

REPORTING MISCONDUCT

Every employer has conduct regulating policies which indicate what conduct is acceptable or not in the workplace. Such policies include, among others, the Disciplinary Code and Procedure, the Code of Conduct which, in other workplaces is referred to as the Code of Ethics. These policies also provide a manner in which unacceptable conduct must be addressed within the framework of the Labour Relations Act 66 of 1995 as updated; hereinafter referred to as the LRA. They are premised upon, among others, relevant sections the Constitution of the Republic of South Africa Act 108 of 1996; such as section 23 (of of the Constitution) that provides for fair labour practices at workplaces.

The Disciplinary Code and Procedure for the Public Service, namely, Resolution 1 of 2003 provides that discipline is a management function. As such, whenever misconduct manifests itself, it must be dealt with by the immediate supervisor of the employee concerned. If the desired outcome is not achieved, the matter needs to be elevated up the line to the relevant management level/s within the respective business unit.

To this end, Resolution 1 of 2003 provides for what could be referred to as a two stage approach to discipline whereby an issue needs to have been dealt with by the management of the affected business unit before it can be referred to Human Resources (HR) or Employee Relations (ER), whatever the case may be. This therefore, indicates that the respective unit's management has roles and responsibilities in applying and managing discipline within the unit itself. Since they have a day-to-day dealing/interaction with employees within business units, they are the first ones to notice the manifestation of unacceptable conduct and therefore appropriately deal with it. When an employee misconducts themselves, they need to be called to the office so that they can be spoken to privately about the said conduct. Management must always ensure that the employee's side is heard at all times in order to make an informed decision. Therefore, the employee needs to be told why their conduct is unacceptable and as such, to desist from such conduct. Further, it must be indicated to the employee what will happen if they persist with the said conduct.

It is thus imperative that the management of the unit understands the Disciplinary Code and Procedure so that if an act of misconduct occurs, they will know exactly what to do. Otherwise, they can always ask HR or ER for advice or assistance or clarity where the Disciplinary Code and Procedure is either not clear or not understandable. The Disciplinary Code and Procedure provides for progressive discipline in the form of corrective counselling, verbal warning, written warning, and final written warning. This is consistent with clause 3 (2) of schedule 8 of the LRA which promotes a concept of corrective or progressive discipline. This clause indicates that the purpose of discipline is a means for employees to understand what standards are required of them. It stresses that efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

Schedule 8 at 3(3) indicates that formal procedures do not have to be invoked every time a rule is broken or a standard is not met. This approach encourages the prevalence of effective communication between an employee and his/her supervisor or manager to alert the employee of unacceptable conduct to ensure that it is rectified immediately. In the same vein, in *Kievits*

Kroon Country Estate (Pty) Ltd v Mmoledi & Others Supreme Court of Appeal (875/12) effective communication between the employer and the employee is encouraged. The SCA indicated that the employer is not expected to tolerate employee's unacceptable conduct. Further, Schedule 8 at 3(3) indicates that repeated misconducts have to be graded according to degrees of severity and that serious infringements or repeated misconducts may call for a final warning. It then indicates that dismissals should be reserved for cases of serious misconduct or repeated offences.

Management must exhaust their part of the procedure before they can refer the matter to HR or ER, for instituting formal disciplinary in terms of clause 6 of the Disciplinary Code and Procedure for the Public Service, namely, Resolution 1 of 2003. When they refer the matter to HR or ER, they must clearly and chronologically indicate in their memorandum/report the (1) date of the infringement, (2) time of the infringement, and (3) course of events. It is important to state when (date and time the misconduct was committed), and give details of the nature of misconduct; that is clearly indicating what is it that the employee did which constituted misconduct. It is therefore imperative; that management be specific when they report cases of alleged misconduct as generalizing will make it hard to establish the grounds for instituting disciplinary proceedings let alone preferring misconduct charges.

Clause 3(4) of the Schedule 8 of the LRA indicates that generally, it is not appropriate to dismiss an employee on a first offence except if the misconduct is serious and of such gravity that it makes continued employment relationship intolerable. Further, factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself are considered.

In conclusion, it is crucial that the employee that is involved in a misconduct case is always afforded an opportunity to present their case.

***An opinion for the labour desk
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