

## **FAILURE TO APPLY FAIR DISCIPLINARY PROCEDURES**

Many managers view disciplinary hearings as a bureaucratic nuisance, not realising what the actual purpose of the hearing is or how just how risky non-compliance can be.

The obvious financial risk is that of an order by a CCMA commissioner for reinstatement and back pay, or compensation, if a disciplinary hearing is found to be unfair. Non-compliance can also lead to bad publicity and resultant reputational damage, as arbitration hearings as arbitrations at the CCMA are public affairs. However, there is also the fact that failure to comply with disciplinary procedure guidelines may contravene the organisation's values. When this happens, employees begin to doubt management's commitments to those values: non-compliance against one employee sends an important message to other employees about the kind of treatment they can expect when their turn arrives to be taken to task.

Disciplinary hearings are there primarily to give the decision-maker (the person chairing a hearing) an opportunity to gather relevant details about a disciplinary incident in order to arrive at a rational, considered decision with regard to the facts of the matter and the sanction to be imposed. In the process, the employee at the receiving end must be allowed to: prepare his or her case; call and question witnesses; obtain internal representation; and given the opportunity to state his or her case in response to the allegations. Without this, the decision of the chairperson may be based on emotion, rather than the facts of the matter. By applying his or her mind to the facts as presented by both the employer and the employer's representative, the chairperson's decision becomes not only more rational, but it also serves to limit the risk of the organisation losing the case if it were to be referred to the CCMA by a disgruntled employee.

What are the risks of losing? In terms of the Labour Relations Act, if a dismissal is found to have been for an invalid reason (e.g. insufficient proof of wrongdoing) the CCMA can reinstate the person in the jobs that they lost, with back pay. If reinstatement is not awarded (e.g. because the employee doesn't want to go back to the employer) the CCMA commissioner can award up to 12 months' pay in compensation. Further, if the reason for the dismissal is found to have been based on unfair discrimination (e.g. race, sex, age, pregnancy, HIV status and so on) the level of compensation rises to a maximum of 24 months!

If the decision to dismiss is only procedurally unfair, i.e. there was a good reason for the dismissal but it was executed in a procedurally unfair manner, reinstatement cannot be ordered, but compensation of up to 12 months' pay can.

So the financial cost may be considerable. However, the extent of the harm done to the organisation's reputation, both internally and externally, if employees are dismissed for insufficient reasons or in a procedurally unfair manner, is more difficult to quantify. Nevertheless, experience has shown that other employees often watch carefully to see

how the organisation treats their colleagues. If the treatment is perceived to have been poor, unethical or simply in conflict with the organisation's values, don't be surprised if demotivation, under performance and increased staff turnover result from this.

What can be done? First, managers need to become acquainted with the legal requirements applicable to discipline and dismissal, as well as their organisation's own procedures. The latter is important, for while a commissioner at the CCMA may still have some sympathy with an employer who does not know all the niceties of the law, managers who fail to comply with their organisation's own procedures should not expect much sympathy. Second, managers need to realise that even if they know how to deal with discipline and hearings, the law can only go a short way towards ensuring that disciplinary problems do not arise. The law is by nature reactive and seldom preventative. The only effective preventative is good leadership, good HR practices and the ability to develop trust in the relationship.

Trust is critical. All relationships need rules (however informal) to function effectively. But they also need trust: a difficult thing to define and to obtain, but something that can be lost very easily. Key ingredients for healthy employment relationships based on trust would include effective, honest and transparent *communication*; *credibility* of management; *competent* management; and *consistency* (predictability in behaviour). Where these are present, it not only serves to ensure greater cooperation between management and staff, but also tends to reduce disciplinary incidents, absenteeism and under performance. Where these are absent, rules are applied in a mechanical and negative fashion, which does little to build relationships but goes a long way towards destroying them.

Third and finally, managers need to ensure that their decisions with regard to employees are not only in line with what the law requires, but that they are always justifiable in terms of the organisation's values. Sometimes a decision may be legally uncertain (perhaps because the law isn't clear or the decision is borderline) or it is thought that dismissal is the best way of limiting the organisation's risk (where the cost of losing at the CCMA is outweighed by the risk of retaining an employee). Managers would do well in such situations not to merely focus on the latter, e.g. by asking HR to advise them about the 'worst case scenario' if the matter went to the CCMA, but to also ask themselves: 'Does this decision in any way run counter to the organisation's values?' If it does, the harm done to the reputation of the organisation if the decision was nevertheless made, can be incalculable.

*Prof Barney Jordaan, Maserumule Consulting and USB*