Conducting a Disciplinary Hearing

Handbook

Project Managers

SEBETSA CONSULTING SERVICES

info@sebesta.co.za

SECTION ONE

CONDUCT A DISCIPLINARY HEARING

INTRODUCTION

Taking disciplinary action against an employee can be quite difficult and emotional. So applying objective principles will help you make fair and reasonable judgments about any action that needs to be taken. This will also reduce the risk of litigation or the decision being overturned in an appeal process.
Disciplinary hearings are a difficult area for employers.
Even though there can be a wealth of evidence against an employee, if a fair process is not followed, it leaves the employer open to the risk of a claim for unfair dismissal.

In this course we will help you understand the local regulations even before considering any disciplinary action.

Before contemplating implementing disciplinary measures, you need to understand which policy or code was breached by the employee, and what level of importance that policy or code has within the company. You Have to familiarise yourself with the Company's policies and code of conduct. This will give you very specific guidance on what your company considers unacceptable behavior.
It is the employer's prerogative to manage discipline in the workplace. In order for employers to be fully compliant with legislation, due process must be adhered to. A chairperson's role in complying with labour laws, would require strict adherence to procedural fairness.
The course will provide a comprehensive guide to assist you as chairperson in fulfilling this legal obligation.

The course will address frequently asked questions such as:

- What are the different types of dismissals?
- What are the requirements of the Labour Relations Act?
- What are the conduct requirements of the chairperson?
- What are possible sanctions?
- Which steps should be followed by the chairperson?

In the first section, we will focus on the protecting the rights and obligations of the employer and employees. With special attention to discipline and maintaining the standard within the Company. At the end of section one, learners will be able to explain the steps in the process of positive discipline. And identify the various grounds for dismissal in terms of the LRA and then outline the various provisions that should be met to ensure the substantive and procedural fairness of dismissal in each instance.

MANAGING DISCIPLINE IN THE WORKPLACE

The aim of discipline

Organisations can only exist and survive if their goals and objectives are being met. The aim of discipline is therefore to ensure that employees, on all levels in an organisation, comply with the prescribed conduct, performance and behavioural standards and criteria that are necessary to ensure the success and the effectiveness of an organisation. If an organisation has a disciplined workforce, the employees will contribute effectively and efficiently to its goals. A major consequence of an undisciplined workforce is that the organisation will not be able to meet its goals contributing to its possible failure.

The disciplinary procedure must be regarded as corrective and positive, rather than punitive When employees accept the leadership and role that management plays, they become motivated to follow the rules set by the leadership, minimising the risk of negative conflict and industrial action.

Before embarking on any form of discipline, it would be wise to consider that discipline may eventually lead to dismissal. Therefore, the way in which an employer goes about disciplining employees may ultimately be tested against the principles contained in the Labour Relations Act of 1995 and its Code of Good Practice.

To determine whether a dismissal for misconduct is fair, the Code of Good Practice prescribes that be given to:

Whether or not the employee contravened an existing rule or standard which regulates conduct or is of relevance to the workplace.

- If a rule or standard was contravened,
- whether or not the rule or standard was relevant and valid;
- whether the employee was aware of, or should reasonably have been aware of the rule or standard;
- whether the rule or standard has been applied consistently, and whether the penalty was appropriate for the contravention of the rule or standard.

Accordingly, these broad principles must be regarded as fundamental to all discipline in the workplace.

Rules and standards

Discipline presupposes the existence of clear rules and standards for employee conduct. It is of major importance that rules and standards create certainty and consistency in the application of discipline. Substantive rules may be formalised in a written code. There may also be unwritten rules such as compliance with the law (OHSA) which must be adhered to. Further rules and standards may come into existence as a result of circulars, notices, day-to-day instructions, custom and practice. The rules must be of relevance to the workplace.

Validity of rules

To be enforceable, a rule must be valid. By "valid" is meant that the rule must be lawful and reasonable.

The primary objective of disciplinary action is to motivate an employee to comply with the organisation's rules and performance standards. An employee receives discipline after failing to meet some obligation of the job. The purpose of a disciplinary procedure is not only to punish, but also to correct the employees' conduct or performance and to ensure consistency when dealing with disciplinary matters.90

The failure to perform as expected could be directly related to the tasks performed by the employee or to the rules and regulations that define proper conduct at work.

Consistency

The Code of Good Practice emphasises the requirement of consistency in the application of discipline. Generally speaking, this means that what applies to one employee must apply to other employees and what applied in the past must apply in future. My advice is only to deviate from a consistent approach if there is good reason to do so.

Employee awareness

Because an employer's rules must create certainty and consistency, it follows that the rules and standards of conduct should be clear and communicated to employees in a manner that is easily understood. As mentioned before, rules and standards may come into existence and become known by means of circulars, notices, day-to-day instructions, custom and practice. Employees must be informed of any change in the rules or standards. They must also be informed if the employer decides to enforce a rule which has not been enforced in the past.

Corrective approach

The purpose of discipline is to maintain employee conduct at an acceptable level. The issue of discipline normally arises when an employee's conduct deviates from the rules or standards of conduct set by the employer. The main objective of discipline should be to correct the employee's behaviour through progressive discipline (formal or informal), rather than to punish the employee.

Disciplinary action. Evoking a penalty against an employee who fails to meet organisational standards or comply with organisational rules.

The Code of Good Practice formulates it as follows:

"...This approach regards the purpose of discipline as a means for employees to know and understand what standards are required are required from them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings."

It continues as follows:

"Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other sanction short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences."

"Generally, it is not appropriate to dismiss an employee for a first offence, except where the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination." (The employer's disciplinary code may provide for further summary dismissal offences.)

An important point in applying corrective discipline is that the problem should be dealt with promptly and not be allowed to fester or grow. (There may, however, be good reason for a delay, for example when the accused employee being on leave or the unavailability of witnesses). The employee in question, as well as other employees, should not get the impression that unacceptable behaviour is condoned by the employer. The sooner the employer deals with the problem, the more effective discipline would be.

Schedule 8, section 3(2) of the LRA

The purpose of discipline therefore is to change behaviour through a process of graded disciplinary measures, such as counselling and warnings.

Formal procedures are not always necessary. Informal guidance, advice and encouragement are often good ways of dealing with minor violations.

The disciplinary code and procedure

No chairperson can operate efficiently, or competently conduct a disciplinary hearing, unless the employer has in place rules and regulations to regulate the behaviour of employees both on the workplace and off the workplace, and unless the company policies and procedures regarding attendance, sick leave, maternity leave, and so on all firmly in place.

These regulations, policies and procedures are highly necessary in order to enable the chairperson to have a standard against which to measure the employee's behaviour.

The code of good practice-dismissal states in paragraph [3] [1] as follows:

All employers should adopt disciplinary rules that establish the standard of conduct required of their employees.

The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

In general, a larger business will require a more formal approach to discipline.

An employer's rules must create certainty and consistency in the application of discipline.

This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood.

This is your authority for putting into place your disciplinary code, and your policies and procedures for addressing matters of attendance, sick leave, misconduct, maternity leave, unfair labour practice, grievance procedure and so on.

The purpose of a Disciplinary Code is to bring to the attention of all employees the standards of behaviour expected of them in the workplace, and what action may be taken against employees who are proven, by means of a fair procedure, to have transgressed any part of this Code.

The Code is a guide only, and is not intended to remove from the Chairperson of a Disciplinary Enquiry his or her authority and duty to properly consider any matter and the appropriate circumstances, and arrive at a suitable sanction to be imposed. The Chairperson of a Disciplinary enquiry is still expected to apply his or her mind to the matter of the sanction to be imposed, and the final decision of the Chairperson will therefore not necessarily be the sanction indicated in this Code.

