

# DISCIPLINARY ENQUIRY

## GUIDELINES

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# THE ROLE OF THE INITIATOR

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# **CHECKLIST FOR CONDUCTING AN INVESTIGATION**

## **CHECKLIST FOR THE INCIDENT**

1. Calm down the situation

An over reaction by management can spoil the Company's case.

2. **Secure the evidence**

Where practical, the physical evidence must be placed in a plastic bag and sealed in front of the offender and his representative. Whenever evidence is used it must be put back into the plastic bag. Get other parties to sign the evidence (e.g. tillslip).

3. Write down the time of the incident and any events leading up to it.
4. Make a sketch of the place where the incident happened.
5. Take photographs of perishables goods, large items, assaulted person etc.
6. Write down names of witnesses (this is important if they don't work for the Company and you need to find them later).
7. Get witnesses to make short notes
8. Take written statements from the witnesses when they have calmed down. **Get the witnesses to sign these statements.** Do this as soon as possible after the incident when it is still fresh in their minds.
9. Ensure that all witnesses who have witnessed an incident have been approached. Canvas widely, for instance there may have been a till packer or other staff member who may have witnessed the incident we saw in the role play.
10. Keep your own notes. Do this immediately after the incident. They can be used later to assist your memory of the events. These are your personal notes (contemporaneous notes), are not signed by other parties and is privileged information which you do not have to discover during the enquiry.

## **CHECKLIST FOR CONDUCTING AN INVESTIGATION**

### **1. Interview the employee.**

Ask the following questions:

- When did it happen?
- Where did it happen?
- How did it happen?
- Who else was involved?
- Why did it happen (extenuating circumstances)?
- Who witnessed the incident?
- Is he/she prepared to give a written statement?
- What was the damage or deviation from standard?

### **2. Check the employee's explanation.**

- a. What did the witnesses see and hear?
- b. Are the witnesses prepared to testify?
- c. Is there physical evidence?
- d. Interview anybody who has been in the vicinity. This may prevent surprise witnesses being called by the other side later on.

### **3. Establish if a rule has been broken.**

- a. Is there a specific rule?
- b. Is it common cause?

### **4. Check for past precedents.**

- a. What action was taken then?

### **5. Analyze the situation. Identify the real problems and causes.**

### **6. Consult with senior managers and personnel department.**

7. Someone who witnessed the incident may not be the investigator. He will be a witness.
8. The investigator may not be the chairman later on. It may be a good idea that an Assistant Manager should be the investigator, leaving the Branch manager free to act as Chairman if called upon to do so.

The charge is one of the most crucial phases of the enquiry and one of the most important duties of the initiator. An incorrect charge will derail the enquiry and can lead to the chairman dismissing the case. Too few charges, that do not cover the full spectrum of the alleged offences, may lead to a quilt finding. But not to an appropriate penalty.

## **CHECKLIST FOR THE CHARGE**

1. More than one charge or allegation can be brought against the offender arising from the incident. But concentrate on the more serious charge during the course of the enquiry.
2. If there is more than one charge, number them: number one being the main charge and the rest the lesser charges.
3. All charges must have a general clause or statement, followed by specific detail. The general statement must refer to the Company's rules and regulations.
4. Do not use allegations which have a criminal base, (i.e. unauthorized removal or possession in place of theft).
5. The enquiry must concentrate only on the allegations, or charges brought against the offender.
6. If during the course of the enquiry additional evidence emerges which may warrant investigation, the enquiry should be adjourned. Advise the employee of these new allegations and give him sufficient time to prepare.
7. When unsure of the exact nature of an incident put in an alternative (e.g. "intimidation of alternatively incitement").

## CHECKLIST FOR SUSPENSION

1. An employee cannot be suspended without pay pending a disciplinary enquiry.
2. An employee can however, be suspended without pay, as an alternative to dismissal, but the employee must agree to this in writing.
3. Suspension can therefore be expensive and should not be considered for a period exceeding 3 days (unless otherwise justified).
4. In Terms of the new Act, the unfair suspension of an employee from work could be an unfair labour practice. The employee may claim that the suspension was on a whim without just cause or reason.
5. An employee should be suspended only if:
  - There is a likelihood he could repeat the offence during the period before the disciplinary enquiry.
  - Employees involved in a fighting incident would also normally be suspended as they may fight again over the incident.
  - The individual could tamper with the evidence (e.g. an assistant accused of fraud may try to rectify the records).
  - Suspension would be appropriate if there is cause to believe that he might interfere with witnesses.
  - The individual's presence on the property might have a disruptive influence on other employees.
  - His presence on the property could pose a threat to his own safety.

