

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

PROCEDURAL FAIRNESS IN DISCIPLINARY ENQUIRIES AND

PRE-EMPTIVE RESIGNATIONS

Jointly organised by:



The Institute of
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PROCEDURAL FAIRNESS IN DISCIPLINARY HEARINGS

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- Why is procedural fairness a requirement?
- The common law requires all people accused of wrong doing to be heard before guilt is decided. There may well be a very good explanation by the accused which must be aired before the decision on guilt is made.
- Egs: innocence, misunderstanding, self defence – all of which determine not only whether he is guilty of the wrongdoing but also how he should be punished, if at all.
- Like in all disputes there are always two sides to the story and one cannot get to the truth of the matter without hearing both sides. So not only is it a legal requirement but also as a matter of logic and for the feasibility of the end result of a disciplinary hearing, the accused's version must be known to the person deciding his fate..
- For the purposes of this discussion the accused is the employee and I will use terms that I assume are understood by everybody. If there is any term or expression that is not understandable, please stop me and I will explain



- An accused in a disciplinary enquiry faces charges, most often for misconduct. There are also charges which may pertain to performance or incapacity. All of these charges require the employee to be heard before a decision on guilt, and then sanction, is made.
- If an employee's version is not placed before the enquiry, the proceedings are immediately flawed and should be set aside.

Aspects of procedural fairness:

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- These are the WHAT, WHEN, WHO and HOW of the hearing.

What is the employee being charged with?

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- The actual charges he faces (in writing and in a language he understands);
- The dates and time of the alleged contraventions;
- The rule that he contravened;
- The employer's bundle of documents that will be used in support of the allegations against him;
- What are the possible sanctions should he be found guilty?

When will the hearing take place?

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- Date, time and place of the hearing;
- Cannot be in a place that is not conducive to his being heard properly (too far away, in a place where he is naturally ill-at-ease);
- Sufficient notice of the hearing (to allow for him to prepare his defence);
- Usually between 7 and 14 days notice
 - **What happens if the notice is insufficient?**

Who will hear the matter?

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- The chairperson must be objective
- Bias – what does it mean?
 - without any familiarity with either the employer or employee party,
 - no vested interest in the outcome of the hearing;
 - no animosity to the employee or employer;
 - not related to the prosecutor, or any witness of the employer or employee;
 - must not be aware of any of the details of the hearing prior to the commencement of the hearing;
 - can only be informed of the details through the actual hearing: i.e through the prosecutor, the employee and the witnesses.
- **Payment by employer? Is this a sign of bias?**



- Best if an outside person who has the necessary skill, experience to chair hearings:
 - the law of evidence;
 - the rules regarding disciplinary hearings;
 - assertive and confident in carrying out his role;
- Sensitive to the issues of the person facing charges and the person prosecuting.

How will the hearing take place?

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- The employee must be informed in a language he understands of the rules of the hearing;
- Should be contained in the notice to attend the hearing;
- The usual rules are:
 - The employer will call witnesses, whom the employee may cross-examine to test the employer’s version;
 - The employee may call his own witnesses in support of his version, whom the employer may cross-examine;
- **What does an employee do when his fellow workers know that his version is correct but they are afraid to testify on his behalf for fear of reprisals?**



- The employee should be allowed access to documents, witnesses that are in the possession of the employer or who are employed by the employer;
- **Expert witnesses used by the employer- how does the lay employee deal with this?**
- **Access to the expert witnesses?**
- **May an employee speak to the employer's witnesses' before the hearing?**
 - The employee may produce his own bundle of documents in support of his version;
 - The hearing must be in a language the employee knows, understands and can communicate in;
 - The employee may request a translator (timeously);
 - The employee may be represented (usually a problem);
- **Relative abilities of the prosecutor and employee in presenting the two versions – is this a factor of fairness?**



- The rules of proceedings should be explained by the chairperson at the commencement of the hearing;
- Should include a summary of how the evidence will be dealt with and how the proceedings are split into two parts:
 - whether the employee is guilty; and
 - if so what sanction is appropriate
- For practical purposes and for the sake of fairness there should be a break between the two parts
 - **Why?**
 - The charges must be read to the employee and he must plead to the before the employer starts to lead evidence
 - » **Why?**
 - Adjournments?
 - If a disciplinary code does not exist?

PRE-EMPTIVE RESIGNATIONS:

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- Some employers have a clause in the disciplinary code allowing an employee the option of resigning instead of facing disciplinary charges and a possible dismissal.
- It is assumed that the employer in this instance will not continue with internal disciplinary proceedings against an employee should the option be exercised by the employee.
- On the other hand some employers still seek to hold disciplinary hearings against employees although they accept their resignations. **Is this lawful?**

The meaning and impact of resignations:

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- An employment relationship may be terminated either by effluxion of time, by the employer or the employee.
- A termination by the employee is usually by resignation.
- Once an employee has resigned the employment relationship has terminated. The employer has no legal control over that ex-employee. Apart from damages arising as a result of the resignation or damages arising out of the conduct of the employee during the course of the relationship, the employer has no right that it can exercise as an employer in an employment relationship.
- All the rights and obligations of the parties stop once the relationship is terminated. The contract is at an end. So, for example, an employee cannot legally claim annual leave from the employer after the relationship has ended. Similarly an employer cannot legally claim that the employee perform any services for it.



