

DOUBLE JEAOPARDY AND WHAT AN EMPLOYER SHOULD BE AWARE

When employers intend on disciplining their staff, they should be cautious of the double jeopardy rule found within our law. In order for employers to be cautious of this rule, they should be aware of what is meant by double jeopardy. In the matter of *Mahlakoane v South African Revenue Service [2018] 4 BLLR 337 (LAC)* it stated that double jeopardy means that an employee cannot be charged again with the same misconduct that they were found either guilty or not guilty of.

Therefore, when an employer contemplates disciplining their staff, it is crucial that they follow the procedure as provided in the Code of Good Practice: Dismissals as provided in the Labour Relations Act (LRA). What the Code of Good Practice provides for is the concept of progressive and corrective discipline which states that discipline should be progressive.

Employers must be careful not to issue their employees with a warning and a notice to attend a disciplinary hearing which deals with the same offence as this will constitute double jeopardy.

The reason why this would be seen as double jeopardy is that when a warning is issued to an employee for an offence, they have then been disciplined for that offence. Therefore, proceeding with a disciplinary hearing thereafter would be unfair.

However, it must be noted that there are exceptions to the rule of double jeopardy. In the same case of *Mahlakoane v South African Revenue Service*, the employee had been charged with the fraud of receiving a social grant in which she was not in a position to receive the grant anymore and had been issued notice

to attend a disciplinary inquiry, but was subsequently found by the Chairperson to be guilty of another offence.

Two years later, new evidence arose in the same matter and the employee had been issued another notice to attend for the offence of fraud. On the face of it, it would seem that the employee has been disciplined twice for the same offence which would constitute double jeopardy. The Court, however, found that this matter had not constituted double jeopardy as the issues of fraud are different and do not relate to the same offence. The employee had been charged with fraud for forgery concerning letter of the social grant she had received.

Therefore, employers should note that an employee can be charged with the same kind of misconduct i.e. gross negligence, but what is important to note is that such misconducts relate to different matters as employee committed two different acts of gross negligence whereby the employer can issue a final written warning for the first offence and then issue a notice to attend a disciplinary hearing for the second offence.

This will not constitute double jeopardy as they are separate incidents and that is what is of importance for employers to understand.

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