

WHEN AN EMPLOYEE RESIGNS IN FACE OF A DISCIPLINARY ACTION

Lately, there has been an increasing pattern of employees electing to resign from employment when faced with a disciplinary action for an act of misconduct. The resignation usually occurs after a notice to attend a disciplinary hearing has been issued to an employee, and before the disciplinary hearing actually takes place. The question which then arises is whether such resignations can be accepted by an employer and the options available to an employer when the employee in fact resigns when faced with disciplinary action.

The timing of such resignation by an employee is rarely in the face of a minor matter, but usually when there is a charge of a serious nature laid against them, or an offense of such gravity that dismissal is likely to result.

The Basic Conditions of Employment Act makes for no provisions that prevent an employee from resigning when faced with disciplinary action, and similarly the Act contains no provision giving employers the power to refuse to accept a resignation.

Despite having tendered a resignation, if an employee fails to present themselves at a disciplinary hearing, it may be construed that they have waived their right to present a defence against the charges. Thus, if an employee resigns from the employment, and does not appear at the disciplinary hearing, the hearing will continue in their absence, and based on the evidence placed before the Chairperson, he may arrive at the verdict of guilty and grant a dismissal. The employee then cannot afterwards go to the CCMA, complaining that they were dismissed without being given the opportunity to present a defence.

Accordingly, the employer is fully entitled to proceed with the disciplinary hearing, even if the employee has resigned and the employee's record will still contain details of the alleged offences, details of the disciplinary hearing held in absentia, and the outcome of the disciplinary hearing.

Further thereto, an employer has a discretionary power in relation to a resignation letter tendered by an employee that is subject to a disciplinary action, in that they can elect to accept the letter of resignation and not proceed with the disciplinary hearing. By this, the employer allows the employee to leave its employ "scot free", without the employee's record being labelled as "dismissed".

In the circumstances, the employer and employee may agree on whether or not the employee will serve their notice period and how remuneration will be calculated.

In conclusion, it is important for employers to note that where the form of misconduct that led to the employee's disciplinary action involves a criminal element, such as theft or fraud, the employer is still entitled to proceed with criminal charges, despite the fact that the employee may have tendered a resignation.

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BONGINKOSI NTULI
LEGAL ADVISOR