In other words, the Chairperson of the Disciplinary enquiry is not bound by this Code, or anything contained in it, to apply the sanction indicated for any particular offense, but in arriving at a decision on a suitable sanction, the Chairperson will consider, inter alia, the seriousness of the offense and the circumstances under which it was committed. The offenses are not necessarily listed in order of importance or gravity.

The establishment of an agreed-upon **disciplinary code** that identifies standards of behaviour expected in the workplace and the sanctions associated with transgressing them assists managers in ensuring substantive fairness.

It is impossible for any Disciplinary Code to contain an exhaustive list of every conceivable offense. This Code therefore lists only the more important or more serious offenses or more common types of offenses, but the omission or non-inclusion of any offense from this Code shall not prohibit the employer from instituting Disciplinary Action against any employee for any offense not listed in this Code.

In Summary, a disciplinary code specifies the standards of conduct – that is, the rules and norms that should be followed in a workplace. The disciplinary code assists employees and management in knowing which forms of employee behaviour are regarded as misconduct. It stipulates the type of disciplinary sanction the employer can apply in the event of an employee breaching the disciplinary code.

The disciplinary code and procedure must be in writing and accessible to all employees in the workforce. This will ensure that they are aware of what is expected of them, and employers will be able to enforce discipline in a consistent way. The disciplinary code provides those formal procedures do not have to be invoked every time a rule is broken or a standard is not met, and advises that informal advice and correction are the best and most effective ways for an employer to deal with minor violations of workplace discipline. The disciplinary code should contain a classification of offences, as well as the penalties imposed.

Violations or offences can be classified as minor offences, serious offences, very serious offences, and dismissible offences.

The purpose of discipline therefore is to change behaviour through a process of graded disciplinary measures, such as counselling and warnings. Formal procedures are not always necessary. Informal guidance, advice and encouragement are often good ways of dealing with minor violations. If violations are repeated, written warnings may be warranted, culminating in a final written warning, with dismissal seen as a last resort for serious misconduct and repeated violations. In addition to warnings and

dismissal, other possible sanctions include denial of privileges, suspension and demotion (provided such sanctions are imposed fairly). Again, it is important that the parties to the employment relationship are aware of the rules of conduct and the action that will be taken by the manager if an offence is committed.

HOT-STOVE RULE

One effective way to approach the disciplinary process is to follow what is popularly known as the hot-stove rule, which suggests that applying discipline is much like touching a hot stove:

- The burn is immediate – the cause is clear-cut.
- The person had a warning – knowing that the stove was hot, the person should have known what would happen if it was touched.

Like touching a hot stove, the application of discipline should also be immediate, with warning, consistent and impersonal. These guidelines are consistent with the positive approach to discipline.

Supervisors or Managers who follow these guidelines should experience less tension and anxiety when applying discipline and should learn to view discipline as a supervisory responsibility rather than as a personal dilemma.

Types of dismissals

Discipline does not always result in dismissal. As previously indicated, it should be the last resort. However, sometimes dismissal is the only viable disciplinary sanction. A disciplinary dismissal occurs when an employee has committed a serious offence, repeatedly violated rules and regulations, or shown a consistent inability to meet performance expectations. Extreme instances of misconduct will almost certainly result in dismissal. For example, in many disciplinary systems, the first offence of intoxication.

Misconduct refers to blameworthy conduct on the part of the employee and therefore implies fault on the part of the employee.

The LRA does not give employees the right not to be dismissed, but only the right not to be unfairly dismissed. For a dismissal to be fair, there must be a fair reason for it. Some reasons are automatically unfair, in that a dismissal for any of those reasons can never be fair. Beyond those reasons, though, the LRA provides permissible reasons for dismissal, recognising three grounds on which termination of employment may be legitimate, as follows:

Grounds for dismissal in terms of the LRA

Dismissal for misconduct

Dismissal as a result of the conduct of the employee relates to the employee's behaviour. An employee may therefore be dismissed when found guilty of breaking a workplace rule as set out in the disciplinary code of an organisation. It is important to note, however, that not all rules are specified in the disciplinary code. Some rules, such as refraining from stealing, are inherent to the employer–employee relationship. An employee can therefore not argue that he or she cannot be disciplined for stealing the organisation's property because there is no rule against theft in the disciplinary code. Furthermore, although the aim of positive discipline is to regard dismissal as the last resort, there are some forms of behaviour that give rise to dismissal following a first offence.

Examples of such gross misconduct include gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer, and gross insubordination.

To determine whether dismissal is the appropriate sanction for such offences, the employer should consider factors such as the gravity of the misconduct, the employee's length of service and disciplinary record, the nature of the job and the circumstances of the infringement (eg was there provocation?).

Not only must the dismissal for misconduct be substantively fair, but it must also be procedurally fair. The rules of natural justice provide that an employer may not take disciplinary action against an

employee without allowing the employee to have a fair hearing. The employee must be allowed the opportunity to state his/her case in response to the allegation.

Dismissal for incapacity

The focus here is on the employee's ability to do the work for which he or she was employed. The key aspect is whether or not the employee's performance meets the required standards set by the employer as agreed in the performance contract. The capacity of the employee relates to the employee's ability to do the job for which he or she has been employed.

Incapacity generally manifests itself in one of two forms: the employee is either incapable of doing the work as a result of incompetence, or is incapable of doing the work for medical reasons (ill-health or injury. If all the appropriate steps have been taken in an attempt to correct the employee's behaviour and this is not successful, then Section 9 of the Code of Good Practice: Dismissal (Schedule 8 of the LRA) can be used as a guideline that sets out the requirements for a dismissal that is based on poor work performance.

Any person determining whether a dismissal for poor work performance is unfair should first consider whether or not the employee failed to meet a performance standard. If it is determined that the employee did, in fact, not meet a required performance standard, the next step is to determine whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard. The employer must also ensure that the employee was given a fair opportunity to meet the required performance standard, and whether dismissal was an appropriate sanction for not meeting the required performance standard. The employer must, therefore, as in the case of misconduct, prove that there was a fair reason for the dismissal – for example, the employee did not meet the standard required – and that the employee was indeed aware of what was expected of him or her.

Dismissal for operational reasons

The dismissal for operational reasons is an extremely wide ground for dismissal. These dismissals are also sometimes referred to as 'no-fault' dismissals because they are related not to the conduct or capacity of the employee, but to the requirements of the business. The most common form of this type of dismissal is retrenchment. However, the employer must have had a valid economic reason for terminating the services of the employees. Such valid reasons could include the introduction of new technology, the restructuring of the organisation, the downsizing of the enterprise or a wish to increase profits.104 There are, however, also other economic reasons for dismissal (such as that the employer no longer trusts the employee or that the employee's presence has a negative influence in the workplace).

Possible Sanctions

Most organisations follow a procedure of progressive discipline that is normally contained in their disciplinary codes. The disciplinary procedure sets out the manner in which disciplinary action is to be taken against employees, whereas the disciplinary code allows for the progressive application of disciplinary sanctions.

When following a progressive approach to discipline, the following sanctions may be imposed:

1. Verbal warning. An employee who commits a minor violation receives a verbal warning from the

Two important characteristics of progressive discipline are:

(1) a penalty commensurate with the offence; and

(2) a series of increasingly serious penalties for continued unsatisfactory performance or behaviour.

In compiling and implementing disciplinary codes and procedures in South African organisations, it is imperative to take cognisance of and comply with relevant provisions of the LRA and, more specifically, of the Code of Good Practice: Dismissal (Schedule 8 of the LRA).

