

## Don't delay discipline



In order to optimise the corrective effect of discipline it needs to be implemented as swiftly as possible. This does not mean that the disciplinary process must be carried out hastily. It does mean that, psychologically and legally, unnecessary delays must be avoided.

Psychologically, the closer in time the corrective action/discipline is to the time the misconduct was perpetrated, the more effective the corrective action is likely to be. This is because:

The time proximity creates a direct and clear connection between the misconduct and the discipline in the mind of the transgressor

This in turn assists the employee in learning that misconduct will result in a negative consequence.

From a legal point of view, discipline that is unnecessarily delayed can be found to be faulty. That is, an unnecessary delay in bringing charges can result in the belief that:

the misconduct was not serious enough to merit discipline

procedural time frames have been overstepped

the discipline was not truly instituted due to the alleged misconduct but rather due to the existence of a hidden agenda and the actual charge was a mere pretext.

In the case of *Van Eyk vs the Minister of Correctional Services* (2005, 6 BLLR 639) the employee was charged with fraud almost two years after the fraudulent transactions allegedly took place. As a result, the Court ruled that the disciplinary charges had fallen away.

In *Riekert vs CCMA and others* (2006, 4 BLLR 353) the employee was dismissed for gaining unauthorized access to management drawers. The Labour Court found the dismissal to be unfair citing a number of procedural irregularities including the fact that the employer had allowed an unreasonable and unnecessary delay between the discovery of the alleged infraction and the laying of charges against the

employee.

In *Uys vs Tshwane University of Technology* (2011, 5 BALR 574) a lecturer was dismissed for inflating the marks of students. However, the employer waited one and a half years before bringing the charge. The CCMA arbitrator therefore found the dismissal to be unfair and ordered the employer to reinstate the lecturer with full back pay.

These cases and a number of others make it clear that the institution of an investigation and the proffering of charges against the accused employee must not be delayed unnecessarily. I stress once again that this does not mean that the employer must cut short its investigation for fear of breaking the rule requiring prompt disciplinary action. It means in practice that the employer should:

Begin the investigation into the alleged misconduct without delay once it has discovered the infraction. The sooner the investigation begins, the sooner it can be completed.

Ensure that the investigation is completed without any unnecessary delay but also without unnecessary haste. That is, a balance between speed and thoroughness must be created. A thoroughly competent investigator must be assigned immediately. He/she must make the investigation a priority and attempt to prevent extraneous issues from delaying the progress of the investigation. He/she must, on the one hand, turn over every stone in discovering the facts of the case but, on the other hand, must find ways of effectively managing the time spent on the investigation. This should result in a large number of facts being discovered in as short a time as possible.

Decide, based on the findings of the investigation, whether there are grounds to hold a disciplinary hearing.

If such grounds exist, formulate the charges without delay and notify the employee thereof.

However, employers need to proceed with caution. The principle requiring speedy discipline does not allow the employer to hold the actual hearing before the employee has had a fair opportunity to prepare a defense. Thus, a delay in holding the hearing will be well justified if it is motivated by the need to give the employee time to understand the charges and to apply his/her mind to a defense.

Where employers do not have internal officials with the time or know how to manage this process, they are advised to outsource this task to an external expert. Also, expert training of officials in the skills required to investigate and bring charges can go a long way towards avoiding procedural flaws that can invalidate the disciplinary process.