- **However this must not be confused with any unlawful action by either party during the life of the contract, for example monies owing to either party during the life of the contract still due to that party at the time of resignation, must be paid, failing which an action for the recovery thereof may be instituted.**
- An employer may therefore sue an employee, for example, whose misconduct has resulted in the employer suffering damages. Such an action may be instituted in the civil courts. An employee may sue an employer who failed to pay him monies owing to him prior to or at the termination of the contract. He too may sue the employer in the civil court for the recovery thereof.

Can a disciplinary hearing be held after a resignation has been accepted?

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- The purpose of a disciplinary hearing is to objectively enquire whether an employee is guilty of misconduct, poor work performance or has some incapacity that lessens his ability to perform the job functions to the employer's standard. If it is found that he is in fact guilty of misconduct or poor performance or incapacitated in some way, the chairperson must decide what is the best solution.
- In misconduct cases an appropriate sanction may be meted, which can be warnings, suspensions, or a dismissal.
- In poor performance or incapacity matters, either more training or an adaptation of the work environment may be facilitated.
- In all these situations it is accepted that the employment relationship is still intact and part of the question to be answered is how best to solve the problem so that the relationship may continue.



- Only in the most severe forms of misconduct where progressive discipline requires that dismissal is the appropriate sanction, is it accepted that the relationship will come to an end. But this also assumes that until that sanction of dismissal is handed down the relationship still exists.
- It is also logical that workplace discipline is only pertinent when the relationship exists. Can you imagine issuing a sanction of more training to be given to an employee who no longer works for an employer? Or adapting the working environment for a disabled employee who no longer works for an employer? It's nonsensical.
- **So can an employer, after an employee has resigned, issue a lawfully binding sanction for misconduct, poor performance or incapacity? The answer is no.**
- **An employer cannot dismiss an employee who no longer works for it.**
- Therefore any right of the employer to hold a disciplinary hearing after the employee has resigned is of no force and effect.

SOME QUESTIONS THAT NEED ANSWERING

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- **Whether accepting a resignation rather than proving the misconduct would prejudice the employer's recourse against the employee for any loss suffered?**
- A distinction must be drawn between the result of a disciplinary hearing and a claim for damages.
- The purpose of a hearing is to resolve a problem currently occurring in the employment relationship. The sanction issued after a disciplinary hearing does not require as a matter of law proof damages suffered by the employer.
- A claim for damages requires proof that the employer suffered loss directly as a result of some conduct by the employee and that those losses must be recovered from that employee.
- A claim for damages does not require in law the holding of a disciplinary hearing against the employee.



- No prejudice will be suffered by the employer who accepts the employee's resignation. It may still sue the employee for damages arising out of misconduct or arising from the resignation itself.
 - **Whether it would prejudice the employer's chances of seeing the person successfully prosecuted?**
- A criminal action against the employee does not require in law the holding of a disciplinary hearing against the employee.
- So there should not be any prejudice to the State prosecuting the employee in criminal proceedings.



– **How to protect the employer from a later claim of constructive dismissal**

- The easiest and most effective way to avoid this is to have a written agreement between the parties recording that:
 - the employee has elected to resign from work;
 - the employee has made that decision voluntarily and it is free of any influence by the employer;
 - the reasons for the employee's resignation;
 - the employee has no intention of instituting a claim for dismissal or constructive dismissal from the employer.
 - the employer accepts the reasons for the resignation and accepts the resignation with effect from a specific date.
- **NOTE** if an employer intends suing for damages as a result of the resignation or as a result of the employee's conduct during the tenure of the relationship, it should be recorded in the agreement that the employer's contractual rights against the employee are reserved.



- **What impact a resignation would have on the employee's pension/provident fund - and UIF**
 - The rules of the respective pension and provident funds will deal with resignations. There must be some punitive effect on the benefits if they are to be claimed on resignation.
 - UIF does not apply to employees who resign.

- **If the employee was part of a bigger ring of suspects in the workplace, the failure to investigate fully and ventilate the matter may result in other employees not being brought to book.**
 - If an employer intends holding a disciplinary hearing, and the employee is opting to resign merely to avoid that hearing, the employer may reject the offer to resign and proceed with the hearing. This does not prevent the employee from leaving.

 - The employer is then enabled to investigate all the employees who may have participated in the misconduct and may consistently hold disciplinary hearings in respect of all concerned employees.



- Although this may be more expensive than accepting a resignation as the employees may have to be suspended with pay pending the outcome of the hearing, it is a fair and effective approach. It will also allow the employer to test the employee's innocence in the misconduct.
- **Whether there would be implications for the employer in terms of any insurance he may hold to cover loss?**
 - The terms of the respective insurance policy will determine this.
 - Usually if, for example, the theft is ongoing and the employer simply accepts resignations from the affected employees as time goes on the insurance company will investigate the employer's actions. Generally if the theft is once off and if the terms of the policy do not place an obligation on the employer to hold an enquiry, then one need not be held.

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THANK YOU

THE END

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