## **CHECKLIST FOR CRIMINAL OFFENCES**

1. It sometimes happens that an employee's transgression constitutes both a breach of a disciplinary (company) rule and a criminal offence. (Theft, fraud, assault etc.)
2. Conviction for a criminal offence does not necessarily mean the employee will be automatically dismissed.
3. An employee may be dismissed by an internal enquiry on the "balance of probabilities" and acquitted in a criminal court where the test of "beyond reasonable doubt" is used for determining guilt.
4. Regardless of the outcome of any criminal proceedings internal disciplinary procedures must be followed and an disciplinary enquiry held.
5. In all instances, the manager or initiator must take advice before he decides to press criminal charges. Proceed with caution and seek expert advice.
6. Depending on circumstances, it would be best to complete the internal disciplinary proceedings and lay a criminal charge afterwards. This is not always possible in all cases which is why it is so important to consult with your personnel department for advice and guidance.

## CHECKLIST FOR NOTIFICATION OF AN ENQUIRY

1. An employee has a right to be heard and to fair procedures. If he chooses not to attend, this will weaken his case should he later claim he was unfairly dismissed. You cannot “force” someone to attend an enquiry.
2. If he fails to attend the enquiry (or investigation) after being instructed to do so, the enquiry may be conducted in his absence.
3. It would be advisable to set a second date and notify the employee to this effect. If he attends the second enquiry, his reasons for absence on the first date should be established at the outset of the enquiry. If his reasons are not acceptable you may decide to lay a further charge: unauthorised absence on date. In such an event the additional charges should be added to the original charges.
4. If the employee fails to attend the second enquiry, it should be held in his absence.
5. An employee must be given written notification which must clearly specify the charge/s against him.
6. The employee must be given sufficient time to prepare himself for the enquiry. Usually 24 hours should suffice, however this depends on the complexity of the matter involved.

# CHECKLIST FOR PREPARATION

Preparation consists of two main aspects:

1. Preparation of documentation
2. Preparation of witnesses.

## 1. PREPARATION OF DOCUMENTATION

The initiator should prepare a bundle of documents. The bundle should consist of the following documents:

1. Notice to appear at a disciplinary Enquiry
2. Notice of suspension (if applicable)
3. Any documentary evidence (e.g. till slip audit roll, doctor's letter etc)

The initiator must also complete the dates in the checklist and must ensure at all times that they are up to date.

It is very important to note that the initiator is solely responsible for the keeping of any evidence. Any evidence that is handed to a person, chairman or shop steward must be signed for in the comments page at the back of the bundle. All phone calls, discussions etc. must be noted in this occurrence register.

The bundle file will grow as additional documents are added to it.

## 2. PREPARATION OF WITNESSES

This is the procedure you must follow in order to prepare your witnesses before the enquiry.

Golden rules for preparing witnesses:

- a) Call witnesses in one at a time. Contradictions in evidence between witnesses should be probed and checked. Therefore witnesses should first be questioned separately.
- b) Explain how the enquiry will be conducted. Many employees have never attended an enquiry – the procedure should therefore be explained to them.

The initiator should also explain to the witness that if they are not sure of something, they should say so. They should not guess or speculate.

For example, if a witness testifies that he saw a person wearing a blue overall driving a forklift truck and the next witness testifies that the person was wearing a green overall, the credibility of both witnesses will be brought into question.

If, on the other hand, the second witness states that he is not sure of the colour of the person's overall, the credibility of both witnesses remains intact.

- c) Let the witness tell his story in his own words without interruption. This enables the witness to arrange his thoughts in such a way that he is less likely to forget details of the incident. Write down their evidence as they relate it to you.
- d) Question until you understand their story completely.

Get as much detail as possible regarding the incident by asking the questions Who? What? When? Where? Why? How? How much?

Question the witness on any inconsistencies in his evidence.

- e) Take notes. This should be done in chronological order.
- f) Determine whether or not to take written statements. (If they have not done so already). Written statements are useful should a witness later change his evidence.

If a written statement is presented in an enquiry, it becomes admissible evidence and the witness could find himself being cross-examined on the statement later at an arbitration.