When following a progressive approach to discipline, the following sanctions may be imposed:

supervisor and is told that, if this problem continues within a specific period, harsher punishment will follow.

2. Written warning. The employee violates the same rule within the specified period and now receives a written warning from the supervisor. A written warning may also be given following transgression of a more serious rule. This warning goes into the employee's records. The employee is told that failure to correct the violation within a certain period will result in more severe treatment.

3. Serious written warning. This may also be referred to as a final written warning. It may be given to employees in the event of a recurrence of a previous transgression of the disciplinary code, or a serious transgression. The employee is warned that a similar transgression in future may result in dismissal. This type of warning may only be issued after conducting a proper investigation and hearing.

4. Dismissal. An employee should only be dismissed where the trust relationship has been irreparably severed and/or after the employer has adopted all reasonable measures to rectify the employee's behaviour.

In some instances, the organisation may resort to alternative measures, such as transferring the employee to a different section or department, suspending the employee for the duration of an investigation, or demoting the employee. These measures should be taken with great circumspection, ensuring that they do not amount to unfair labour practice. Depending on the specific case, only some of these sanctions may be relevant and not all these steps will be followed in every instance. The appropriate sanctions will usually be outlined in the organisation's disciplinary code. It is important to consider all the facts and the relevant circumstances when deciding on an appropriate sanction.

Decisions relating to dismissals for misconduct

SAFRAWU obo Dwili v Epla t/a Cradock Abattoir [2002] 10 BALR 1082 (CCMA)

Mr Dwili was dismissed for swearing at a manager. Mr Dwili's trade union claimed that the manager had provoked Mr Dwili by manhandling him, and that his dismissal was procedurally unfair because he was not represented at his disciplinary hearing and he was not afforded the opportunity to present his case. The commissioner rejected the union's arguments that a shop steward, who had signed the attendance register before the disciplinary hearing, had merely acted as an interpreter. The commissioner therefore found that the dismissal was procedurally fair.

However, regarding the substantive fairness of the dismissal, the commissioner noted that one of the employer's witnesses had stated that Mr Dwili had been physically manhandled by the manager in question. Also, the commissioner found that the manager's claim that he had been humiliated by the abusive language was not true. The employer did claim that Mr Dwili was under the influence of alcohol at the time. However, he was not charged with this offence. Even if he had been charged with this offence, the employer admitted that action had not been taken against other employees for being under the influence of alcohol. The commissioner accordingly found that dismissal was in the circumstances too harsh a sanction and Mr Dwili was retrospectively reinstated.

SECTION 2

CONDUCTING THE DISCIPLINARY HEARING

For a hearing to be fair, the following requirements must be met:

• The hearing must precede the verdict.

• The hearing must be held as soon as possible.

• The employee must be notified of the charges in good time. • The employee must be notified of the allegations in writing and in a language that the employee understands.

• The employee should appear at the hearing and be entitled to representation by a shop steward or a fellow employee (legal representation should generally not be permitted).

• When the opportunity arises for the employee to present his/her case, the employer should clarify the fact that the employee has understood the letter of notification and the charge. The employer should then put the charge to the employee, and the employer's case should then be presented. When it is the turn of the employee to present his/her case, the employer should listen and weigh the employee's evidence against his/her own and then determine guilt on the grounds of a balance of probabilities (the two versions of evidence are weighed against each other and the employer determines which version is more probable).

• The employee must be allowed to call witnesses and question those of the employer.

• The employee is entitled to an interpreter if necessary.

• The chairperson of the hearing must not be biased.

• The chairperson must inform the employee of the decision verbally and in writing, and give full reasons for the decision.

• If found guilty, the employee must be given the opportunity to present evidence in mitigation before dismissal.

In this Chapter you will learn the skills to professionally chair a disciplinary hearing in line with the principles of fairness and equity as envisaged by the Labour Relations Act.

We will focus on the fowling:

- Understanding the disciplinary hearing process.
- The principal of procedural and substantive fairness.
- Become a master in the process of chairing disciplinary hearing.

Section 188 of the LRA sets out basic rules for all dismissals that are not automatically unfair by stating that a dismissal will also be regarded as unfair if the employer fails to prove that the reason for the dismissal is fair or if the procedure leading up to the dismissal was unfair. The LRA regards only three reasons for dismissal as fair:

• The conduct of the employee.

• The capacity of the employee.

• The operational requirements of the employer's business.

Other than specifying these categories of dismissal, this section of the LRA incorporates what can be called the two basic principles of a fair dismissal, namely substantive fairness and procedural fairness. Substantive fairness relates to the reason for the dismissal. The reason for the dismissal must be fair.

To successfully chair a disciplinary hearing, it is of great importance to firstly understand these two fundamental concepts of disciplinary action and how the process should take place. Therefore, we will explore the true significance of Substantial and Procedural fairness.

Substantive fairness

A principle of a fair dismissal relating to the reason for dismissal.

Procedural fairness.

A principle of fair dismissal relating to the steps followed.

Substantial and Procedural fairness

South Africa labour laws require fair treatment of employees when it comes to disciplinary measures. To determine whether an employee has been treated fairly or not during a disciplinary process, a two-pronged test is applied. Firstly, was the disciplinary process substantively fair, in other words, was there a fair reason to discipline the employee, and secondly, was the disciplinary process procedurally fair, in other words, was the employee subjected to a fair process? Employers often burn their fingers not for the reasons for which the employee was disciplined but for how the employee was disciplined.

Substantive fairness

Validity

Substantive fairness means that there is a just, fair, and equitable reason for an employer to discipline employees. Dis concept refers to validity. The employer must prove on a balance of probabilities that that the offence for which the employee is being disciplined, was committed.

The onus to prove the guilt of the employee is on the employer. Validity means that the disciplinary reason for the dismissal must apply in the case of the particular employee, which in return means that, as a matter of objective fact there must be sufficient proof that the employee charged committed the alleged misconduct.

Validity means that:

- The employer's reason for treating the employee's action as misconduct must be lawful;
- the employee must not have acted under duress, coercion or intimidation in committing the act charges;
- a valid reason must be relevant to the question of the continued employment of the particular employed.

Sufficiency

The act that was committed must be sufficiently serious to warrant disciplinary action. In order to ascertain what is considered sufficient, the individual circumstances of the each case must be considered in the context of general practice in the industry.

All the facts surrounding the misconduct must be considered.

There are a number of relatively well established practices that will, in all likelihood, be regarded as substantially unfair, such as:

- The sanction being excessively severe for the offence committed.
- The dismissed employee having been unaware of a specific rule that was broken.
- The sanction imposed on the employee being inconsistent with the treatment of other employees who committed the same.
- No account was given to mitigating factors, such as the service record of the employee.
- There was insufficient proof of misconduct.

The guidelines provided by item 7 of the Code of Good Practice are aimed at establishing substantive fairness and in terms of schedule 8, the proper procedures need to be followed.

The Chairperson considering if a dismissal is fair, needs to consider all these factors before imposing dismissal as an appropriate sanction.

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Substantive fairness

Procedural fairness is ***not concerned about the reason or the merits of the case*** or dismissal, but rather with the way the termination process was handled.

