

Resignation in the face of discipline

It is not uncommon for an employee to resign in the face of a disciplinary hearing. But what if the employee does not resign – may the employer offer resignation as an alternative to disciplinary action?

When an employee faces disciplinary action that may lead to dismissal, it is invariably an uncomfortable situation. The disciplinary process itself is anything but pleasant for the parties involved. The employer usually feels that the employment relationship has been seriously damaged. Even if the employee is found not guilty, or if there is insufficient reason for dismissal, the future employment relationship is likely to be more strained than before. The employee, on the other hand, may not want to risk having a blemished record.

So why not avoid all of the above by offering the employee the opportunity to resign? May the employee then refer the matter as a constructive dismissal on the basis that he/she was 'forced' to resign? Every now and then this type of dispute ends up at the CCMA. The following set of facts is an example: The employer had good reason to believe that one of the senior employees was conducting another business contrary to company rules. Before bringing disciplinary charges, the employer decided to confront the employee with the choice to either resign or face a disciplinary enquiry. The employee elected to resign. The employer requested him to put it in writing. Upon handing in his written resignation, the employee packed his personal possessions and left the employer's premises. He apparently later regretted the decision and referred the matter to the CCMA, alleging that he had been constructively dismissed. He alleged that he felt intimidated by the choice given to him and said that he had made an emotional decision. At the time he felt that he did not want to blemish his record – he did not have any confidence in the dispute resolution mechanism, should he not succeed in the disciplinary enquiry. The CCMA commissioner came to the conclusion that the employee had made a clear choice and that there was no basis for his contention that the choice offered had been intimidating. The employee had made a choice voluntarily and the employer did not make continued employment intolerable. Accordingly this was not a constructive dismissal.

This case therefore confirms that an employer is not necessarily bound to follow the disciplinary route in dealing with serious misconduct. It does not, however, give employers free reign to jostle employees into resigning as an easy way out. As a point of departure, an offer for an employee to resign should not be made unless there is compelling evidence of serious misconduct and the notice of a disciplinary hearing has been prepared. Furthermore, when contemplating giving an employee the option to resign, the employer must consider that the employee's choice may be influenced by several factors, such as the seniority of the employee, the history of the employment relationship, the employee's knowledge of the consequences of the choice that is made, and the manner in which the choice is put to the employee (E.g. Is the employee told that the alternative to resignation is dismissal, rather than the prospect of disciplinary action of which the outcome could be dismissal?). The employer should not offer the employee the option of resignation where there is doubt about whether the employee's choice would be truly voluntary. An example of this would be where the employer gives an employee a pre-printed resignation letter to sign, particularly where the employee is not very literate.

Before offering an employee the option of resignation, employers should also consider the impact that it might have in the longer term. Where the misconduct is serious, this may set an uncomfortable precedent for similar cases in future. One of consequences that the employee should bear in mind, is that there is no claim for unemployment benefits in the case of a voluntary resignation.

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