

DEBATE HOTS UP RE LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS

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DEBATE HOTS UP RE LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS by angelique | Apr 9, 2021 | Employers | 0 comments Item 4 of the Code of Good Practice: Dismissal (The Code) contained in Schedule 8 of the Labour Relations Act (LRA) states that, when an enquiry is held into an employee's alleged misconduct "The employee should be allowed the assistance of a trade union representative or fellow employee." It is on this basis that employers allow the accused to be represented by someone from inside the organisation. Employers have, on the other hand, traditionally disallowed external legal representatives to represent accused employees at disciplinary hearings. In the case of NUMSA obo Thomas vs Murray and Roberts Alucast (2008, 2 BALR 134) the arbitrator found that the fraud-based disciplinary matter was not legally complex and therefore rejected the trade union's claim that the employee was entitled to be represented by an external trade union official instead of by a shop steward. The CCMA Guidelines: Misconduct Arbitrations states that an employee is not automatically entitled to legal representation. However, in the case of MEC: Department of Finance, Economic Affairs and Tourism: Northern Province vs Schoon Godwilly Mahumani (Case number 478/03 SCA. Report by Dr Elize Strydom distributed 30 January 2005) the employee was refused the right to an external legal representative. The employee went to the High Court to dispute this ruling. The court found that the ruling of the presiding officer of the disciplinary was wrong and ordered that the employee be allowed to have legal representation at the disciplinary hearing. The employer appealed against this judgement to the Supreme Court of appeal which decided that the accused employee at a disciplinary enquiry, could, under certain circumstances, be entitled to be represented by a legal representative at a disciplinary hearing. This court found that clause 2.8 of the employer's disciplinary code labelled the code as a guideline that may be departed from under appropriate circumstances. This gave presiding officers the right to use their discretion in deciding whether to depart from the prohibition on legal representation. In the case of Molope vs Mbha (2005, 3 BLLR 267) an area manager was dismissed for unauthorised use of funds and was brought to a disciplinary hearing. The accused employee chose a colleague to represent her but, shortly before the disciplinary hearing this colleague decided not to represent Mbha. The employee therefore applied for a postponement in order to obtain another representative but the employer refused and the employee was dismissed. The Labour Court it found the dismissal to be procedurally unfair and said that "it is now established that one of the requirements of a procedurally fair hearing embraces the entitlement of an employee to be represented thereat by a co-employee or a trade union official or a lawyer." In Public Servants Association of South Africa obo Leiee and others / Department of Police, Roads & Transport (FS)[2015] 3 BALR 276 (PSCBC) the arbitrator found that neither employers nor employees may appoint lawyers to represent them in disciplinary hearings. However, the courts have made it plain that, while there is no such general right, applications for legal representation must be considered on their merits even if collective agreements or disciplinary codes appear to exclude legal representation absolutely. In view of the contradictions in the case law as evidenced in the above reports employers are advised, when receiving applications for external representation to consider whether: Their policies allow external representation The complexity level of the case is high The consequences of an adverse finding could be serious There would be no significant prejudice to the employer if legal representation would be allowed The employee's ability to deal with the case is low in comparison to that of the employer. The above case findings have major consequences for employers engaging in disciplinary hearings. In particular: An

employee's request for legal representation can no longer be dismissed out of hand. While such requests must not always be granted, they must be given very careful consideration. This in turn means that employers will need to ensure that their presiding officers are highly skilled in chairing disciplinary hearings. This is so as to be able to make the right judgement as to whether to allow legal representation or not and also to be able to deal with the legal challenges posed by attorneys and advocates at disciplinary hearings. Managers must be thoroughly trained in disciplinary process and the employer must use genuine labour law experts to chair and/or prosecute hearings. BY Ivan Israelstam, Chief Executive of Labour Law Management Consulting. He may be contacted on (011) 888-7944 or 0828522973