# THE MINIMUM REQUIREMENTS FOR A FAIR DISCIPLINARY HEARING

**Extract of Article written by Adv. Charles Kinnear**

According to the Labour Relations Act, (LRA) a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure. Section 188 of the LRA stipulates that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the misconduct or incapacity of the employee, or is based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure. Furthermore, any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms of the LRA, specifically, schedule 8.

Schedule 8 deals predominantly with the procedural elements of a disciplinary hearing. When misconduct occurs, the employer should conduct an investigation to determine whether there are grounds for disciplinary action and dismissal. This does not need to be a formal enquiry. The employer should then notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee is entitled to areasonable time (minimum 2 clear working days) to prepare his defence and is entitled to the assistance of a trade union representative or a fellow employee. This constitutes the core rights of an employee when suspected of misconduct.

After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision. If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

Procedural fairness in general terms refers to a disciplinary hearing that has to be held to afford the employee to state his or her defence. This, by no means, requires the employer to hold a “mini court” case. This requirement is derived from the audi alterem partem rule that requires, in the labour context, an employer to afford an employee the opportunity to be heard and state his defence. As long as these requirements have been complied with, the employer would be deemed to have applied a fair procedure. Informal disciplinary procedures in the workplace also balance the interests of employees and employers, as required by the Constitution and the applicable ILO convention.

This is the standard commissioners are required to apply when they judge the procedural fairness of dismissals, unless the parties have agreed to more rigorous procedures or, perhaps where administrative law applies. The code does not substitute employers' own procedures and if the employer has its own disciplinary code of conduct, it should adhere to the principles set out therein. Employers who do not have their own disciplinary rules must adhere to the principles set out in schedule 8 and should be mindful of the requirement of consistent discipline. It should at least ensure that it applies the requirements of schedule 8 in a consistently manner to all employees suspected of misconduct.

The substantive requirements of a disciplinary hearing and the standard of proof required were decided on in the case of Avril Elizabeth Home for the Mentally Handicapped v CCMA & others (2006) 15 LC 1.11.4, [2006] 9 BLLR 833 (LC); [2006] JOL 17623 (LC). The employer dismissed the employee after finding that she was implicated in theft. She referred a dispute to the CCMA and at the arbitration, the employer relied on a videotape which revealed another employee stealing a plastic bag containing a pair of boots in the respondent employee's presence. The employer argued that the only inference to be drawn from the videotape was that the respondent employee was also involved in the theft because she was seen facing the thief at the time and talking to her, and that her "body language" indicated involvement. The commissioner did not accept this evidence as proof of her involvement and ordered the applicant to reinstate the employee.

The Labour Court held that, when determining whether an employee is guilty of misconduct, the proper test is proof on a balance of probabilities not that of beyond reasonable doubt, which is the burden of proof as it applies in our criminal law system. The Labour Court found that the commissioner, while purporting to apply that probabilities test, had in fact applied the test of proof beyond reasonable doubt. This was in itself a ground for review.

The Court confirmed that while the LRA is silent on the contents of the notion of procedural fairness, the nature and extent of that right is spelled out in the Code of Good Practice: Dismissal in Schedule 8. The code specifically states that the investigation preceding a dismissal "need not be a formal inquiry". The Code requires no more than that before dismissing an employee the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision. This approach represents a significant change from what may be termed the "criminal justice" model developed by the erstwhile industrial court under the 1956 LRA.

***This article is an extract of the Learning Material prepared by Advocate Chalres Kinnear as part of the Labour Relations Courses presented by Step Across Training.***

***For more information call Gert Oberholster at cell no: 082 090 2813.***