



ANNUAL LABOUR LAW & COMPLIANCE SUMMIT

Disciplinary Enquiries - Where Have We Gone Wrong in the Last 30 Years?



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The problem

POLITICS

Civil servants suspended for years on full pay

674 provincial and national officials are currently on suspension

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- Employee placed on precautionary suspension
- Prominent law firm appointed to investigate allegations of misconduct
- Detailed and technical ‘charge’ sheets issued
- Legal representation permitted during disciplinary proceedings, including advocates
- Extensive documentary bundles
- Hearing conducted over numerous sittings spanning several months
- Additional legal proceedings instituted to apply pressure to employee

- Employee placed on precautionary suspension
- Long investigation, lasting many months
- ‘Charges’ issued
- Legal representation permitted
- Process is beset by technical point taking and objections, requiring various rulings and postponements

The Problem

- In both scenarios we see legalistic approaches to disciplinary hearings involving big investigations, ‘charge sheets’, bundles of documents, legal representatives, formal processes.
- Not unusual to see this.
- Why are we running our disciplinary processes like court cases?
 - Is this what our law requires?
 - Where have we gone wrong?
 - How can we fix it?

The Law

The Legal Standard: Procedural Fairness

- Section 188 Labour Relations Act
 - dismissal must be procedurally fair
- Code of Good Practice
 - Item 11 requires:-
 - Notify employee of allegations
 - Opportunity to respond
 - Consider representations

- Right to be heard (*audi alteram partem*)
- The Code does NOT require:-
 - Formal disciplinary hearing
 - Legal representation
 - Cross-examination
 - Rules of evidence
 - Processes that resemble trials

- Workplace discipline is not a criminal trial
- Process should be flexible and efficient
- Focus on fairness, not legal formality

Core legal framework:

- Labour Relations Act (s188 + Code of Good Practice)
- Public Service Act (and Regulations)

Collective agreements and disciplinary frameworks

- PSCBC Resolution 1 of 2003 (Public Service)
- SALGBC Disciplinary Procedure (Municipalities)
- SMS Handbook, Chapter 7 (Senior Managers)
- Applied in practice through:-
 - DPSA Disciplinary Guide
 - DPSA Directive on Discipline Management and Compliance
 - SMS Handbook (for senior managers)

Public Service (DPSA Guide + PSCBC)

- Investigation to be finalised within 30 working days
- Hearing to be held within 10 working days after notice
- In cases of precautionary suspension, the disciplinary hearing should commence within one month or 60 days
- Process to be finalised within 90 days

Municipal framework (SALGBC):

- Disciplinary proceedings must be initiated without undue delay
- Disciplinary hearings must commence as soon as reasonably possible, and no later than three months from the decision to institute proceedings
- Charges must be issued within five days of the appointment of the employer representative
- Hearings must commence within 7 to 15 days after notice has been served

Who is to blame?

Who is to blame?

- Everyone
 - Employers & employer's organisations
 - Employees and Unions
 - Attorneys and consultants
 - CCMA and the Labour Court

Who is to blame?

- Hangover from pre-1995 model continues. Cheadle (2005) suggests 4 reasons for this:-
 - Stranglehold of the past was not easy to break. Previous disciplinary policies were carried into the new LRA era and never changed
 - Reliance on criminal proceedings model to ensure ‘fairness’, rather than *audi alteram partem*
 - Lawyers and consultants have a vested interest in making the law more complicated than it is
 - CCMA commissioners and bargaining council arbitrators have continued to apply the old legal position

Who is to blame?

- Many employers seem to think that acts of misconduct require a ‘formal’ investigation
- Lack of skill, understanding or willingness from employers = disciplinary process being outsourced
- Most glaring example is the public service - Not unusual to see 2 advocates and several attorneys representing an employer in a disciplinary process
- Once attorneys become involved proceedings become acrimonious, positions become increasingly polarized and *Avril Elizabeth* flies out the window
- Attorneys and consultants have a vested interest in maintaining the status quo - Investigations and disciplinary enquiries are big money spinners for attorneys and consultants

Moving forward

- Apply the law as it is intended
- Focus on fairness, not formality
- Manage processes within defined timelines
- Avoid unnecessary escalation

Thank you