For a hearing to be fair, the individual being charged has the fowling rights:

- To be notified of the date, time, and place of the hearing.
- To be giving sufficient time to prepare. Generally, a minimum of 48 hours will be regarded as sufficient, depending on the merits of the case.
- The hearing must take place timeously. Taking too long to initiate disciplinary action, might see a company being accused of victimisation.
- Some form or representation during the hearing.
    - Representation means that the accused will be actively helped by a fellow employee. Representatives is not permitted to give evidence on the behalf of the of the accused.
    - The right to be represented by a fellow employee.
    - The right to be represented by a shop steward if the shop steward is employed by the same company.
    - The right to be represented by a full-time trade union official is generally not permitted.
    - Employees are generally not allowed to be represented by practising advocates or attorney who is not employed by the same company.
- It is advisable for chairpersons to familiarise themselves with Company disciplinary procedure for guidance on the representation at the hearings.
- The right to call a witness.
- To be present to and represent his of her case and to question any evidence.
- The right to an interpreter.
- To have his or her previous service record with the company considered.
- To have mitigating and aggravating factors considered.
- The right to a finding
- To be advised about the penalty.
- To appeal against the decision arrived after the hearing.

The determination of the employee's guilt or innocence must be determined during a disciplinary hearing where the chairperson has an opportunity to hear from both the complaining employer and the allegedly misconducting employee. In other words, a hearing is scheduled to determine guilt or innocence and not to rubber-stamp a finding of guilt and a sanction that has already been made.

Employee's refusal to attend a disciplinary hearing.

It is important to distinguish between a refusal to attend or non-attendance and the situation where the employee and his representative arrive late for the hearing. It is generally accepted that a leeway of 30 min should be allowed before the start of proceedings.

Chairpersons are generally left facing the following situations:

- The employee or accused notify the company that they won't attend the disciplinary hearing.
- The employee or accused simply chose not to arrive for the hearing.

In both instances, it is advisable to postpone the hearing. It is never wise to continue in the absence of the accused. This is simply to eliminate any risk of procedural unfairness.

Two strategies may my applied:

Firstly, the hearing should be postponed with written warning to the employee or accused informing him or her that the hearing will continue in his or her absence. Should the accused fail to be present on the second instance, the hearing must continue in their absence. The accused will subsequently get notified of the outcome, based on the evidence led at the hearing.

Alternatively, on discovering that the employee will not attend the hearing, the Chairperson may continue the hearing in the absence of the employee, whereafter a summary of the evidence will be sent to the employee for comments. If within a reasonable period, the employee does not respond, a finding should be taken on the evidence led during the hearing.

If the employee responds to the evidence, then the response must be assessed before making a finding.

These approaches are both crucially important because the onus rest firmly on the employer to prove that a dismissal was procedurally fair and the holding of a hearing lies at the heart of procedural fairness.

Thus, if the employer fails to prove that the employee was given the opportunity of a fair hearing the employer will most likely lose the case.

The Disciplinary hearing

This section will guide and assist you as the chairperson at a Disciplinary hearing and ensure that both procedural and substantive fairness prevail. Before we have an in-depth look at the disciplinary process and the conduct of the chairperson, you must ensure that the administrative requirements are in place.

The following should be present:

- The chairman
- The complainant.
- The respondent (accused)
- Respondent's representative.
- Interpreter if required.

It would be beneficial to communicate to the parties before commencing that the bundle of documents with the documentary evidence must be ready before commencing with the proceedings.

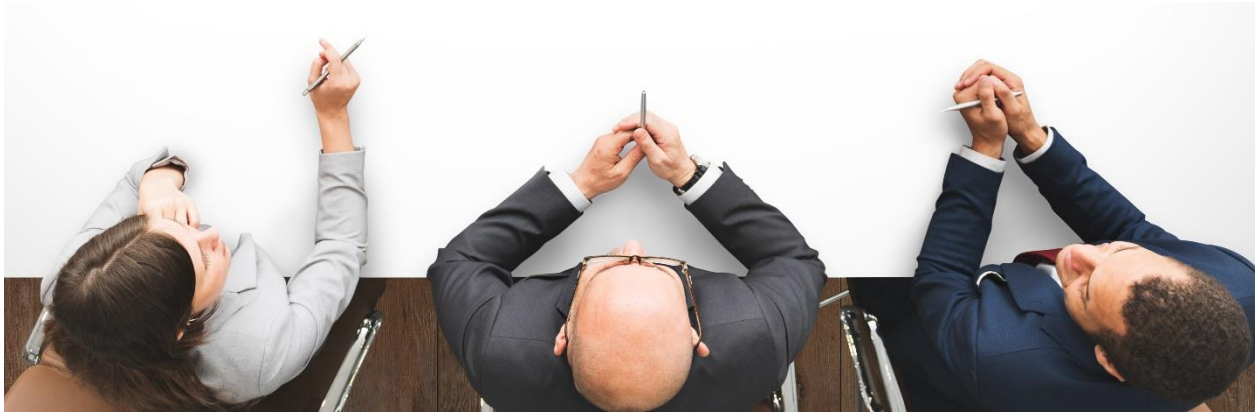
The bundle of documents must be paginated.

Ensure that both parties make extra copies for the chairman and the other party.

The following administrative arrangements prior to the hearing will ensure that the proceeding can commence with little to no disruptions.

- Times and venue for hearing.
- Notifications of all persons required to be at the hearing required.
- Voice Recorders. The entire proceedings must be recorded in writing in the minutes. Needless to say, this is not negotiable. If the proceedings are not reduced to writing, you are running the risk of jeopardising the credibility of conducting a fair hearing.

The Hearing Process



- Welcome all present and introduce yourself and any other participants unknown to each other.
- House rules should be communicated. For example;
    - ***cell phones*** should be switched off;
    - ***comfort breaks*** will be at the discretion of the chairperson;
    - ***caucus*** during the hearing is not allowed;
    - If any ***witnesses*** are present at this stage, they should be asked to excuse themselves.
    - all ***questionings*** will take place under your direction.
    - ***disorderly conduct*** – shouting, arguing etc will not be allowed.
    - a witness is ***not to be interrupted*** while giving evidence.
    - Any ***adjournments*** will be at your discretion

- State the purpose of the enquiry:
- Ask the accused if he or she understands their rights as explained in the Notice of Disciplinary Enquiry.
- If the answer is in the negative, go through the rights with him or her.
- Ask if the accused has a representative present and record the name of the representative. If there is no representative, ask if he or she wants one. However, this should have been arranged before the date of the hearing. As a chairperson you have the right to prevent any delays of the process.
- Get agreement that the enquiry will be conducted in English. (or Afrikaans or whatever)
- Inform the employee that the proceedings will be recorded.

From here on the disciplinary hearing is broken up in four segments.

1	The employer will be afforded the opportunity to give evidence and call witnesses. Allowing the accused to cross-examine any of the evidence.
2	Thereafter, the accused will also be offered to give evidence and call witnesses. And the employer may also cross-examine the evidence and witnesses.
3	After both parties give evidence and cross examined the Chairperson will adjourn the hearing and call the parties to reconvene with a verdict of guilty.
4	Lastly, impose a sanction, only after considering mitigating and aggravating circumstances from both parties.

Explain the procedure as follow:

- The employer will first give evidence in support of his charges and call witnesses
- When a witness has completed giving his evidence, the employee will have the opportunity to cross examine that witness.
- After the employee has completed cross examination, management or the Chairperson may ask clarifying questions.
- After management has presented its evidence and called all its witnesses. The employee will then give his/her evidence in reply and call his/her witnesses.
- After the witness for the defence has given evidence, management will be given an opportunity to cross examine that witness.
- The employee and the Chairperson will be allowed to ask clarifying questions of the witness.
- The employee will be allowed to testify himself/herself and lead evidence.
- Management and the Chairperson may cross examine the employee and ask clarifying questions.
- Witnesses will be called singly and will be excused when their evidence and cross examination has been completed.
- The Chairperson may also question witnesses.

