The right to be represented at the hearing by another person, either by a colleague of the accused employee's choice or by a shop steward.
- The right to ask questions and test/dispute the evidence submitted and statements made by the employer and their witnesses. Furthermore, the right to present his/her case in defence of the charges and to call witnesses to testify on his/her behalf.
- Lastly, the right to appeal against any sanction/penalty that is imposed.

Which parties should be present at a disciplinary hearing?

The following parties would be present at a formal hearing:

- A chairperson (preferably independent)
- The employer/complainant
- The accused employee
- The employee's representative – if required
- An interpreter – if required.

Let's look in detail at the roles that the above-mentioned parties play during a disciplinary hearing.

The Chairperson

The Chairperson should be unbiased, impartial and should not have any knowledge of the case prior to the hearing to ensure that the hearing is conducted in a fair and objective manner. The role of the Chairperson is to ensure that the hearing is conducted in an orderly manner. The Chairperson will facilitate the entire hearing.

- Firstly, the Chairperson will introduce him/herself and all parties present by indicating each party's role in the procedure. The Chairperson can then proceed to confirm the procedure that will be followed and the accused employee's rights. After confirming the above, the Chairperson will read the charges laid against the employee and determine whether the accused understood the charges and will then request the accused employee to plead on the charges.
- The Chairperson will proceed to provide each party with the opportunity to present their case by submitting evidence and calling witnesses. Each party will have an opportunity to cross-examine evidence submitted and statements given by the other party. The Chairperson will listen to all the statements made and evidence submitted in order to take everything into consideration. He/she will also afford the employee an opportunity to present mitigating factors, while the employer will have an opportunity to present aggravating factors.
- The Chairperson will then adjourn the proceedings in order to apply his/her mind and to study all evidence submitted. He/she will also make a finding of guilty or not guilty based on a balance of probabilities. 'On a balance of probabilities' means that one party's version must be more probable than the other party's version in order to succeed. After a finding has been made by the Chairperson, a recommendation for an appropriate sanction will be made. The recommended sanction should be in line with the company's disciplinary code or Code of Conduct. Should the accused employee not be satisfied with the outcome of the hearing, he/she must be offered the opportunity to appeal the sanction.

It should be noted that it is not always possible, especially in smaller workplaces, for a chairperson to be independent. For instance, in smaller companies the manager and supervisor is also the employer and owner of the business. In such instances, the employer is expected to be the chairperson but will also act as the complainant. In *Mitchell v Fairstep Digital Prepress*, it became evident that the law requires a fair and reasonable outcome and not necessarily a formal hearing, meaning that a smaller employer can fulfil the role of chairperson, and although not independent, must exercise an independent judgement after the hearing by taking all evidence, including that of the errant employee, into consideration.

The Complainant/Employer

The employer or complainant must lead and submit evidence and call witnesses to prove the employee's guilt. The employer must provide the Chairperson with the company's disciplinary code and ensure that the matter had been properly investigated in order to prove on a balance of probabilities that the employee is guilty.

- Furthermore, the employer should lead evidence to confirm that there had been a breakdown in the trust relationship to the extent that it would render the employment relationship intolerable. The employer should furthermore ensure that aggravating factors are provided, such as the accused employee's previous warnings.
- A lack of evidence provided during a hearing might lead to a 'not guilty' finding; therefore, proper care should be taken when investigating and presenting the case.

The accused employee

In order to give full effect to the *audi alteram partem* rule, and employee must be given an opportunity to be heard. The entire purpose of a hearing is to allow an employee, who is allegedly guilty of misconduct, an opportunity to defend him/herself against the charges.

The accused employee will be afforded the opportunity to lead evidence and call witnesses in defence of the charges. Once the employer/complainant had made their statement and called witnesses, the employee will be afforded an opportunity to cross-examine the employer/complainant and their witnesses. This is to familiarise the Chairperson with the employee's side of the case.

Employee's representative - if required

An employee facing a disciplinary hearing has the right to be represented or assisted at the hearing either by a fellow employee or by a shop steward.

- Representation by an external person is not a right but should not simply be denied without affording the accused employee the opportunity to state the reason for said representation. If an employee wishes to be represented by an external person, he/she should submit a request or application stating the reason why internal representation cannot be used. The employer will then have to consider the application or request and make a decision based on the facts and/or merits.
- The role of the representative is to ensure that the employee receives the fair procedure he/she is entitled to. As soon as the employee receives a notice of the hearing, he/she should consult with his/her representative in order to prepare adequately for the hearing. The representative will be afforded the opportunity to make representations on behalf of the accused employee and to cross-examine evidence and statements submitted.

The Interpreter

An employee facing a disciplinary hearing has the right to an interpreter who will translate all proceedings in the language as requested by the employee. In the case of *Mmola v CCMA [2018] 8 BLLR (LC)*, the Commissioner held that proper interpretation is an important element in the procedural aspect of a disciplinary hearing; therefore, an employee reserves the right to an interpreter in the language of his/her choice. It is important to note that an interpreter will only be fulfilling the role of a translator and will not be allowed to testify in the hearing.

In conclusion

Thus, in order to ensure fair procedure in dismissing an employee, it is important to be fully aware of each party's role in a disciplinary hearing and to afford each party the explicit right to be heard. *SERR Synergy assists businesses and employers to ensure that the correct procedure is followed in terms of the relevant Labour legislation by conducting disciplinary hearings in a professional and fair manner in order to mitigate the risks employers face in terms of dismissals.*

About the Author: Dané Benadie joined SERR Synergy in January 2018 and is a Legal Advisor at our Pretoria Branch. She completed her Honours in Labour Relations at the North West University Potchefstroom and also holds a Post-Graduate Certificate in Advanced Labour Law.

Sources:

- SA Labour Guide
- Labour Relations Act 66 of 1995 and the Code of Good Practice
- *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC)
- *Mmola v CCMA* [2018] 8 BLLR (LC)
- *Mitchell v Fairstep Digital Prepress*
- *National Union of Furniture & Allied Workers South Africa obo Javulani / Dreamworx Bedding (Pty).*

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