

The importance of having a Disciplinary Code and Procedure in the workplace



Employees have an obligation to make their personal services available to the employer and to do so with due diligence, competence, and good faith within the employment relationship.

This can be brought about by entering into a contract of employment, which is an agreement between the employer and employee.

In terms of this contract, the employee will perform their work in line with the conditions as specified therein and follow instructions given to them by their employer.

A great tool to further regulate compliance with the contract of employment is by way of a *disciplinary code and procedure*. Furthermore, a disciplinary code and procedure can be described as a method to maintain the standards of conduct and, to a certain extent, address the incapacity of employees within a company or organisation. The aim of discipline is to correct unacceptable behaviour, adopt a progressive approach in the workplace, and to create certainty and consistency when discipline needs to be applied.

In this blog, we will deal with the importance of a company having a well-drafted and clear disciplinary code, as well as how important is it for a company to abide by it during disciplinary hearings.

What are the obligations of the concerned parties in the disciplinary code?

The onus rests on the **employer** to ensure that all employees are aware of the rules and reasonable standards of behaviour expected from them in the working environment. The disciplinary code must be drafted in clear and unambiguous terms to ensure that the employee is certain as to what is expected of them. On the other hand, it is the **employee's** responsibility to ensure that they are familiar with the relevant standards and requirements and, when in doubt, to make an attempt to obtain clarity to ensure compliance.

What alternative measures can be taken in cases of misconduct before applying disciplinary action?

An appropriate measure would first be to undergo counselling with the employee. **Counselling** would be necessary in instances where an employee has breached a rule of the disciplinary code. The breach may be minor in nature, in which case condonation by the employer is a distinct possibility. To pursue this measure, a meeting must take place between the parties where the employer will explain to the employee how they breached a specific rule and, in turn, the employee will need to give reasons for their misconduct. However, should this measure not succeed, application of the disciplinary code can proceed by way of informing the employee to attend a formal *enquiry*.

What are the types of disciplinary action in the workplace?

Disciplinary action can take several forms depending on the seriousness of the offence. The following forms can be identified in order of severity:

- Verbal Warning
- Written Warning
- Final Written Warning
- Suspension without pay
- Demotion as an alternative to dismissal
- Dismissal

When can an employer hold a formal Disciplinary Inquiry?

An employer should give the employee at least 48 hours' notice (reasonable time) of a proposed disciplinary inquiry which the employee is requested to attend. **The notice which should include the following:**

- Date, time and venue of the inquiry;
- Details of the allegations against them;
- The employee's right to representation at the hearing by either a fellow employee or shop steward;
- The employee's right to an interpreter if required; and
- The right to call relevant witnesses in support of their case.

How important would it be for a company to abide by its own Disciplinary Code during formal Enquiries?

Section 188 of the Labour Relations Act (LRA), which deals with other unfair dismissals, states the following:

1. A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

2. Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”

Given the provisions of section 188 of the LRA above, the onus of proof rests with the employer. Employers must therefore exercise great care when designing and applying their disciplinary policies as the labour courts do not take kindly to employers who do not follow their own policies and those who cannot justify dismissal as a result. It is important to note that consistency must be applied when dealing with such disciplinary matters to ensure that there is an element of fairness and that the employer is not guilty of unfair labour practices by applying rules in an arbitrary and discriminatory manner.

Caselaw – *Riekert vs CCMA and other*

In **Riekert vs CCMA and other (2006, 4 BLLR 353)**, the following significant findings were made by the Labour Court where an employee’s dismissal was upheld by an Arbitrator:

- *“The CCMA Arbitrator had recognised that the employer had a very extensive disciplinary code but had not adhered to it.*
- *The CCMA Arbitrator found that the employer had complied with the basic requirements of natural justice and that disciplinary codes were mere guidelines.*
- *While it is true that disciplinary codes are merely guidelines this does not entitle employers to deviate from procedures as they like.*
- *It was unclear how the arbitrator arrived at the conclusion that the hearing was substantially fair since, contrary to the employer’s own code, the chairperson of the hearing had neither kept any minutes of the proceedings nor provided any explanation for his decisions.*
- *The employer had waited six months from the time it became aware of the misconduct before bringing the charges against the employee. This was despite the employer’s own disciplinary code that required that charges be brought within a reasonable time.*
- *The CCMA arbitrator had been wrong in accepting the employer’s deviation from its own code in the absence of any compelling reason for such deviation.*
- *The CCMA arbitrator had not applied his mind to his decision that the employee was guilty of the charge of accessing confidential information without authority. The employer’s witnesses were not even able to remember the date of the alleged incident.*
- *The arbitrator had failed to apply his mind to the evidence at all.*
- *The arbitrator’s award was set aside as the dismissal was substantively and procedurally unfair. Employer was ordered to pay the employee compensation (including interest) as well as his legal costs.”*

Conclusion

In conclusion, a disciplinary code is therefore a very important tool which employers and employees will make use of to ensure that both parties “know where they stand with one another” despite it being a guideline as highlighted in the *Riekert* case above. Furthermore, it is also important to note that employers should not simply ignore their own disciplinary codes, allow any unnecessary delays in notifying employees of disciplinary charges, and forget to prepare adequately for the hearings by gathering and preparing all evidence prior to the disciplinary hearing. Furthermore, the employer must realise that despite the importance of the code, each case will essentially be dealt with on its merits and, where a deviation does occur, it must be reasonable and justifiable. A clear and properly drafted code circulated beforehand, will ensure that employees know what is expected of them and that disciplinary measures are applied consistently and fairly. This very basic and elementary rule regarding disciplinary codes in the workplace, if followed, will prevent hefty and stiff awards against employers at the CCMA.

SERR Synergy seeks to assist employers in a thorough and supportive way by ensuring that disciplinary codes are drafted clearly and that the correct procedures are followed during a disciplinary hearing. We also assist in formal grievance inquiries by serving as independent and objective chairperson(s). With our professional legal advisor’s assistance, the employee’s grievances will be addressed and resolved in a fair manner.

About the Author: Stanley de Vries joined SERR Synergy in 2017 as a BEE Project Manager. He completed his LLB degree at the University of Pretoria in 2009 and became an admitted attorney during 2011. He is currently working as a labour legal advisor.

Sources:

- o Section 188 of the Labour Relations Act 66 of 1995.
- o *Riekert vs CCMA and other* (2006, 4 BLLR 353).
- o Disciplinary Procedures as per CCMA directives.
- o Article by Ivan Israelstam: “Why is it important for employers to follow their own disciplinary procedures?”
- o Law@work 4th Edition: A van Niekerk and N Smit.

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