CHAIRPERSON CAN MAKE OR BREAK A HEARING

Extract of Article written by Adv. Charles Kinnear

Under labour law, employees have the procedural right to a fair hearing before being disciplined or dismissed for misconduct or poor performance. This includes the following rights:

- To prepare for the hearing;
- To have the assistance of a representative;
- To have an interpreter;
- To bring witnesses;
- To cross-examine witnesses brought against them; and
- To have an impartial presiding officer chairing the hearing.

Other than under a few isolated exceptional circumstances, these rights are strongly entrenched.

More employers are starting to afford employees some of these rights, but they still fail to appoint an impartial chairperson.

The reasons for this include:
The employer's intention is to hold a kangaroo court and get the employee fired regardless the consequences; those employees assigned the task of chairing hearings are not properly trained; or the employer does not understand what constitutes bias.

There are some factors that may suggest that the hearing chairperson could be biased. These include, among others, situations where the chairperson:

- Has previously had↑a clash with the accused employee;
- Has prior↑knowledge of the details of the case;
- Is a close friend↑of the complainant bringing the charge on the employer's behalf?
- Unreasonably turns ↑ down requests from the employee for representation, witnesses, an interpreter or other requirements; and
- Make a finding that is unsupported by the facts brought before the hearing.

What does not necessarily constitute bias is the refusal of the chairperson to allow legally impermissible evidence, to hear irrelevant testimony or to allow unjustified adjournments.

However, it is extremely difficult for a hearing chairperson to distinguish fairly between reasonably and unreasonably turning down the accused request for a witness, representative, adjournment or other requirement.

The ability to make rulings in this regard that will stand up in court can only be acquired via substantial formal training and solid experience of the hearing chairperson.

In the case of Fawu obo Sotyato v JH group Retail Trust, the employee confessed to having stolen two bottles of beer from the employer and to drinking one of them during working hours.

The arbitrator did not accept the confession as valid and also found that the chairperson of hearing was biased. This was because the chairperson had caught the accused employee with the beers and had been involved in drawing up the charges.

This created a reasonable apprehension of bias and rendered the dismissal procedurally unfair. The employee was reinstated with full back pay.

In Saccawu obo Mosiane v City Lodge Hotels Ltd. The employee was dismissed for stealing an item belonging to a guest at the hotel. The arbitrator found the dismissal to be substantively and procedurally unfair because the chairperson of the hearing had been biased, and reinstated the employee.

In order to ensure the employers do not lose cases due to chairperson bias or alleged bias at disciplinary hearings employers must ensure that the chairpersons have no involvement in or knowledge of the case prior to the hearing.

The chairpersons should have a solid understanding as to what constitutes apprehension of bias, and they should contract in a labour law specialist to chair hearings where the employer has no internal official with the necessary knowledge to carry out the task properly.