Management must then lead evidence and call their first witness. After the witness has finished leading his or her evidence, ask any clarifying questions you may have.

Ask the accused if he or she wishes to question management or the witness.

Allow all relevant questions.

When all management witnesses have testified or management has completed leading their evidence, allow the employee to proceed with his/her evidence and witnesses. The same procedure will apply to the accused.

When all evidence has been presented, adjourn the meeting. This adjournment must be for a reasonable period – say at least 2 days.

Keeping Record

- The minutes must be typed.
- The Chairperson must consider all the evidence, weigh it up on the balance of probability, and then decide on guilt or innocence.

When the meeting is reconvened, the Chairperson will deliver his verdict and explain his reasons for arriving at that verdict. He will explain what evidence led him to believe, on the balance of probability, that the employee was guilty.

The Chairperson will then ask the employee if they have anything to add, any other evidence to lead, or any other circumstances, personal or otherwise, in mitigation of sentence.

The Chairperson will then call for the employee's disciplinary record (personal file) and armed with that together with a knowledge of the employee's personal circumstances, will proceed to decide on a sanction based on a fair reason.

The meeting will be re-convened, and the Chairperson will deliver the sanction decided upon and give reasons for deciding on that sanction.

Confirm in writing to the employee that the employee has the right to appeal within 5 days and state reasons on which the appeal is based.

State that the employee has the right to refer the matter to the CCMA if he or she feels aggrieved in any way by in terms of unfair treatment or procedure.

It is important that the chairperson understand arriving at a verdict of guilty or not guilty and the arriving at a decision on the sanction to be imposed are two distinct processes. Always remember that the one bears no relation to the other.

If the employee plead guilty to the charge, the flow of events will take a different course. Since there is no longer an obligation for employer to prove that the accused is guilty, no further evidence is required.

The chairperson will ask the employee to present factors in mitigation. Mitigating factors are those that could persuade the chairperson to impose a lighter penalty, for example a clean disciplinary record, a show of remorse or any other personal factors such as, Age, Health, Financial position, and dependants. Justifying circumstances may include the following:

- Self defence
- Provocation
- Necessity
- Lack of intent
- Coercion

The complainant should then be given the opportunity to counter the employee's evidence with aggravating evidence. This may result in a harsher penalty, for example the accused was in a position of trust, or recent previous, similar offences.

The chairperson must then inspect the employee's service record in order to establish whether there are any relevant and valid warnings on record. If there are current warning for similar offences to the current case these must be considered.

The chairperson must now weigh up any mitigating, extenuating and aggravating factors in deciding the appropriate recommended disciplinary sanction.

In considering the verdict of guilty or not guilty

The Chairperson will consider all the evidence led at the Disciplinary Hearing by both parties. Based on that evidence, he will decide, on the balance of probability, whose story is more likely to be true – that of the employer or that of the accused.

In Labour Law, the chairperson does not deal with the concept of ''beyond a reasonable doubt'' as is the case with Criminal Law. The principle of a ''balance of probabilities'' is enough to make a finding.

Based on the decision of whose story is more likely to be true, he will arrive at a verdict of guilty or not guilty.

For example: If an employee is proven to be the only person in an office, and money goes missing, it is enough to prove that, if this was the only person in the office, it stands to reason that he is the only person who could have taken the money. Another question to ask is whether a reasonable person, having the same evidence placed before him would come to the same conclusion.

A sanction will only be considered if the verdict is a guilty one. If the accused is found not guilty, then that verdict is communicated to the respondent and the matter is closed.

In considering a sanction

The duty of the chairperson is now to consider all the evidence before deciding on the sanction or penalty to be imposed.

Over and above mitigating and aggravating circumstances the decision should be tested by asking the following questions:

Is the purpose of the sanction to prevent others of committing the same offence?

- Will the proposed sanction do so?
- Is it in fact necessary to do so?

Here the nature of the business must be considered. If, by the nature of the business, it is easy for other employees to do the same thing, then prevention becomes an important consideration.

Is it necessary to impose the sanction to prevent a recurrence – that is would the consequences be serious were the same thing to happen again?

This also entails asking oneself if the employee is likely to do it again, whether it is in character for him or her to commit such an act. The previous record and performance are, therefore, of importance in this respect.

Can the employee possibly be rehabilitated without the sanction, or is the sanction necessary to rehabilitate him or her?

Will imposition or non-imposition of the sanction adversely affect the company, the employee or other employees?

If aggravating circumstances outweigh mitigating factors and if the answers to some or most of these questions point to the need for imposing a sanction of dismissal, then that sanction is in all probability well justified. Where the chairperson is of the opinion that the relationship cannot be restored, dismissal is justifiable.

Ensure that all documentation relating to the enquiry is kept safely, in the event of the outcome of the enquiry being challenged. (This would include the notice of the enquiry, documentary evidence, chairperson's notes, minutes of the enquiry, outcome of the enquiry, and appeal documentation if any).

General principles:

Disciplinary code and procedure

For the company to function effectively, all staff members of the Company are responsible for ensuring the maintenance of acceptable behaviour at all times.

All staff members of the Company shall be made aware of what constitutes misconduct and what penalties shall be incurred. For cases of misconduct, the disciplinary procedure shall be followed.

The purpose of the disciplinary procedure is to guide both management and staff members to ensure that disciplinary action is fair.

The purpose of discipline is to correct, prevent and rehabilitate rather than to punish, therefore all disciplinary actions shall be accompanied by counselling aimed at correcting and avoiding a recurrence of the transgression.

Discipline shall refer to those actions, including dismissal (either dismissal with notice or summary dismissal), where appropriate, taken by management against any staff member or group of staff members to correct unsatisfactory or unacceptable behaviour or performance in good time.

Summary dismissal shall mean that no notice will be given to the staff member or members. It does not preclude the staff member's right to a fair disciplinary inquiry.

An alternative to dismissal shall be a reasonable period of suspension without pay.

Disciplinary action must be initiated within seven days of the Company becoming aware of the staff member's alleged misconduct.

Any staff member of Company X shall be presumed innocent until proven guilty on a balance of probabilities.

The disciplinary code and procedure shall apply equally to all staff members of the Company, including managers and the director.

Staff members alleged to have transgressed a rule shall always be granted the opportunity to state their case.

A staff member subject to action in terms of the code and procedure shall always be entitled to representation by a fellow staff member of the Company.

Warnings shall be valid for the following time periods:

(a) Verbal warnings: three months

(b) First written warnings: six months

(c) Final written warnings: nine months

Warnings will expire after the prescribed period but will remain as part of the staff member's disciplinary record.

The disciplinary record will be important when deciding on the sanction to be imposed on an employee found guilty of an offence.

The director of the Company will review the disciplinary record of all staff members on a regular basis

SECTION THREE

EVIDENCE

As we have learned thus far, it is the responsibility of the chairperson at a disciplinary hearing who determines the guilt or innocence of an accused employee. This is normally done only after analysing and evaluating all the evidence, and this mut be done in compliance with the law of evidence's principles.

In doing so, the chairperson must not only eliminate all subjective emotional prejudices but must also carefully and correctly analyse the charge and its elements.

Having to make these crucial yet highly complex decisions require a solid understanding of the laws and the concept of evidence. It requires substantial skill in weighing up the pros and cons and making a decision that is fair and pragmatic for the employer but does not infringe the labour laws protecting the employee.

This section we will prepare you as the chairperson to understand what evidence is, how to evaluate it and how to analyse evidence, and then finally assist you in making the right decision.

What is Evidence?

