Use hearsay evidence with caution

A common example of hearsay evidence is where the person placing the evidence before the presiding officer of the disciplinary or arbitration hearing is not the person who witnessed the incident. For instance, the complainant may call the bookkeeper as a witness who might testify that the accused employee had been seen by the accountant making false entries in the books of account. The bookkeeper's evidence is hearsay because he/she did not see the false entries being made. His/her evidence that the accountant saw the alleged incident is hearsay, indirect or second hand.

Another example of hearsay at a disciplinary hearing is where the complainant hands the presiding officer a written statement (with or without the writer's signature affixed) but the writer is not brought as a witness.

The reasons that hearsay evidence is considered as suspect at best and impermissible at worst include that:

It increases the possibility that the evidence has been intentionally fabricated because the originator is not there to confirm it

It increases the likelihood that there may be errors in the hearsay evidence placed before the hearing and that the person presenting it might have misunderstood the originator. In this sense hearsay evidence is akin to a rumour as, the more people to whom the story is relayed, the more it can be inadvertently altered. This renders the evidence unreliable.

The opposition party who may wish to dispute the evidence is not given the opportunity to cross examine the originator of the evidence.

There are certain exceptional circumstances where hearsay evidence might be accepted to a limited extent. However, where a presiding officer of a disciplinary hearing illegally admits hearsay evidence in

dismissing an employee this is most likely to result in the CCMA or bargaining council arbitrator ruling the dismissal unfair.

In NUMSA obo Mnisi vs First National Battery (2007, 10 BALR 907) several employees were dismissed for stealing. The presiding officer admitted into evidence a tape recording of a statement by an employee. The arbitrator found that the admission of this evidence to be hearsay because the maker of the alleged statement did not testify. The arbitrator therefore ordered the employer to reinstate all the dismissed employees with retrospective effect.

In the case of Mhlanga vs SA Mint Company (2011, 1 BALR 7) the employee was dismissed for submitting a false school leaving certificate. At arbitration the employer submitted a report from a verification agency which showed that the employee's alleged school had no record of him having passed his final exams. The arbitrator found that this report constituted hearsay as it was neither issued by the school itself nor was it accompanied by any evidence that could authenticate it. Although the arbitrator also did not accept the applicant's evidence that he had fully completed his schooling he found the dismissal to be unfair and ordered the employer to reinstate the employee with full retrospective effect.

When a presiding officer of a disciplinary hearing is faced with hearsay evidence he/she must consider:

whether it should be admitted at all

The reason that hearsay evidence is being brought instead of first hand evidence. It may be that it is impossible for the originator of the evidence to testify because he/she has subsequently died.

Whether it should be admitted but be given less weight than it might otherwise be given.

Admitting the hearsay evidence will result in legal prejudice to the opposing party. That is, will the admission of this evidence substantially disadvantage the case of the opposing party?

The inherent value of the evidence outweighs the potential disadvantages of admitting hearsay evidence.

Having to make these crucial yet highly complex decisions requires a solid understanding of the laws of evidence. It also requires substantial skill in weighing up the pros and cons and making a decision that is fair and pragmatic for the employer but does not infringe the labour laws protecting the employee.

It is therefore crucial that all employers either thoroughly train their managers who act as presiding officers or hire reputable labour law experts to chair disciplinary hearings.

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