- g) Test the witness. Play "Devil's Advocate". The initiator should test the credibility of his witnesses and how well they will stand up to cross-questioning.

The initiator should therefore brief the witness to develop a very clear picture of the incident in his mind and not deviate from this.

By playing “devil’s advocate” the initiator shoot questions at the witness as if he were a shop steward. By putting these difficult questions to the witness the initiator gives him an idea of what to expect.

In putting these questions, tone and pitch of voice is important. The idea is to stimulate as closely as possible the actual situation that the witness will experience at the enquiry.

- h) Establish the importance of the witness’s evidence relative to the total case.

The initiator should assess whether the witness’s evidence is material to the case.

If several people witnessed an incident, it is not necessary to call all of them – just one or two of the more reliable witnesses.

- i) After all witnesses have been questioned separately, the initiator should call them together and run through the information with them.

This enables them to listen to the entire story and hear how and where their particular evidence slots in.

It also gives them an opportunity to correct any misimpressions and it can stimulate them into remembering information not divulged in earlier questioning.

- j) The initiator should not attempt to get the witness to change evidence. Doing this is unfair and does not promote good industrial relations.

Getting witnesses to alter their evidence can often be counter productive, as the truth may emerge during the enquiry and discredit the witness.

Finally, the initiator must decide on what order to call the witnesses. Normally one would start with the strongest witnesses.

The initiator should make it clear to the witnesses: -

- order in which they will be called;

- the questions that are going to be put to them. (Never ask a witness a question to which you do not know the answer!). Inform them of your general line of argument.

k) Do a “key point analysis” on what questions the other side may ask your witnesses and do a key point analysis on what the other sides line of case may be.

l) Get your witness to re-enact the incident.

Points to tell your witness:

- (a) Do not be scared to say he is “not sure” when uncertain about the answer to a question.
- (b) Keep the evidence brief. He may confuse himself if he waffles on.
- (c) He must tell the truth.
- (d) He must not be argumentative or aggressive.

An opening statement is a very short statement of how the initiator of the union representative sees the case. The initiator must make an opening statement. Whilst the union representative or offender, if he does not have a representative, has a choice whether he wants an opening statement or not.

## CHECKLIST FOR THE OPENING STATEMENTS

1. The opening statement is similar to the charge i.e. there is a general and specific.
2. The opening statement should be short and to the point, usually not longer than half a page.
3. The opening statement must be a brief summary of the case and it sets the scene for the disciplinary enquiry.
4. It must clearly indicate which company rule has been broken.

Under the LRA of 1995 disciplinary chairmen or initiators are not Expected to be legal experts and to run enquiries like a court of law..

However we need some framework upon which to run an enquiry and in order to present the offender with the opportunity to state his case.

## RULES OF EVIDENCE

### **Hearsay**

Hearsay evidence is evidence by a person who recounts what he did not observe or perceive through his own senses but heard from someone else.

This kind of evidence is not permissible as the credibility of the person who made the statement cannot be established if he is not available to be cross-examined in order to establish his honesty, memory and accuracy of what he said.

The initiator will object to the chairman when the witness gives hearsay evidence.

## **The Single Witness**

The evidence of a single witness should not be accepted where the witness has a bias against the accused or where the witness makes inconsistent statements, contradicts himself, or has been found guilty of an offence involving dishonesty.

When dealing with a evidence of an accomplice – you need to consider the following:

- The accomplices involvement in the misconduct.
- Blame shifting – the accomplice may try to exonerate himself by trying to place the blame on the accused.

The opinion of a witness is not admissible – it is the job of the chairman to make that finding, not the witness. Only the evidence of an expert witness may be admissible.

When a question calling for an opinion is asked, the initiator must immediately object.

## **Direct VS Circumstantial Evidence**

- Direct evidence is where a witness testifies that he someone do something or heard someone say something.
- Circumstantial evidence is evidence from which an inference can be drawn. For example, number of factors could exist which point to an employee having committed a transgression.

## **Documents / Notes**

The party submitting a document as evidence is required to prove that it is authentic. In order to do this, a witness must be called to testify that the document is what it is supposed to be.

The party submitting the document is required to prove the contents of the document.

Generally, a witness will not be allowed to refer to notes unless the notes were made by the witness himself at the time of the incident or immediately thereafter whilst the events were fresh in his mind.

He must however, be prepared to submit it for inspection by the opposing party and be cross-examined on them.

