Allegations not enough to win cases

Proof is evidence soundly supported by other relevant evidence. Regardless of the seriousness of an employee's misconduct his/her dismissal will be found to be unfair if the employer is unable to provide at arbitration sound and relevant evidence that the employee was guilty of the offence for which he/she was dismissed.

Proof of guilt is a factual and skilful exercise requiring:

Testimony that is not contradictory
Evidence that has been tested and cross-examined by the accused employee and, despite such a test, still holds water
Documents that are validated and that clearly show up the employee's misconduct
Evidence that is corroborated by other evidence
Testimony from credible witnesses
Evidence derived from thorough and honest investigation.

Thus, proving one's case depends on the bringing of evidence that will persuade the presiding officer that one's allegations or claims are true and genuine.

Parties should not delude themselves that the presiding officer of a disciplinary hearing or a CCMA arbitrator will believe their evidence merely because the witness testifying is a powerful, well known or highly regarded person or comes from a prestigious organisation.

That is, the bringing of persuasive evidence does not depend on the status of the person bringing it but rather depends on the skill of the investigator and prosecutor in gathering, preparing and presenting convincing, relevant and material evidence in a legal and effective manner. In labour law winning is not about power it is about legal, strategic and investigatory expertise.

However, it is not enough to bring strongly supported or incontrovertible evidence. Parties need to further ensure that the evidence they bring is relevant to the case.

For example, if an employer wishes to convince an arbitrator that an employee stole petty cash it is pointless for the employer to bring solid proof that the employee's work performance is poor because this is irrelevant.

At the same time, it is most infuriating for parties who have gone to the trouble of collecting genuine, solid and relevant evidence only to see the arbitrator ignore this evidence. Fortunately, the parties do have recourse to the Labour Court if a CCMA arbitrator disallows or ignores relevant and legally permissible evidence in making his/her award.

For example, in the case of Jafta vs CCMA & others (2007, 3 BLLR 209) the employee was a goods returned clerk dismissed for failing to follow company stock handling procedures. The arbitrator found the dismissal to be fair but the employee took the arbitrator on review to the Labour Court. The Court found that the arbitrator's decision was defective largely because he had ignored relevant evidence relating to the stock losses and to the effect that the employee did not have a full understanding of the operation of the employer's stock system. The Court ordered the employer to reinstate the employee with full retrospective effect.

However, it is not always easy to decide if evidence is relevant or not. This difficulty applies to chairpersons of disciplinary hearings and to CCMA arbitrators. There is more than one reason for this difficulty:

The presiding officer may not be properly trained to be able to understand what is and is not relevant.
Lack of clarity of the evidence itself. For example, the witness giving the evidence may waffle so badly that it is difficult for even a trained presiding officer to recognise the relevance of the testimony.
The evidence may only be indirectly relevant to the case. For example, the employee may have been dismissed for poor performance of his/her work. However, the employee might tell the arbitrator that the employer has been victimising him/her for weeks on end. While this seems, on the surface, to be irrelevant to a charge of poor performance it might not be irrelevant. That is, the employee may be able to show that it was the victimisation that caused the poor performance or that the poor performance allegations are false and are part of the victimisation campaign.

It is therefore crucial that parties ensure that they bring their evidence in such a comprehensive, clear and persuasive manner that it cannot be ignored by a fair arbitrator or disciplinary hearing chairperson.

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