Evidence is defined as:

"the available body of facts or information indicating whether a belief or proposition is true or valid". It is not the argument, but rather facts or information to prove the argument is correct. During the disciplinary hearing, the chairperson can only make a decision based on the evidence presented at the disciplinary hearing. If admissible and trustworthy evidence were not presented, it cannot be taken into account.

Why must we have a clear understanding of evidence?

When a chairperson needs to decide whether it is probable that an offence or transgression occurred, for instance whether a theft has been committed, he must base his finding on admissible evidence, and his recommendation as to the instigating of disciplinary proceedings must be based on evidence showing the probability of a transgression.

The presumption of innocence

The rule that management has to prove its case against the employee, rather than the employee having to disprove it, reflects another one of the basic principles of fairness. In legal terms it is known as the presumption of innocence.

This means that someone is innocent until proved guilty. In other words, if management

insists that the employee stole something, then they need to establish that this is indeed so. If management cannot do so, then the employee is presumed to be innocent. It can never be fair to say, in effect, to the employee, "I think you're stealing. Now you go ahead and show me that you did not steal."

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Evidence Versus Proof

For a party to successfully prove their case, they will depend on bringing evidence that will persuade the chairperson that one's allegations or claims are true and genuine.

Therefore, you must be able to grasp the concept of proof that consist of evidence.

Evidence is the information obtained from witnesses, documents and material objects which is placed before a chairman of a disciplinary hearing in order for him or her to make a decision on a factual point which is in dispute.

Proof consists of evidence. Proof arises when there is enough relevant, reliable, credible, and probable evidence to enable the chairperson to make a decision or finding on a factual issue.

Forms of Evidence

The following forms of evidence may be relevant during the investigation and the hearing:

- ***Witness or oral evidence*** – people who saw or heard what happened or can explain procedures and processes such as disciplinary policies/rules and security procedures.

- ***Real/Tangible Evidence*** – evidence that may be examined, inspected and seen.
- ***Documentary evidence*** – written warnings, false doctor's notes, invoices, letters, e-mails, policy documents, delivery schedules, clock-cards, satellite tracking reports, security, registers, etc.).
- ***Objects*** – stolen items, an assault weapon, etc.
- ***Places*** – it may be necessary to visit the site of the alleged incident, in order to get an understanding of what allegedly occurred.
- ***Circumstantial Evidence*** – provides for indirect proof (it suggest what might have happened).

Important notes on the particular forms of evidence

Direct and circumstantial evidence

Evidence has two facets: direct evidence on the one hand and circumstantial evidence on the other.

Direct evidence will carry more weight in a disciplinary meeting than circumstantial evidence. This should be considered when examining and weighing up how strong your evidence is. It is thus vital to be able to differentiate between direct and circumstantial evidence.

Direct/oral evidence

Direct evidence clearly confirms or proves a point directly, or what happened. For example, direct evidence in a case of assault would exist where the witness tells you that he saw employee A hit employee B over the head with a red bottle.

Circumstantial evidence

Circumstantial evidence furnishes only indirect proof. It does not confirm or prove what happened but rather suggests that it might have happened. For example, circumstantial evidence in an assault case would exist when the witness testifies that he saw employee A with a red bottle, that employee A was present at the scene of the assault, and that employee A had a motive to assault employee B because they were arguing beforehand. However, he did not actually see employee A hit employee B with the red bottle.

Direct evidence

Direct evidence will, by its definite nature, carry greater weight than circumstantial evidence. This does not mean, however, that circumstantial evidence cannot be used in deciding the facts of the matter. It can be of value when the conclusions drawn from the circumstantial evidence tie up with and support other direct evidence. A case based purely on circumstantial evidence will be unlikely to succeed. If this is the only evidence that you have, it may be advisable to drop the case.

Important notes on the particular forms of evidence

Real/tangible evidence

There are certain types of evidence which, due to their nature, may be examined, inspected and seen. Such evidence may thus be put forward and looked at during a disciplinary hearing. This is called real evidence and is an important aspect of information regarding an offence.

Real evidence is evidence that can be physically inspected or seen. Real evidence can include anything, a person or a place, that can be examined to establish what happened or to prove a fact.

Real evidence includes the weapon used in an assault, the appearance of a person, tape recordings, fingerprints, photographs, handwriting and so on.

Example of real evidence:

A person's physical appearance and individual features are regarded as real evidence, such as when a witness states that a man who was short, fat and bald committed the assault and the accused fits the description exactly. In a case of assault, the wounds or bruises themselves, photographs of them, or a medical report, would be real evidence that an assault had occurred.

Example of real evidence:

Tape recordings may be used as real evidence. The main difficulty is the danger of editing or alteration. You would need to demonstrate that the evidence had not been tampered with. One of the common problems associated with tape recordings is quality of sound. If you plan to use recorded evidence, you should ensure that it is intelligible.

It is also advisable to present a transcript of the recording to confirm accuracy, and to have a witness who can identify the speakers in the recording.

Example of real evidence:

Photographs may be produced as real evidence, for example in matters such as injuries or accident damage. A photograph may also be used where an item is too bulky to produce at the disciplinary hearing. Witnesses may also identify persons by examining photographs. A photograph is a document and is admissible as evidence, preferably together with an affidavit from the photographer confirming its authenticity. Note that principles regarding the use of films and videos as real evidence are the same as those for tape recordings and photographs.

Documentary evidence

Documentary evidence consists of statements made in writing and can be defined as any writing or printing capable of being made evidence. Documentary evidence can also be a map, painting or drawing.

Should the complainant wish to introduce documentary evidence, it would need to meet the

following requirements:

- The statement in the document must be relevant and admissible.
- The authenticity of the document must be proved.
- The original document should ideally be produced. However, secondary evidence, i.e. a copy of the original, may be used when the original has been destroyed, lost or is unobtainable.

Hearsay evidence

When a witness presents information based on what some other person has said or what has been overheard, then this is regarded as hearsay evidence. For example, the witness gives evidence to the effect that John told him that he had seen Elec leaving the warehouse at 14h30 on the day of the theft. However, the witness did not observe the incident personally.

Under normal conditions hearsay evidence is not acceptable in court because it cannot be questioned by cross-examination. However, a disciplinary meeting is not a formal court of law, and the main concern is to assure that the accused employee is given a procedurally fair hearing.

Depending on the circumstances, hearsay evidence may be used to help prove your case.

However, bear in mind that hearsay evidence will attach little weight to it. An chairpersons should be careful in accepting such evidence. In general, it is better to use hearsay evidence to corroborate other evidence as it has obvious weaknesses and would be inadequate on its own to prove guilt.

Credibility and Reliability – Who Speaks the Truth?

The following Guidelines should be used to determine if the evidence is credible and reliable:

The probabilities. This requires a formulation of the contending versions and weighing up those versions to determine which is the more probable. The factors for the determination have to be identified and justified.

Secondly;

The reliability of the witnesses.

This involves an assessment of the following:

- The extent of the witness's firsthand knowledge of the events
- Any interest or bias the witness may have
- Any contradictions and inconsistencies
- Corroboration by the other witnesses
- The credibility of the witness, including character.

Inadmissible Evidence

Not all evidence that is presented at the hearing is automatically acceptable. Certain types of evidence are excluded because they are irrelevant. Some other types, although relevant, are excluded for other reasons.

Evidence that is irrelevant is not accepted because it does not contribute towards proving or disproving an allegation. Statements which have no bearing at all on the matter in the case are clearly irrelevant.

