Cross Examination is an Essential Tool

South Africa's Constitution gives all accused persons the right to defend themselves. Cross examination is a key tool used for this purpose. It is used universally in courts and tribunals and gives an accused the opportunity to challenge his/her accusers. However, it is contentious as to whether an accused employee at a disciplinary hearing has the right to cross examine evidence brought against him/her. Before examining this question it is necessary to look at what is meant by the concept of 'cross examination'.

When a person is accused of something in a court of law, at a tribunal or other forum the accused person is entitled, before the verdict is decided, to understand the allegations against him/her/it and to put forward a defense in response to the charges. One aspect of the accused's right to respond is the right to question the evidence led against him/her/it. The normal format for this is as follows:

The party bringing the allegations presents evidence in support of the charges. Once a witness has completed his/her evidence the accused person is entitled to challenge what the witness has said. This step of asking questions of an opposing witness and challenging the evidence brought is called 'cross examination'.

This fundamental right to cross examine is, as a matter of course, given to all accused persons in our criminal and civil courts at arbitration hearings at the CCMA and bargaining councils and at the Labour Court and Labour Appeal Court. This right is so integral to the accused's right of defense that very few limitations may be placed on it. That is, the presiding officer is not entitled to refuse the accused the right to cross examine. Nor is he/she normally entitled to cut short the cross examination unless. An

exception might be made to this rule if the accused is repeating questions that have already been properly answered by the witness. The cross examiner is not allowed to badger or bully the witness by pressing the witness for the answer he/she wants or by attacking the witness unduly. The cross examiner is also not allowed to ask questions that are irrelevant to the case. Other than these common sense limitations the accused's rights to cross examine the witness freely is sacrosanct. The person who has called the witness is normally neither allowed to interrupt the cross examination nor to assist the witness with the answers to the questions or other challenges put by the cross examiner.

While the above rules are very well established in the courts and other tribunals it is still an open question as to whether these same rights of cross examination apply to accused employees at a disciplinary hearings. In his article on "Conducting disciplinary hearings by correspondence" in Contemporary Labour Law (May 2007, page 105) Wayne Hutchinson addresses this issue. He states that the Code of Good Practice: Dismissal contained in Schedule 8 of the Labour Relations Act (LRA) does not confer the right to cross examine witnesses in a disciplinary hearing. If advocate Hutchinson is inferring that this means the employee has no right to cross examine then his view is controversial. The main reason for this is that, for decades, it has been a very common practice at disciplinary hearings to allow cross examination and it could be argued that this right has become entrenched in common law. Furthermore, it appears that presiding officers who do not allow cross examination might be interpreting the Code of Good Practice: Dismissal too literally. Advocate Hutchinson is right that the Code does not expressly provide for cross examination. However, the Code does provide that the employee should be "allowed an opportunity to state a case in response to the allegations." In my view the accused's right to respond encapsulates the concomitant right to challenge the evidence brought against him/her.

Section 35 (3) (i) of the Bill of Rights contained in the Constitution of South Africa gives every accused person the right to "adduce and challenge evidence." This means that every formally accused person has the constitutional right to bring his/her own evidence and to challenge any evidence brought against him/her. In my view, should an accused employee not be allowed to cross examine opposing witnesses, his/her opportunity to challenge the evidence would be seriously diluted and his/her right to defend his/her case would be severely compromised. Having presided over countless disciplinary hearings I have never come across an employer that has not claimed the right to cross examine the accused employee. It would therefore be folly for the employer to deny the same right to the employee.

Coming to the employer's right to cross examine we need to look at the limitations placed on this right. The employer is in control of disciplinary hearings because these are convened at the workplace owned and managed by the employer. The employer therefore normally claims, as an automatic right, the opportunity to question the accused employee or his/her witnesses. And I see no problem with this in principle. However, the key question is "Who specifically has the right to cross examine the accused?" normally it is the person bringing the charges on the employer's behalf. This person is normally called

the complainant, initiator or charging officer. However, the employer could be in trouble where the chairperson, the official presiding over the hearing, conducts the cross examination. In the case of Botha vs Mac Steel Trading (Pty) Ltd (2007, 3 BALR 197) the disciplinary hearing chairperson vigorously cross examined the accused employee before firing him. The arbitrator found that this biased behaviour rendered the dismissal procedurally unfair and ordered the employer to pay the employee compensation. This was despite the fact that the employee had been found guilty of turning a blind eye to theft by subordinates.