

Asset news hub

Disciplinary hearings and the employee's right to legal representation.

THE recent postponement of suspended Eskom executive Matshela Koko's disciplinary hearing highlights just how costly and drawn out disciplinary procedures can be when lawyers become involved in the process. It also begs the question: Under what circumstances does the employee have the right to engage legal representation in respect of a disciplinary hearing?

The Labour Relations Act is low-key on the issue of legal representation during disciplinary hearings. Schedule 8 of the LRA, the Code of Good Practice for Dismissal, deals with some of the key aspects of dismissals for reasons related to misconduct.

More specifically, the Code states that "The employer should notify the employee of the allegations, allow the employee a reasonable opportunity to prepare, to state his/her case in response to the allegations and that the employee should be entitled to the assistance of a trade union representative or fellow employee."

Advocate Tertius Wessels, Legal Manager at Strata-g Labour Solutions, says the Code serves as a guideline for employers to consider when establishing their own internal disciplinary codes and procedures.

"These codes can differ quite significantly from one organisation to the next, depending on their size and type of industry they operate in. Some organisations allow for legal representation, while others specifically prohibit same.

"Most employees are under the misconception that if their case gets to the disciplinary hearing phase and the company's disciplinary code and procedures expressly prohibits legal representation, then employees cannot engage the services of a legal representative," he continues. The reality, however, is that employees can never outright be denied legal representation. They must be afforded the opportunity to apply for legal representation, which will be for their own cost.

Wessels cautions, however, that there is no guarantee that the chairperson of the hearing will allow legal representation. "The same principle applies when dealing with dismissals for misconduct at the Commission for Conciliation, Mediation and Arbitration (CCMA).

In terms of the CCMA rules the right to legal representation in arbitration proceedings is restricted in instances where the dispute relates to the fairness of the dismissal and where the reason for the dismissal relates to the employee's conduct or capacity. Legal representation is not always guaranteed, but an employee may always bring an application for legal representation."

The chairperson of the disciplinary hearing will consider certain factors in determining whether to allow legal representation or not. These include the nature and complexity of

the matter; questions of law that arise; comparative abilities of parties; and public interest.

The downside of engaging legal representation is that it can prolong the matter and result in higher costs and increased frustration for all parties involved. Koko's case is a typical example of this. Following Eskom firing of its evidence leader, who apparently did not familiarise himself with that case timeously, the hearing has now been postponed to 24 November 2017. Hearings where the services of legal representatives have been engaged are subject to the availability of the legal representatives. "To avoid an overly protracted process, company's need to be clear on the disciplinary process regarding legal representation. In addition, they need to state upfront they will not allow for unnecessary protraction as a result of decisions by either party to chop and change legal representation," concludes Wessels.

