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# DISCIPLINARY NOTICES: COMMON MISTAKES & GOOD PRACTICE

One of the most important items in the disciplinary process is the disciplinary notice (or "charge sheet", as some prefer to call it). Yet, it is generally also the most neglected one, with too little attention paid to proper drafting. The results of a poorly drafted notice, if not already apparent at the disciplinary hearing, will certainly become so when the matter gets to arbitration. This note looks at the most common questions that arise in connection with disciplinary notices and proposes a number of best practice solutions.

## *Is it a case of misconduct or incapacity?*

Many managers still confuse misconduct and poor performance situations, which could prove to be fatal in arbitration proceedings, because an arbitrator may find the dismissal to be either procedurally or substantively unfair. Therefore, before one can even begin to think of formulating charges against an employee, it is important to know what type of situation one is dealing with, i.e. with a conduct or capacity issue. Disciplinary "charges" belong with misconduct situations, not cases of incapacity.

The essential distinction is this: misconduct involves fault on the part of the employee, i.e. the employee fails to comply with a term of his employment in circumstances where he *is* able to do so, either because he intends not to (e.g. theft or assault) or is careless or neglectful. In other words, the employee displays an attitude of: "I can do what is expected of me, but I won't (intent) or I don't care (neglect)". Incapacity involves situations where the employee is willing to do what is required, but not able to comply, e.g. because of ill health, lack of ability, poor training and so on. The employee's attitude is one of: "I'd like to do what is required of me, but I'm not able to".

If you are uncertain whether the matter concerns misconduct or incapacity, the safest option is to treat the matter as one involving incapacity until sufficient information is available to conclude that the matter must be dealt with as a conduct issue.

## *How much detail is required in a disciplinary notice?*

As a general rule, therefore, the allegations should be sufficiently detailed to allow the employee to prepare a response and should include full details of the incident leading up to the charges. We would propose that an employer should

rather give too much than too little information. Too little information may result in requests for postponement or complaints of procedural unfairness.

We would suggest further that alternative charges should be used, especially if the transgression fits into more than one category of the employer's disciplinary code. If, in terms of the employer's code, dismissal is the prescribed sanction for a transgression, this should be mentioned in the notice.

A number of recent cases confirm that an employer cannot find an employee guilty of allegations which the employee was never charged with and which, accordingly, he or she never had an opportunity to prepare for. In *Edcon Ltd v Pilemer N.O. & Others* (2008) 29 ILJ 614 (LAC) the employee was charged with failing to report that her company car was involved in an accident while her son was at the wheel. Under the incorrect impression that she was not allowed to lend her vehicle to her son, she lied about the details when confronted. At her disciplinary hearing she admitted to lying and was found guilty of dishonesty and dismissed. The CCMA reinstated her, a decision that was confirmed on review by the Labour Court and subsequently by the Labour Appeal Court (LAC). The LAC found that the hearing was unfair because the employee had been charged with failing to report an accident and had not been given an opportunity to explain why she had dishonestly tried to cover up the accident.

### *De-criminalising disciplinary charges*

Charging someone with a criminal offence in a disciplinary hearing creates potential problems, e.g. there could be pressure on the employer to delay the hearing until the criminal trial has been finalised; arbitrators will most likely raise the level of proof and insist on "strong probabilities" before finding the employee guilty; and, importantly, all the elements of the criminal charge must be proved.

A better option is to frame the transgression in a manner that shows that the complaint really concerns the employee's failure to comply with her contractual obligations, or other terms of employment applicable to her (e.g. a code of conduct or ethical code). For example, instead of charging someone with fraud, the charge could refer to "deliberate misrepresentation"; instead of theft, the charge could simply refer to "dishonest behaviour", "failure to act in good faith" or "unauthorised removal" of the employer's property.

### *Common mistakes*

**Here are some of the most common mistakes managers make in connection with disciplinary notices –**

- insufficient detail of the transgression is provided
- the notice is issued prematurely before the investigation is completed
- alternative transgressions are not used

- the most serious transgressions are proceeded with, without proper investigation or evidence
- transgressions are framed as criminal charges, without sufficient evidence that would satisfy all the elements of the charge
- misconduct is confused with incapacity
- charges are "split" (duplicated)
- the evidence presented does not match the transgression as stated in the notice

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