MASERUMULE
Consulting | Learning | Organisational Growth

## DOUBLE JEOPARDY

If an employee has been subjected to a disciplinary hearing and has been given a sanction, the employer may not, as a general rule, subsequently impose a more severe sanction for the same transgression. Similarly, if a hearing has been held and an employee has been found not to have committed the alleged transgression, that is the end of the matter and conducting a fresh hearing in respect of the same allegations would be impermissible. An employer may therefore not "appeal" against the decision of one of its own managers who has been tasked with conducting a disciplinary hearing. Doing so could constitute "double jeopardy". The principle underlying the prohibition of double jeopardy is that it is unfair to punish someone twice for the same thing.

There is a perception that the rule against double jeopardy is sacrosanct and that, once an employee has been let off the hook, or has not been dismissed where dismissal would have been appropriate, he or she is free from all further action for that transgression. This is not so, because the general rule stated earlier is subject to exceptions.

The labour courts and arbitrators have held in a number of cases that whether or not an employer may re-open a case against an employee, or impose a more serious sanction, is always a question of fairness to both the employer and the employee. It is therefore incorrect to assume, as some employers and trade unions do, that once a sanction has been issued against an employee an employer may never change its mind about the matter.

For example, if an employee who has committed serious misconduct and deserves to be dismissed, is mistakenly and contrary to the employer's disciplinary code given, e.g. a written warning, by a supervisor who is possibly not too well acquainted with the employer's disciplinary procedures; or if information about the serious nature of the employee's misconduct is hidden from the employer, or is not known, at the time of the hearing, a fresh hearing may be conducted and may result in a more severe sanction being imposed if that information surfaces later.

Further, provided it has proper grounds for doing so and provided further that it complies with its own procedures, an employer may decide to reject a recommendation made by an outside chairperson for a lenient sanction and substitute that with a decision to dismiss. Finally, if it transpires that a chairperson has conspired with an employee to ensure a lesser sanction than dismissal, an employer would be able to re-open the matter, conduct a fresh hearing and impose a harsher sanction.

The situations under which it may be fair to re-open a case or impose a more severe sanction will invariably relate to cases involving serious acts of misconduct (e.g. dishonesty) where the circumstances of the misconduct are not fully canvassed at the initial enquiry; new information or evidence subsequently surfaces; or where a supervisor makes a hurried, ill-informed and inappropriate decision leading to a sanction at odds with the employer's guidelines.