

## Relying on written statements in a disciplinary hearing

It is normal practice in disciplinary hearings for the accused and witnesses to appear person. The accused would have an opportunity to face and cross-examine witnesses, followed by an opportunity to fully state his or her case and present further evidence. Occasionally, situations arise where the necessity for such a process is called into question.

### Employee arrested

An interesting set of facts emerged in the case of ***Oberholzer vs. Central University of Technology: Free State (2017)*** where the employee, a lecturer in law, was arrested by the police. The employer (CUT) intended to proceed with disciplinary action on several unrelated charges. It was not known when the employee would be released from custody. CUT was not willing to wait. The employee was served with the charges and invited to make written representations. His attorney attended the disciplinary hearing as an observer. The employee was found guilty and afforded an opportunity to make written representations in mitigation. He failed to do so and was dismissed. The employee disputed the dismissal and referred it to the CCMA. He claimed that the procedure had been flawed because he had not been afforded a proper opportunity to state his case.

The CCMA Commissioner referred to the Code of Good Practice: Dismissal as set out in Schedule 8 of the Labour Relations Act (“the Code of Good Practice”). It provides as follows as far as procedural fairness is concerned:

*“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. 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.”*

An important fact in this case was that the employee was an admitted advocate. He would have been quite capable of presenting his case by means of an affidavit. According to the commissioner the manner the employer had gone about conducting the hearing had been in compliance with the Code of Good Practice. The dismissal was found to be procedurally fair.

### Mass hearings

Support for a deviation from normal practice in disciplinary hearings can also be found the Labour Court case of ***Broadcasting Electronic Media and Allied Workers Union (BEMAWU) & others vs. SA Broadcasting Corporation & others (2016)***. More than 100 employees were charged with making fraudulent claims from the medical aid scheme. The disciplinary hearings were conducted on the basis of written representations. The SABC deviated from its normal disciplinary procedures for practical reasons. The union approached the court to obtain an interdict to prevent the SABC from proceeding along that course. The union relied on the SABC’s disciplinary code which states that *“(f)or misconduct or offences which in the opinion of management warrant a stronger disciplinary measure than a warning ... a formal disciplinary hearing must be held.”*

2/...

2.

The court expressed an understanding for the situation that the SABC was faced with. Having to deal with similar allegations of misconduct against more than 100 employees, it would have been unworkable to adopt a process where every employee had to be heard individually, could call witnesses and present evidence.

*The court remarked that “(a)lthough the process adopted by the SABC in this case is different from that which it normally adopts, I do not think that it can be said that it is not a ‘formal disciplinary hearing’. It envisages a hearing chaired by an independent and experienced chairperson on the panel of a respected dispute resolution agency. It envisages a hearing, albeit on paper, without hearing oral evidence or argument. In my view it satisfies the requirements set out in the Code of Good Practice of the Labour Relations Act.”*

While the union's application for an interdict failed, the court pointed out that employees who disputed the outcome of the disciplinary hearing would still have access to the CCMA.

### **Criminal vs. disciplinary procedures**

In a criminal trial, a guilty finding could have severe consequences for the accused. The stringent procedural standards that apply are intended to minimise the chances of a miscarriage of justice. The criminal justice model requires the presence of witnesses and the accused. It allows for cross-examination. In addition, there are several other intricate evidentiary requirements that have to be met.

Although the same procedural standards do not apply to disciplinary hearings, the Code of Good Practice does not suggest that disciplinary matters may be dealt with in a slipshod manner. Firstly, an employer is at least bound by the standards set by its own disciplinary code and procedure. Secondly, it remains a requirement for the employer to prove the employee's guilt on a balance of probabilities. A proper investigation into the facts can be aided by the presence of the accused employee and witnesses in a hearing. The extent to which the demeanour of parties in a hearing plays a role in finding the truth, should not be underestimated. Evidence can be tested through cross-examination and further questioning by the chairperson. The outcome of a disciplinary hearing that meets these requirements is likely to be more robust.

While evidence by means of written statements or in the absence of the accused employee may meet the procedural requirements of the Code of Good Practice, it should only be considered in exceptional circumstances, as illustrated in the cases mentioned above. Also see videoclip at <http://www.labourwise.co.za/the-expert-explains/relying-on-written-statements-in-a-disciplinary-hearing>

*Article provided by Jan Truter from Labourwise*

[www.labourwise.co.za](http://www.labourwise.co.za) is an on-line labour relations service aimed at assisting employers with the implementation of effective labour relations. They can be contacted via the website or [info@labourwise.co.za](mailto:info@labourwise.co.za).