The following aspects are considered to be inadmissible evidence:

- Hearsay
- Privileged information
- Opinion Evidence
- Lie Detector or polygraph test test Results

With regards to disciplinary hearings and polygraph test or lei detectors, bear in mind that employees can't be dismissed merely because they failed to pass the polygraph test. A CCMA commissioner noted this in 2018 at the CCMA. The employee was dismissed mainly because he failed to pass the polygraph test. The commissioner reviewed case law on the admissibility of the polygraph test results, and held that labour courts attach little weight to such evidence because poly graph test results intrude in an area

that the commission is itself enjoined to decide. More evidence than polygraph test results is needed to prove that an employee is guilty of misconduct. The dismissal in this case was ruled substantively and procedurally unfair, and the employee was reinstated.

This does not mean that employers cannot use polygraph testing. However, there are some strict rules that need to be complied with when conducting the polygraph test. Such rules are that the employer cannot force any employee to submit to the test, and the employer should agree with the polygraphers on the questions to be asked.

Polygraph testing can be used, provided that employers abide by the following rules:

- Validate evidence that the employees gave consent. Preferably written consent before the test was conducted.
- Validate evidence that an expert or a qualified person conducted the tests by using accepted procedures.
- Validate evidence that the subject was physically and mentally fit at the time of the test.
- Validate evidence that the process was explained to the subject.
- The expert must be present at the hearing and testify about his or her findings.

As chairperson, you should attach very little weight to polygraph test results if there is no supporting evidence because a polygraph test does not record lies.

The Assessment of The Evidence

When the hearing is over, the chairperson will have to review the evidence and, where there is conflict, decide which party is to be believed.

Sometimes, the evidence will appear to be completely inconclusive. In such a situation the chairperson should ask himself where the onus of proof lies. The general rule is that he, who claims, must prove his claim and, if it appears that the claimant has not proved his claim on a balance of probability, the claim must fail.

If the accused employee admits the claim but says that it is offset by a counter claim, then the onus lies on him (the employee) to prove the counterclaim and if he does not prove it on a balance of probability, he must lose the counterclaim and the original claim must, if proved or admitted, succeed.

In order to assess evidence, the following aspects should be assessed:

- ***background facts***
- ***the summary of the evidence led***
- ***the analysis of that evidence***

Background facts

Background facts should set the scene and contain definite facts that may be important in analysis in making a decision, such as length of service.

Background facts should focus on the following aspects:

- ***The parties.*** These facts describe the parties to the dispute. The question of whether a trade union is a party to the dispute or a representative of the employee in the dispute should be clarified.
- ***The workplace.*** These facts should include the sector, the nature of the work, the size of the workplace and any special considerations that may flow from this. So, for example, a mine may have special requirements regarding discipline and safety.
- ***Procedures and agreements***. These facts should include the facts concerning the regulations of conduct in the workplace such as disciplinary codes, disciplinary codes, disciplinary procedures and collective agreements.
- ***The employment relationship.*** These facts are specific to the employee such as the contract of employment, length of service, salary at dismissal and disciplinary records.

The degree of detail will depend on the importance that any of these facts may have on analysis later in the assessment.

Summary of evidence // Writing the outcome report

The outcome report should record the relevant evidence led. Normally it is easiest to organise the evidence in the order that it is given, or chronologically. It need not contain all the detail that may be necessary for the purposes of analysis in making the decision process.

- Documentary evidence should be summarised under this part of the factual enquiry.
- Any relevant parts of the contract of employment and disciplinary code should be quoted or summarised.
- It is best not deal with issues of credibility or probability at the stage. The purpose of this part of the decision is to record as accurately.

In closing

Chairpersons must ensure they have basic knowledge of the law of evidence.

This includes the definition, what is admissible and what type of evidence carries the most weight in order to prove a case, as well as limit risk.

When an employee is dismissed, the onus rests on the employer to prove the correct procedure was followed and there is enough evidence to justify the sanction.

Therefore, it is of great importance for the Chairperson to protect both parties involved when considering or discarding evidence.

SECTION 4

MISCONDUCT AND THE DISCIPLINARY CODE

Why must we investigate allegations of misconduct in the workplace – or outside of the workplace for that matter.

Why can an employer not simply call the employee to the office and give him or her a warning, or if the employee has committed the offence or other offence more that once, call the employee into the office and simply dismiss him or her?

The answer lies in the constitution, which guarantees all person's fair labour practices and our labour laws, specifically the Labour relations Act.

Flowing from that, the question can be asked, what is misconduct?

- When any employee breaks the rule or regulation of the employer, such as the rules set out in the employers disciplinary code of conduct or breaches a company policy or procedure, or a condition of his employment contract, then that employer is entitled to rectify or take action against the employee who has broken the rules
- As we have learned, this procedure followed by the employer is termed "the disciplinary procedure". This disciplinary procedure or enquiry consist of several parts, which is mainly described in Section 8 of the LRA.
- an investigation to establish what rule has been broke, and to gather evidence to prove that the employees is guilty.
- Proper gathering and evaluation of the evidence gathered.
- To make a decision as to whether the matter will be addressed by formal Disciplinary Hearing or informal Disciplinary hearing.
- The convening of the Disciplinary hearing or formal Disciplinary hearing.
- The holding of the Disciplinary hearing, at which the evidence is presented by the employer and that the evidence is responded to by the accused employee.
- A decision is made by the Chairperson regarding whether the accused employee is guilty or not guilty, and if guilty, the Chairperson will pronounce a suitable sanction.

From the LRA and the code of conduct on misconduct, as contained in Schedule 8 of the LRA, it is therefore clear why we therefore clear why an investigation is necessary.

Another reason is that an employer must never overlook an act of misconduct. It does not matter how minor or insignificant the act of misconduct may be. This creates inconsistency and the employees do not know what is expected from them.
If an employer overlooks an act of misconduct, and takes no action, the employer could be accused of condoning the misconduct and giving permission to the employee or all employees to carry om doing it. This may create impossible situation where the employer will find its employees unmanageable.

It is essential that all employers must adopt a disciplinary rules that establishes the standard of conduct required by their employees, both on and off the workplace.

In addition, these rules must create certainty and consistency in the mind of the employee and this requires that the employers rules be fair and made available to employees in a manner the is easily understood.
Labour Laws also provides that some rules of conduct may be established and known, that it is not necessary to communicate them.

In other words, to be consistent, the employer must keep records for each employee, specifying the nature of any disciplinary transgression as well as a record of the actions taken by the employer and the reason for those actions.
It is obvious that, in order to comply with these requirements proper investigation of any incident of misconduct is essential.

Improper, unfair or poor charring of a case is also probably one of the biggest causes to employer losing at the CCMA and the labour court and having to reinstate dismissed employee or pay compensation.
By Proper, is meant the presentation and chairing of a Disciplinary hearing in a fair and lawful manner, which allows the Chairperson to reach a finding on guilt or innocence logically and fairly, by considering all the evidence and a balance of probability and arriving a fair and reasonable sanction.
There are a number of factors to be taken into this town to the achieve this. the procedure needs to be fair and lawful.
the based God do add fee and lawful procedure is schedule 8 of the Labour Relations act, the code of good practice dismissal.

A Chairperson can not chair a disciplinary hearing effectively, if he or she does not know what to do and which procedures to apply. it is therefore imperative for every employer to have proper disciplinary procedures, which must be followed in all disciplinary hearing, by whoever the chairperson is.

the prime requirement is that the same procedure B apply in all disciplinary hearings where misconduct is being addressed, in the interest of consistency in the application of discipline.
if an employer follows differing procedures at disciplinary hearings, he will certainly be found to be inconsistent in the application of his discipline, which is a sure road to this disaster at the CCMA.