## **LEADING EVIDENCE**

When a witness is called to give evidence, by either the initiator or the representative that evidence is called Evidence in Chief.

The purpose for Evidence in Chief is:

- To prove the initiators (or representatives) case;
- To check or co-ordinate the evidence of the witnesses;
- To create an impression of credibility and honesty of one's witness.

This is normally followed by cross-examination by the other party

## **LEADING EVIDENCE IN CHIEF**

- Call witnesses sequentially to testify in the same order as the events which occurred during the incident.

For example, a witness could be called to testify that he saw an individual draw an item from stock. The next witness would be called to testify that he saw the individual carrying the item into an area where it should not be. The next witness would be the security guard who caught the individual attempting to push it through a hole in the fence.

- Settle the witness – establish the identify of the witness and why his testimony is necessary.

This is normally done by asking simple, straight forward questions which the witness should have no difficulty in answering and which are intended to reveal his identity and why he has been called to testify.

For example:

“What is your present position?”  
“How long have you done this job?”  
“Where is your work station situated?”  
“What were you doing on Friday morning?”

Once the witness has been “settled”, the initiator should ask him to tell the enquiry, “in his own words”, what he witnessed.

- Allow the witness to lead evidence in his own words and choice of language.

Witnesses who relate their evidence in their own words, using their own expressions tend to be more credible or believable.

- Only interrupt the witness in order to:

- Guide him to salient points;
- Highlight certain aspects of evidence;
- Prevent him from straying from the point.

- Stick to the plan as explained to the witness during preparation.
- These questions should preferably be written down so that there is no misunderstanding by either the initiator or the witness.
- Only ask one question at a time and allow the witness to complete his answer before asking the next question.
- Never ask a question to which you do not know the answer – it might not be to your liking and could damage the case.
- Avoid asking unnecessary questions.

If too much information is revealed, it increases the likelihood of inconsistencies and provides the other party with ammunition with which to attack your case!

- Never ask leading questions.

These are questions which put words into the witness's mouth. Such questions are not fair and should be disallowed by the chairperson.

## CROSS EXAMINATION

To be effective, the initiator must prepare questions to put to the offender and eye witnesses the other party might bring forward.

Cross – examination is not easy and takes practice and skill. There are however certain basic rules which, if followed effectively, will enable the initiator to get to the truth in most circumstances.

- Block off excuses through “freeway” questioning.
- Questions – don’t talk.
- Do not make speeches or lengthy comments to the witnesses. You are only providing information to the other party.

### Checklist for cross – examination

#### 1. Never argue with a witness

It serves little purpose except to give the other side information and damage your credibility.

#### 2. Caution the evasive witness

If he refuses the answer, ask the question again. By refusing to answer he damages his credibility as a witness.

3. Only cross – examine if you stand a gain from it.
4. Do not try to improve upon favourable answers.

Rather use these favourable answers in your closing Argument.

5. Do not ask questions which might produce unfavourable answers.

The golden rule is - do not ask questions to which you don't know the answers. This is why planning is so important.

6. Follow a pattern but do not be predictable.

This is to try and catch the witness off-guard. He would have little idea of what will be asked next so he does not have time to prepare.

7. Do not deliberately try to mislead a witness.

This is dishonest and is clearly aimed at unsettling the witness, besides being unethical. It will prejudice your case.

8. Question why he remembers (cause to remember)

If a witness describes a particular aspect, question him to find out why he remembers that point.

9. Listen actively

Look at the witness and observe his body language and demeanor.

10 After questioning is complete, put your version of the facts to the witness and ask him to comment on it.

It helps to clarify certain aspects for the chairman.

- Refute any contradictory evidence at the conclusion of the cross – examination.

Objections.

During the course of the presentation of evidence or during cross – examination it may happen that the representative can ask which do not conform to the accepted rules of evidence or may intimidate your witness to the extent that it affects his credibility.

When this happens you must object to the chairman. This must be done before the witness answers the question. You simply have to tell the chairman that you object to the question or

manner of questioning +and you must give the reason for your abjection. It is the chairman's prerogative to decide whether he accepts your objection of if he is going to allow it. If he allows it don't waste time arguing, accept it and don't allow it to upset you enough that you lose your concentration. You will not win case arguing with the chairman.

Checklists for objectives.

1. Misleading a witness. This happens when the person cross – examining a witness tells that witness certain facts which are not true. Do not ever tell lies or half-truths.
2. Leading questions. This occurs when your opponent questions his own witness and the question is framed in such a way as to suggest the answer. All questions must always be put in an open-end manner.
3. Irrelevance. The danger in cross-examination is that one can wander off into areas that have no bearing or relevance on the issue at hand. This kind of "fishing expedition" is not acceptable and one must object to the chairman. The chairman will instruct the questioner to stick to the point. The chairman however can use his discretion and he may decide to allow the questioner to continue to see where his argument is going.
4. Hearsay. You must immediately object if a witness relates evidence of an event he did not personally experience (for example, he heard about it from someone else).
5. Badgering the witness. When cross examination becomes rude, robust and aggressive and is liable to negatively affect the quality of evidence, then one must object to the chairman and ask him to stop the other party from doing so. You must protect your witness from this kind of situation.

To close off the enquiry both the Company and the offender or his representative will be given a last opportunity to summarize their case and try to convince the chairman of their own witnesses credibility and why he should agree with them. The credibility of the other party's witnesses or lack or it, can also be pointed out. This is your last opportunity to state your case.

## **CLOSING ARGUMENT.**

1. Comment on each of your witnesses. Sum up their evidence and point out the strength of their evidence.
2. Comment on each of the other's side witnesses. Sum up their evidence and point out the weaknesses in their evidence. Point out the inconsistencies and contradictions.
3. Question the motive of the other witnesses.
4. Request the chairman to view the matter only on the balance of probabilities. Inform him of how improbable the other's side version is.
5. Address the question of onus and try to shift the onus on the other side.
6. If possible quote a precedent.

# THE ROLE OF THE CHAIRPERSON

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## **THE ROLE OF THE CHAIRPERSON IN AN ENQUIRY**

It is the responsibility of the Chairperson to ensure that procedural and substantive fairness prevails during the enquiry. The process through which this objective is achieved can be divided into Four Stages viz:-

- INTRODUCTION
- FACT FINDING
- DECISION
- OUTCOME

Before we look at this process in more detail, there are some other important questions regarding the enquiry that need to be answered first.

### **1. WHO CAN ACT AS A CHAIRPERSON?**

Generally it is a matter for Management to decide who is to conduct the Hearing. The Courts require this person to be **impartial** and to approach the enquiry with an open mind. Of course it is understood that it is not always possible for a Chairperson to be totally unbiased. This is acceptable provided that there are not obvious reasons why the impartiality of the Chairperson is questionable eg.. a vested interest in the outcome due to a family or social relationship with one of the parties involved, or a witness to the incident. The Court has also ruled that the Chairperson should not be perceived as being substantive to influence by the complainant eg a direct subordinate of the complainant.

The conduct of the Chairman during the enquiry is often the deciding factor where bias is concerned. Management conducting the enquiries in a domineering, high handed or threatening manner will naturally not be seen to be impartial.

It is suggested where the alleged offence be serious enough to warrant possible dismissal, that the Manager handling the enquiry should be senior enough to make a decision.

### **2. CAN MANAGERS INVOLVED IN A CASE CHAIR THE ENQUIRY?**

Under normal circumstances this would not be acceptable but it does depend on the nature of the case and the size and location of the branch. In small country branches the manager may be the only senior person in the branch and will therefore have to chair enquiries. The conduct of the manager under these circumstances is all important and some careful planning needs to be done before the investigation and the enquiry is tackled.

Where possible it is advisable not to get too involved in the investigation or if that is impossible, to find an alternative Chairperson such as a Branch Manager from a neighbouring branch or contact the Regional Personnel Manager for advice. In cases involving serious charges which may lead to dismissal it would be unwise to allow the investigator or a witness to chair the enquiry.

### **3. WHERE SHOULD THE ENQUIRY TAKE PLACE?**

The choice of venue is at the discretion of the Chairperson and the decision will be influenced by the availability of a private office or room and the access to witnesses. It is the responsibility of the Chairperson to ensure that there are no interruptions during the enquiry and arrangements must be made in advance to hold all telephone calls. There is nothing more frustrating to employees than being interrupted whilst relaying sensitive matters at an enquiry. In addition the venue used should have sufficient seating, lighting and ventilation.

### **4. WHAT SHOULD THE CHAIRPERSON'S OBJECTIVE WITH THE ENQUIRY BE?**

It is every Chairperson's responsibility to be fair and neutral throughout the enquiry. If he sets

the following two objectives for himself/herself, when handling an enquiry he will most likely be perceived to be fair and neutral.

#### **4.1 Establish the facts of the case:**

The main responsibility of the Chairperson is to establish the facts of the case by listening to Management and the employee. This can only be done if **ALL** witnesses are called to the enquiry and if the employee and representative have been afforded the opportunity to state their case in full and cross examine all the evidence presented by Management.

#### **4.2 Administer the disciplinary action:**

If careful analysis of the evidence indicate that the employee is guilty of the charges, the Chairperson has to administer the disciplinary sanction. At this stage the employee must be given the reasons why he/she has been found guilty. Before a decision can be made about the suitable penalty, the employee **MUST** be given an opportunity to raise any points in mitigation of the penalty. Only then can the Chairperson be in a position to decide on what penalty to impose, taking into account both the degree of guilt and the pleadings in mitigation.

**5. WHAT PROCEDURE SHOULD BE FOLLOWED BY THE CHAIRPERSON IN CONDUCTING A FULL SCALE DISCIPLINARY ENQUIRY**

The actual enquiry process can be divided into four stages viz:

- INTRODUCTION
- FACT FINDING
- DECISION
- OUTCOME

**INTRODUCTION**

Ask the accused if they are satisfied with the language to be used at the enquiry. If necessary or requested by the accused, call in an interpreter.

- a) Open the enquiry and thank the participants for their attendance.
- b) Introduce yourself and all the participants (if necessary).
- c) Obtain acknowledgement from the accused on the following:

- His right to be represented.
- Proper and adequate notice of the enquiry received
- **That the employee is aware of the nature of the charges.**

d) Should the employee be uncertain about ANY of these issues it is the responsibility of the **Chairperson to adjourn the meeting and give the employee proper opportunity to prepare.**

- e) State the purpose of the enquiry and procedure to be followed:

## PURPOSE

- To establish whether allegations are justified on the basis of probabilities.
- To give the employee the opportunity to state his/her case.
- To ensure fairness at all times.

## PROCEDURE

- Management to state their case.
- Management witnesses called to testify and be cross examined.
- Accused to defend allegations and call witnesses.
- Meeting adjourned for Chairperson to consider the facts.
- Chairperson to inform employee of findings and reason.
- Employee to make representation in mitigation of penalty.
- Adjourn for Chairperson to consider suitable penalty.
- Chairperson informs employee of sanction.

All witnesses should wait outside the room during the introductory comments, and be called in only to give evidence when they are required to give evidence.

## FACT FINDING

During this stage the Chairperson should by way of the procedures explained above, establish all the facts of the case. In doing so due attention must be given to the following:

- a) That adequate records of the proceedings are kept.
- b) That both Management and the employee have adequate opportunity to present their case.
- c) Maintain control of the enquiry but at the same time allow the employee to put his case in his own way.
- d) The cross examination is allowed after evidence has been led.
- e) That the Chairperson does not assume the role of the person leading the Company's evidence as this may incite allegations of bias.
- f) That open-ended questions are asked to further seek information and ensure understanding.
- g) That the credibility of all witnesses is established through questioning.
- h) Guard against expressing an opinion as to the employee's guilt before all the evidence has been led by both sides.

- i) Questions to the Chairperson about substantial issues should be noted and answered only after all the evidence has been led.
- j) Concentrate on the facts and do not allow parties to get drawn into personal attacks.
- k) Guard against asking questions or making comments which could suggest bias or pre-judging of issues.
- l) Ensure that important matters raised are responded to satisfactorily.
- m) Where an item raised by either of the parties has not been responded to adequately, call on the party in question to clarify the matter.
- n) Conflicting statements must be clarified by asking for explanations.
- o) The Chairperson should summarise the views of each person who gave evidence for later consideration.
- p) Ensure that all witnesses are called and that documentary evidence is shown to the employee for comments.
- q) Remain calm and rational and never become angry, sarcastic or rude.

Before the conclusion of the enquiry the Chairperson should ask the employee/representative if there are any further points they wish to raise on the merits of the case. If there are no further points, the enquiry can be adjourned for the Chairperson to consider the facts and make a decision.

### **DECISION**

The Chairperson must now analyse all the facts and decide whether the employee is guilty of the charge against him. Remember, it is the Chairman alone and not the other members of management or the Regional Team who must make the final decision.

In order to make a fair decision the Chairperson must have clarity on all the allegations, comments, evidence and defences which are raised during the enquiry. If there is uncertainty the Chairperson should consult with the RPM to assist in reaching a decision. After weighing up the evidence and reaching a conclusion, the Chairperson should then communicate the decision and the reasons for it to the employee.

### **OUTCOME**

Before the Chairperson can decide on a suitable penalty the employee must be asked for mitigating factors to be considered and also whether he wishes to make representation with regard to a possible penalty. The Courts go so far as to say that this is a separate

stage of an enquiry which is a requirement for substantive fairness. It is then advisable to adjourn the enquiry for a few hours to consider a suitable penalty.

The following are guidelines in this respect:

- Serious of the offence.
- Circumstances under which the offence was committed.
- Previous practices in dealing with similar offences.
- Points raised in dealing with similar offences.
- Previous disciplinary history.
- Employee's position.
- Length of service.
- Employees age.
- Job performance.

The final outcome must then be conveyed to the employee supported by the applicable Documentation eg. Final Written Warning, Letter of Termination etc. In the case of dismissal, confirmation must be obtained from the Regional Personnel Manager. It is also the Chairpersons responsibility to inform the employee of his right to appeal.

The responsibility to keep a concise and accurate record of the proceedings lies with the Chairperson. A responsible person should be briefed on how to record the proceedings if such a person is available. Whilst this record need not be a verbatim report of the proceedings, the Chairperson should ensure that all relevant concerns and information is reflected in full. This may be time consuming and cause the enquiry to proceed slowly but the record is particularly important where disciplinary action is challenged in an appeal or in the CCMA. It is necessary for the Chairperson to ensure that the records of the hearing portray the proceedings accurately. Remember the accused and his representative have the right to these records in order to prepare for an appeal. The Court regards any refusal to supply such a record as a serious irregularity.

### **CONCLUSION**

It is understood that Managers are not legal practitioners but if the procedure remains focused on the objectives of the enquiry, the proceedings will be perceived to have handled fairly.

**THE GOLDEN RULE REMAINS – WHEN IN DOUBT – ASK !!**



## **REQUIREMENTS FOR PROCEDURAL FAIRNESS MISCONDUCT**

1. An Impartial Chairperson.
2. Clear written description of the alledged misconduct.
3. Time to prepare
4. Representation by fellow employee of choice from that business unit.
5. Right to an interpreter
6. An opportunity to state his case.
7. Presentation of evidence in mitigation.
8. Written decision with reason.
9. Right of appeal.

## **REQUIREMENTS FOR SUBSTANTIVE FAIRNESS MISCONDUCT**

1. Did the employee breach a rule of the Company?
2. Does the rule which the employee is alledged to have been breached exist?
3. Did the employee have knowledge of the rule?
4. Is the rule legitimate? Is it fair and reasonable?
5. Is the sanction appropriate in the context of the facts of the case?
6. Has there been consistency in application of the rule in similar cases in the past? (precedent)

## **REQUIREMENTS FOR PROCEDURAL FAIRNESS**

### **INCAPACITY: ILL HEALTH**

1. The Chairperson must conduct an investigation to establish the extent of the incapacity and prognosis.
2. Investigate alternatives to dismissal if employee is unable to perform or will be absent for an unreasonably long period.
3. Relevant facts to be considered.
  - a. Nature of the job.
  - b. Period of absence and seriousness of the illness
  - c. Possibility of securing a temporary replacement.
  - d. Employee has a right to be heard and represented.

## **REQUIREMENTS FOR SUBSTANTIVE FAIRNESS**

### **INCAPACITY: ILL HEALTH**

1. Whether or not the employee was of performing the work for which he or she was employed.
2. If not, then the extent to which he or she was able or not able to perform that work.
4. The extent to which the employee's duties may have been adapted.
5. Was the availability of any suitable alternative employment considered and tried?
6. And what was the employees ability to perform that alternative employment.

## **REQUIREMENTS FOR PROCEDURAL FAIRNESS**

### **INCAPACITY: POOR WORK PERFORMANCE**

1. Was the employee notified in writing as to standards that not have been met?
2. Was the employee given adequate time to improve?
3. Was assistance offered?
4. Was the employee given the right to be heard and represented?

## **REQIREMENTS FOR SUBSTANTIVE FAIRNESS**

### **INCAPACITY: POOR WORK PERFORMANCE**

1. Establish exactly which standards the employee did not meet.
2. Was the employee aware of the expected standard?
3. Were the standards fair and reasonable?
4. What was the degree of sub standard performance?
5. Has the employee been given a fair chance to meet the standards?
6. What are the prospects for future improvement?
7. Will additional training make a difference?
8. Has demotion or transfer been considered?

## Some Examples of Disciplinary Charges

### **Misconduct**

- Serious misconduct arising out of the disappearance of Company property under your control on March 29<sup>th</sup>.
- Serious misconduct arising out of your absence from work on April 23<sup>rd</sup>.
- Serious misconduct arising out of your failure to correctly process the claim of Mr. Jones on March 18<sup>th</sup> resulting in a loss to the Company of R10,000-00

### **Incapacity**

- You are required to attend a meeting on ..... at ..... regarding your failure to meet required performance standards.
- You are required to attend a meeting on ..... at ..... which will inquire into your ability to continue performing your job function in the light of your ongoing ill-health/injury/absences from work.

# THE APPEAL HEARING

## Appeals against Dismissal

The appeal hearing is not an opportunity for the entire disciplinary hearing to be reconvened. The appellant must give reasons for appealing, and the hearing would **focus on those reasons only**.

If witnesses were cross examined at the disciplinary hearing, it is not necessary that they be questioned again at the appeal hearing. The appellant or his representative (s) must be able to justify the need to re-question, and this will only be allowed if a valid purpose will be served.

THE ONUS IS ON THE APPELLANT TO SUBMIT GROUNDS FOR  
THE DISMISSAL DECISION TO BE CHANGED!

These can be;

- **Procedural Defects in the handling of the dismissal**
- **Factors concerning the substance (facts) which led to the dismissal**
- **Mitigating factors which warrant a lesser penalty**

## **BEFORE THE APPEAL HEARING.....**

1. **STUDY THE EMPLOYEES PERSONAL FILE OR COPY PLUS RECORDS OF THE ENQUIRY.**
2. REVIEW THE INQUIRY

- **PROCEDURES**

Was an inquiry held?

Was adequate prior notice given of the inquiry?

Was the employee told of the charge they would face at the inquiry?

Was the employee allowed to be represented?

Were witnesses available?

Was the employee allowed to respond to the charges and explain/rebut the evidence?

Was the inquiry just an “investigation “?

- **SUBSTANCE**

Was the dismissal consistant with other similar circumstances?

Did the charge justify the penalty?

Was proper account taken of any mitigating factors?

After reviewing all the facts, is dismissal still justified?

# DEALING WITH GROUNDS FOR APPEAL

<b><u>ALLEGATION</u></b>	<b><u>REMEDY</u></b>
Procedural Defects	Correct in Appeal or re-open inquiry.
Substantive Factors	Consider and evaluate. deal with new evidence if necessary.
Mitigating Factors	Consider and determine if reversal or lesser penalty is warranted.

## APPEAL HEARING CHECKLIST

1. HAVE YOU STUDIED THE EMPLOYEES PERSONAL FILE OR COPY PLUS RECORDS OF THE ENQUIRY.

Y    N

2. HAVE YOU REVIEWED THE INQUIRY.

Y    N

### **PROCEDURES**

Was an inquiry held?

Y    N

Was adequate prior notice given of the inquiry?

Y    N

Was the employee told of the charge they would face at the inquiry?

Y    N

Was the employee allowed to be represented?

Y    N

Were witnesses available?

Y    N

Was the employee allowed to respond to the charges and explain/rebut the evidence?

Y    N

Was the inquiry just an "investigation"?

Y    N

## **SUBSTANCE**

Was the dismissal consistant with other similar circumstances?

**Y      N**

Did the charge justify the penalty?

**Y      N**

Was proper account taken of any mitigating factors?

**Y      N**

After reviewing all the facts, is dismissal still justified?

**Y      N**

# **DOCUMENTATION**

## **1. Disciplinary Forms**

- **Enquiry coversheet**
- **Notice of suspension**
- **Notice to Attend a Disciplinary Enquiry**
- **Participation in a Criminal Offence**
- **The Disciplinary Hearing / Enquiry**
- **Employees Personal History**
- **Notification of Findings of Disciplinary Enquiry**
- **Disciplinary Warning**
- **Record of Meeting**
- **Disciplinary appeal**