

Why do we have technical and legally comprehensive notices to attend disciplinary hearings?

It is a requirement of the Labour Relations Act 66 of 1995 (“LRA”) that a fair process be followed prior to the dismissal of an employee. For years a fair process has been defined based on the criminal system. A comprehensive charge sheets fashioned in legally comprehensive jargon is issued to the employee and the employee has to plea guilty or not guilty. But is this necessary? The short answer is no. This does not mean that procedure is not required. It just means that there is no need to apply the rigorous standards of the criminal court system. Item 4 of Schedule 8 of the Code of Good Practice does not mention cross -examination, calling of witnesses and an internal appeal process.

In *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* [2006] 9 BLLR 833 (LC) the Labour Court affirmed the approach that for purposes of disciplinary enquiries, there is no place for legalistic procedures that incorporate all of the accoutrements of a criminal trial, including technical and complex “charge sheets”. Normally on a charge sheet employers place misconduct under legal headings such as “theft”, “negligence”, “fraud”, and “unlawful conduct”. These terms are legal and for instance with fraud it’s a legal concept that involves an intentional misrepresentation. It would therefore mean that if there is no intention, one cannot be found guilty.

Recently in *EOH Abantu vs CCMA & Others (JA4/18)[2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC)*, the Appeal Court dealt with categorisation of misconduct based on technical terms. It was noted that employers could be excused for formulating of charges that are too narrow or incorrect. The Labour Appeal Court concluded that there is no requirement that competent verdicts be mentioned in the charge sheet, subject always to the principle that the employee should not be prejudiced. An employee would be prejudiced if the employee has no idea exactly what case they face.

Based on the above cases, the following are the principles from these cases:

1. An employee would need to be aware of the charges against him or her.
2. The charges don’t have to be technically phrased but must be specific enough for the employee to answer them.
3. The employee should not be prejudiced. Prejudice would occur should the employee not be aware of the charges against him or her at the commencement of the hearing.
4. When arbitrating at the CCMA or bargaining Council, the arbitrator should not adopt a too formalistic approach.
5. The employee should have adequate information about the charge, this can be done by explaining what the employee did wrong in a descriptive manner.

In conclusion, the above cases are useful when addressing the technicality of the charge sheet. It is settled now that an employee must be made aware of the essential details of the alleged misconduct and in what respect a workplace rule has been infringed. There is no need for technical or legal language when categorising misconduct.