Therefore, proper, established procedures must be in place, to be followed at every disciplinary hearing. often the employer has two procedures - one procedure for formal hearings and one procedure for informal discussion all warnings or counselling. normally warnings that do not warrant dismissal can be done via the informal procedure. this also applies to the counselling procedure an employer may have. It is advisable to always follow the core principles of right to represent a defence and the right to be represented, even in the case of informal or counselling procedures.

If the outcome of the hearing is serious like a final written warning or dismissal, Bing the formal procedures must always be followed.

Offenses and the disciplinary code

No complainant can properly charge an employee and no chairperson can operate effectively, or completely conduct a disciplinary hearing, unless the employer has rules and regulations in place to regulate the behavior of employees both at the workplace and off the workplace, and unless the company policies and procedures regarding attendance, sick leave, maternity leave, and so on, are not firmly in place. Although some rules or generally known, some are not and an employer cannot charge an employee whom reasonably did not know about the rule.
These regulations, policies and procedures are necessary in order to enable the chairperson to have a standard against which to measure the employee's behaviour.

The purpose of eight disciplinary code is to bring to the attention of all employees the standard of behavior expected of them in the workplace, and what action may be taken against employee who are proven by means of the fair procedure, to have transgressed any part of this code.

In many cases the code is a guide only, and is not intended to remove from the Chairperson of a Disciplinary hearing of her or his authority to properly consider any matter in the appropriate circumstances, and arrive at a suitable sentence to be imposed. Chairpersons should make sure that they understand their level of authority in terms of the employers code.

If the code is only a guideline, the Chairperson of the disciplinary hearing is expected to apply is or her mind to the matter of the sanction to be imposed, and the final decision of the Chairperson will therefore not be necessarily be the sanction indicated in the code.

In other words, Chairperson of the disciplinary hearing is not bound by this guideline, or anything contained in it, to apply the sanction indicated for any particular offence, but arriving at a decision on a suitable sanction, the Chairperson will consider, inter alia, the seriousness of the offence and the circumstances under which is was committed. The Chairperson should however always consider the requirements of consistency when deviating from the code.

It is imposable for any disciplinary code to contain an exhaustive list of every conceivable offence.

Examples of misconduct

Misconduct as already established, is the infringement of the employers disciplinary standards by the employee.

Misconduct is always the fault of the employee as opposed to incapacity involving poor work performance where the employee is not necessarily at fault.

Misconduct procedures involve a proper investigation, in order to establish firstly, whether or not an act of misconduct has occurred and if so, whether a formal disciplinary hearing is required or whether the matter can be handled by an informal disciplinary process or in fact with if any formal disciplinary action is required at all.

Regulation policies and procedures are highly necessary in order to enable the Chairperson to have a standard against which to measure the employees behaviour.

The code of Good Practice-dismissal states the following:

- The employer should adopt a disciplinary rules that establish the standard of conduct.
- The form and content of the disciplinary rules will vary according to the size and the nature of the business. Larger corporate companies will require a more formal approach to discipline.
- The rules must create certainty and consistency in the application of discipline.

Disciplinary Sanctions – Warnings

Most organisations follow a procedure of progressive discipline that is normally contained in their disciplinary codes. The disciplinary procedure sets out the manner in which disciplinary action is to be taken against employees, whereas the disciplinary code allows for the progressive application of disciplinary sanctions.

Two important characteristics of progressive discipline are:

- .a penalty commensurate with the offence; and
- a series of increasingly serious penalties for continued unsatisfactory performance or behaviour.

An employer should apply progressive discipline on the understanding that discipline should be corrective rather than punitive. This means that the employer should endeavour to first correct an employee's behaviour, such as by issuing:

Verbal Warning - for minor transgressions.

Verbal warnings are appropriate in the case of minor offences or if a rule was broken the first time. The approach should be to hold a meeting with the employee. Allow the employee to explain and give reasons for what happened. If after the explanation, you still think that a verbal warning is appropriate, give it. State clearly that it is a verbal warning. The employee is allowed to have a representative with them during the meeting. A verbal warning is usually valid for three months. Complete the required verbal warning documentation and keep on record for the required period.

Written warning - for consistent misconduct. A written warning is appropriate if the verbal warning is being ignored or if a serious offence took place, but not a dismissible offence. The procedure is the same as for a verbal warning; the only difference is that the warning is written. It is valid for 6 months and is kept on the personal file of the individual. Complete the required written warning documentation and keep on record for the required period.

Final Written Warning - for persistent misconduct. Final Written warning is given if the same offence is committed within 6 months or it is an offence that warrants a final written warning. The final written warning is given after a disciplinary hearing and is valid for 12 months. Complete the required written warning documentation and keep on record for the required period.

All warnings given, including a verbal warning should be acknowledged by the employee concerned. The employee must sign the warning or the disciplinary report. This means that the employee acknowledges

receipt and understands the content of the warning. Should an employee refuse to sign, this should be noted and witnessed.

Warnings are not effective for an indefinite period and usually expire after six to twelve months so that two offences of the same nature committed over a period of fifteen months would both be considered as first offences and not a first and second offence.

Warnings that have expired cannot be considered in a decision as to the guilt of an employee in that they cannot compound the transgression.

Employee Misconduct Outside the Workplace

The question that often arises is whether an employer can discipline or even dismiss an employee for misconduct committed after hours and away from the workplace?

In all cases involving employee misconduct outside the workplace, the employer must be able to show how the wrongdoing is relevant to the workplace. If the link between the misconduct and business operations can be shown, the employer can discipline the employee for off-premises, away-from-work misconduct.

Even though the misconduct occurred outside the workplace it can still occur within the context of the work relationship. And, if it does, the employer may, in certain circumstances, still have the right to discipline the employee.

The dismissal of the employee cannot happen right away, a disciplinary hearing must be held before the employee could be dismissed for misconduct.

Conclusion

In conclusion, section 188 of the LRA provides that, in order to be to be acceptable, a dismissal must be for a fair reason and in accordance with a fair procedure. The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct as follows:

Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision.

The Statutory Dismissal Guidelines and Requirements are fairly straightforward and uncomplicated, and the Labour Courts have consistently held that dismissal procedures should not be assessed too vigorously, and that the reasons for dismissal are to be emphasized. The golden rule however is that nobody should be dismissed without a hearing or a pre-dismissal warning.

In addition to compliance with fair dismissal procedures, the employer's actions could also be judged after the fact at the CCMA on a new or fresh basis.

The following question then arises: "Why should the employer be forced to hold a pre-dismissal or disciplinary hearing in respect of offending employee, if the same hearing is going to be conducted by the CCMA after the dismissal where the employee will find true justice, on a new basis? In other words, why not ignore the pre-dismissal procedures, just dismiss the employee and then present the employer's case at the CCMA?

Remember that the legal answer is that employers must follow a fair pre-dismissal procedure because the LRA sets procedural fairness as independent requirement for a fair dismissal.

Appeal after dismissal as sanction.

A dismissed employee may appeal against a disciplinary action or a dismissal if he or she feels that he/she was unfairly disciplined or dismissed.

Appeals can be lodged for reasons including that:

- the hearing didn't follow the right procedure
- the finding was unfair (procedural and/or substantive unfairness);
- the sanction was too extreme (substantive unfairness);
- the chairperson was biased or one-sided (procedural unfairness); or
- new evidence has come to light which is relevant to the disciplinary hearing.

Dismissed employees must be given reasonable time to submit the appeal to the chairperson of the disciplinary hearing. It is advised that appeals should be heard by another person of more senior job grade or status to the chairperson of the disciplinary hearing where the disciplinary sanction was imposed. If there is no such person available for an appeal hearing, the employee should be advised that they have a right to refer the case as a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA).