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Understanding the difference between Disciplinary Enquiry versus Disciplinary Hearing

In terms of South African Labour Legislation, each and every employee has the right to be heard and to defend himself or herself when facing possible dismissal.

In a recent matter, the question arose as to whether there is a difference in procedure and outcome when it comes to interpreting the terms “disciplinary enquiry” and “disciplinary hearing”.

In this blog, we will dig deeper to establish firstly the difference between the two concepts, the rights that employees have during such processes, and the onus that rests on the employer.

What is the purpose of a disciplinary enquiry?

The purpose of a disciplinary enquiry is to determine whether the employee was indeed guilty of misconduct. Stated differently, it is an investigative process that the employer needs to conduct to establish whether the employee was indeed guilty of misconduct.

In *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others*, the Court found that the Labour Relations Act does not expect a court-styled disciplinary enquiry but that an employee be provided an opportunity to state their case in response to any allegations made against them, which need not be in a formal enquiry.

This was reaffirmed by *AUSA obo Melville v SA Airways Technical* which referred to *Schedule 8 of the Code of Good Practice,* stating that *"while the process can be informal, the employee should nevertheless be told what case he has to meet and be given a proper opportunity to prepare and present his response".*

What is a disciplinary hearing?

A *disciplinary hearing* is a formal and structured process used by an employer to deal with matters relating to an employee's work and issues such as misconduct due to unacceptable or improper behaviour.

What procedure must an employer follow?

In terms of *section 188 (1) (b) of the Labour Relations Act (LRA),* the onus is on the employer to prove that a dismissal was procedurally fair. This begs the question: how does an employer do this without invoking a formal process? The employee has the following procedural rights, to name a few:

- The right to be informed as to what the charges are;
- The right to a proper opportunity to prepare; and
- The employee's right to be heard and to present a defence.

The above rights clearly require supporting documentation such as minutes, hearing notices and charge sheets, all of which suggest a sense of formality.

The *Avril Elizabeth Home* case, as mentioned above, is significant in that it highlighted two important findings, namely:

- Video coverage does not have to be absolutely conclusive to be accepted (balance of probabilities is the onus of proof applicable to labour law, which differs from that of criminal law).
- The procedure bringing about a dismissal does not have to be a formal enquiry *unless* the parties have agreed that it will be a formal hearing.

Conclusion

In conclusion, a clear difference between the two processes is the nature thereof.

Given the above, it is clear that a formal process is not actually required unless agreed to by the parties. The agreement can be in the form of a stipulation in the *employment contract,* the acknowledgement of *the company's Code of Conduct* or confirmation to proceed by the parties at the beginning of a hearing.

Despite this, the onus is nevertheless on the employer to prove that the employee's rights have been considered to ensure that fairness is achieved. For this purpose, however, the employer would have to embark on a controlled disciplinary hearing with an independent/impartial chairperson who is skilled in disciplinary procedure.

The employer can do this either through managers who have been thoroughly trained in disciplinary processes (in which case it could potentially be argued that the chairperson is not impartial), or by hiring labour law experts to chair their hearings, which seems the logical route to follow to argue that the disciplinary process had been conducted fairly.

SERR Synergy assists employers in chairing disciplinary hearings to ensure that they have taken their employees' rights into account and are able to prove the fairness of disciplinary processes.

About the Author: Stanley de Vries joined SERR Synergy in 2017 as a BEE Project Manager and is currently working in the Labour Department as a Senior Labour Advisor. He completed his LLB degree at the University of Pretoria in 2009 and became an admitted attorney in 2011. He has also completed a certificate course in Advanced Labour Law which he passed with Distinction.

Sources:

- Avril Elizabeth Home for the Mentally Handicapped vs CCMA and others (2006, 9 BLLR 833)
- AUSA obo Melville vs SA Airways Technical (Pty) Ltd (2002,6 BALR 573)
- Schedule 8 Code of Good Practice: Dismissal
- Section 188 of the Labour Relations Act (LRA)
- Labour Guide: *"Hearings must be formal, and also fair"* by Ivan Israelstam.