Cross examination is a right

At a hearing arranged to discipline an employee both parties are entitled bring witnesses. These witnesses may come from inside or outside the workplace. The accused employee has the right to cross-examine the witnesses brought by the employer.

The employer is not compelled, in every case, to bring witness that it chooses to leave out of the hearing. However, where the hearing chairperson, in making his/her decision, relies on statements made by a person, the employer is required to call that person as a witness so that he/she may be cross-examined by the accused employee. For example, in NUFAWSA obo Fortuin vs Cori Craft (Pty) Ltd (2007, 5 BALR 423) the employee was dismissed for stabbing a colleague in the arm. He was dismissed at a hearing where the stab victim's statement was introduced. However, the stab victim was himself not called as a witness. As this meant that the accused employee was unable to cross-examine the victim the arbitrator found the dismissal to be procedurally unfair and ordered the employer to pay the employee five months' remuneration in compensation.

On the other hand, should the accused employee bring witnesses as part of his/her defence it is most important for the complainant to cross-examine those witnesses. The purpose of this is:

To deny those things said by the witnesses that the complainant believes to be untrue
To expose the weaknesses in the testimony of the witnesses
To highlight the lack of credibility of the witness
To ask the employees witnesses any questions that could shed light on the employee's guilt.

It is essential that, once the complainant's witnesses have testified, the accused employee is given the opportunity to cross-examine them. That is, the employee must be allowed to question the evidence brought against him/her in order to be able to show the presiding officer the employee's side of the story.

It often happens that the employee, while cross-examining a witness, asks questions that appear to be irrelevant to the case. The chairperson is entitled, for purposes of clarity, to ask the employee how the line of questioning is relevant to the charges. However, the presiding officer is not entitled to interfere unduly with the employee's cross-examination of the complainant's witnesses. There is therefore a very fine line between what the chairperson is and is not allowed to do. This is a key reason why the presiding officer needs to be properly skilled in labour law and disciplinary hearings.

The Labour Relations Act (LRA) neither deals with the employee's right to cross-examination nor prescribes the extent to which the employee can digress from the point of the hearing. However, CCMA arbitrators and Labour Court judges insist that employees are given the right to cross-examine the complainant's witnesses. This is because such cross-examination is the democratic right of anyone accused in any formal process. Interfering with this right without sound reasons is likely to land the employer in serious trouble.

For example, in the case of Aranes vs Budget Rent a Car (1999, 6 BALR 657) the arbitrator found that the disciplinary hearing chairperson had been wrong in intervening in the proceedings before the accused employee had been given a chance to cross examine the complainant's witnesses. This was unfair because it would have been likely to have intimidated the accused employee and to have given him the impression that the chairperson had already made up her mind that he was guilty.

In the case of Labuschagne vs Anncron Clinic (2005, 1 BALR 40 CCMA) the employee had been the administrative manager at the clinic. She had been dismissed for putting laxative in a cup of yogurt that had been eaten by the hospital manager before he had embarked on an air trip. The employee admitted putting the laxative in the yogurt but claimed that it had not been intended for the hospital manager. The arbitrator found that chairperson of the disciplinary hearing had continually interrupted the accused employee while she was trying to question the complainant's witnesses at her disciplinary hearing. The arbitrator found this to be unfair and ordered the employer to pay the employee six months' remuneration in compensation.

Although the disciplinary hearing's presiding officer is the one in control of the hearing this does not give him/her the power to do anything he/she likes. The law restricts the rights and powers of the presiding officer and the CCMA is there to act as policeman should the presiding officer exceed his/her powers. Whether the presiding officer steps out of line knowingly or unintentionally makes no difference. If such an error on the presiding officer's part potentially interferes with the rights of the accused employee the employer is likely to lose its case at the CCMA. This is the reason that employers are now, more than ever, tending to have their managers properly trained in labour law and in the management of discipline. The wise employer also hires a labour law expert to chair its more serious cases that could end up in dismissal and in a CCMA hearing.

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