



Practical guidelines for initiators in disciplinary enquiries

Each company has certain rules, regulations and procedures which need to be adhered to by all the employees in the workplace. When such rules and regulations are breached by employees, and if the said misconduct is serious, the employer may reserve his/her right to proceed with a disciplinary enquiry against these employees.

Schedule 8 of the Good Code of Practice indicates that usually, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry referred to in the Labour Court matter of the *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others (JR782/05) [2006]*. As per the Good Code of Practice, it is always recommended that an employer should notify the employee of the allegations using a form of language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations and afforded a reasonable time to prepare the response to these allegations. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written communication of that decision.

If certain rules are broken in the workplace, and an investigation is conducted to determine whether there are grounds for a disciplinary sanction or dismissal, an initiator must be appointed by the employer. The initiator may be an employee, member of management, owner of the company or any other person, should the company make provision for such. It is of utmost importance that employers ensure that the selected initiator is well equipped with the necessary knowledge, skills and training as the duties of an initiator plays a pivotal role in the investigation as well as the disciplinary process. The initiator of a disciplinary hearing may be required to provide substantial evidence to prove the case against the employee. It often happens that a misbehaving employee cannot be found guilty due to the fact that the initiator failed to present a substantially convincing case.

We recommend the following steps be taken by both the initiator and the investigator when preparing and presenting a substantially convincing case:

Investigate the incident exhaustively.

1. Establish how, when and where the incident took place;

2. Take notes of the incident, interview all the employees involved and get written statement from those employees;
3. Secure and establish all possible evidence available for example video and sound recordings, tracking records, policies and procedures, witnesses and receipts;
4. If eyewitnesses witnessed the incident, obtain a written statement from the witnesses and take their contact details. It is important to arrange with these witnesses to be available at the disciplinary enquiry as they will need to testify regarding the content of the statements and they could further be required to come and testify at arbitration, should the case go further;
5. Establish whether the employee has committed a similar offence previously.

Prepare thoroughly for the disciplinary enquiry.

1. Ensure the employee is informed of the date and time of the enquiry;
2. Ensure proper allegations is drafted which clearly indicates the date and time the allegations took place;
3. Serve the notice to attend the disciplinary enquiry on the employee at least 48 hours before the scheduled date of the enquiry;
4. Prepare questions for your witnesses. Arrange with your witnesses to be available on the date of the enquiry. Questions also need to be prepared for the employee and any possible witnesses which the employee may call to testify at the enquiry;
5. Prepare a bundle with all the documentary evidence you intend to use;
6. All evidence must be available and presented in aggravation if the initiator intends to argue aggravating circumstances, for example, previous warnings, damages and loss which the employer suffered or could have suffered and a statement why the trust relationship is broken;
7. Ensure the bundle of documents contains all the personal information of the employee such as the employee's contract of employment, signed policies and procedures, disciplinary record, training confirmation and all evidence of the misconduct.

If a sanction of dismissal is issued after the enquiry and the employee believes that the ruling is unfair and incorrect or the procedural process was flawed, the employee has the right to refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or relevant Bargaining Council. In this regard, the chairperson should advise the employee of his/her right to refer a dispute to the CCMA.

If the dispute is unresolved and referred for arbitration, the employer still bears the onus to prove that the dispute was substantively and procedurally fair. The arbitration process is *de novo*, meaning determining the matter afresh. The initiator from the disciplinary enquiry should once again be part of the arbitration process, ensuring that the Commissioner is being provided with substantial evidence to prove the case against the employee. The initiator is required to ensure that all witnesses who were part in the disciplinary hearing are available to testify in the arbitration. All evidence which was used in the disciplinary enquiry must be presented in the arbitration, and therefore, the initiator will need to ensure that such evidence is arranged and presented on the said date.

The responsibilities of an initiator are instrumental as they are entrusted with ensuring that all evidence pertaining to the allegations against the employee is presented at the disciplinary enquiry and arbitration, should the matter be referred. A well-equipped and skilled initiator forms

the backbone of a successful disciplinary enquiry or arbitration hearing, as to ensure that the allegations against the employee are proven to be substantively and procedurally fair.

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NB: Please note that this information does not constitute legal advice.