How to approach a Departmental Trial

It is common cause that in the world of work, any employee will always want a shop steward who has done many cases as they prefer an expert to represent them.

In this instance, the most important aspect of handling a case is to establish whether the employee knows and/or understands what he/she is being charged for.

Though there have always been many ways known and utilised by shop stewards on handling cases, in reality, each case is different because representatives of employers and chairpersons are usually always different.

Under normal circumstances, cases are to be registered at the Provincial Case Manager's offices to ensure there is record of all cases.

Above we share with you some tips on how to approach a Departmental trial;

1. Receiving of the Discipline Report

- **Make sure you interview the employee:** This is critical because the employee must tell you if the misconduct took place or not. The employee must be honest with you as this will inform your Departmental trial approach in either one or two ways, namely offensive or defensive, or both.

- **Check for common mistakes:** Make sure the employee was informed about the misconduct in time. If not, then you should argue on the procedural unfairness. Approach it in no other way.

  The shop steward must do it before the employee pleas.

  It is called "***points of limmine***", which simply refer to any points that you want to raise before the employer representatives read any charges of misconduct into record.

  If the chairperson has not been informed any charges, then you can argue procedural aspects prior to the plea.

  Make sure that all proceedings are recorded, and NEVER discuss any matter off the record because the employer representative might go and rectify his/ her mistakes.

  Always keep in mind that when one goes to war, one never tells their opponent where one is or what one has as a defence mechanism because it will defeat the purpose.

  Always prepare yourself as a shop steward by doing research. This can be done by, among others, asking fellow shop stewards on how to approach matters if uncertain, etc.

  Remember, it is a member's livelihood that you are defending, so the basic rules of the tribunal must be known.

  Remember, there are three role players, namely;

  a. **The Chairperson**

His/ her role is to ensure that the trial is fair. Many chairpersons are normally from the employer and should always be reminded as some tend to forget that.

Any actions from the chairperson that always favour the employer representative are known as substantial unfairness. We normally use the term 'bias' to refer to such.

Chairpersons keep records of hearings and are there to ensure that employee rights are protected as well.

b. The Employer representative

His/her role is to put forward the allegations of misconduct via evidence and witnesses called. They are tricky and well prepared.

Their ranks must be equivalent or higher than those of the employee being charged for misconduct.

The employer representative cannot make a deal of a lesser sanction out of his/her accord. They need permission from their seniors, so be careful when making deals with them.

Always ask if he/she received a mandate to do a deal, and insist on it because chairpersons sometimes overrule them if the employer representative does not inform the chairperson that they got their mandate from their seniors.

c. The Union shop steward

The union shop steward must at all times ensure that the employee they represent knows the tribunal rules.

They must always be punctual for hearings.

They must do sufficient preparations and always ask for assistance if not sure.

They must have sound knowledge and understanding of the rules of the tribunal, and always consult with the employee being charged with misconduct.

They can utilise laws to refer to matters in dispute. For example, the matter of van Eck versus The Minister of Correctional Services.

This case law speaks to an eventuality in which if the employer has got a set of known rules, then they cannot adjust them as they please.

The very case law speaks to the about the time periods of delay and implementation of misconduct. It further says that when the employer becomes aware of misconduct, the employer MUST institute disciplinary steps immediately, and if delayed, it must be justified.

In this instance, you need to check the disciplinary codes of the agreements guidelines, which speak to the matter above.

It is also important that you read both the regulations and the Employers Guidelines manual because they are obligated to follow the known rule and not make them up as it suits them.

2. Amendment of Charges

The Constitution provides that the employee is entitled to reasonable clarity about the charge. In a hearing the employer representative may amend the charge sheet prior to the plea if there is no prejudice in so doing, on one or more of the following grounds;

- Want of an essential averment;
- Variance between the charge and the evidence;
- Missing words or particulars;
- Excess words or particulars; and
- Any other error.

Amendment is possible even if the original charge discloses no offence. This portion of the legislation was introduced to correct the effect of R v Herschel.

The judge, when granting an amendment, may grant adjournment to the accused if he thinks fit. [186] the basic test is whether or not the accused will be prejudiced. [187][188] the courts have held that most types of possible prejudice can be cured by suitable adjournment and the opportunity to call or recall witnesses. [189] the fact that the charge is not amended shall not affect the validity of proceedings, unless the court refuses to grant an amendment. [190]

Although amendment is permissible, substitution is not. [191][192][193] Substitution is never possible, in fact—even if there would be no prejudice to the accused.

Charges may be amended on appeal or review. [194] the test, again, is prejudice. [195] Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.[196] S v Van Wyk[197] is relevant here.

PS. It is important to take note that if you ask the employer representative to check his / her charge sheet and the he/ she agrees that there are no faults or amendments, you can argue that it is because the employer was not prejudiced. **No amendments can be done after the plea**, unless there is a mutual agreement between the parties.

Because chairpersons don't understand the rule, do yourself a favour and get the relevant case laws.

The case law on Sosibo versus SA Stevedores Ltd explains that as a shop steward, you have got the right to cross question any witness. The employer is nowadays utilising statements in hearings and when they cannot find their witnesses, force the issue to be submitted.

This case law simply says you have the right to cross question the witness, and if not given the opportunity then it is procedurally unfair.

Note that if a statement was taken from a witness who is on his/her death bed, then it can be submitted as evidence. This, however, cannot hold any value is done beyond that point.

Applying these tests to the case before us I believe that a reasonable employer in the same industry would, under the same circumstances, have made the same decision that the respondent did in this case. I find, therefore, that the respondent did not commit an unfair labour practice and that the applicants' application for reinstatement therefore falls away. The application is accordingly refused.

Applicant's Attorneys: *Webber Wentzel*, Johannesburg.

Respondent's Attorneys: *Sonnenberg Hoffmann & Galombik*, Cape Town.

SOSIBO v SA STEVEDORES LTD

INDUSTRIAL COURT

21 October; 5 November 1986

DURBAN

Before JOHN, Additional Member

Dismissal—Procedural fairness of—Employee not permitted to cross-examine at enquiry—Dismissal unfair.

Dismissal—Procedural fairness of—Enquiries not procedurally adequate or impartial—Dismissal unfair.

Sosibo had been dismissed after several disciplinary enquiries into alleged attempted theft of goods from a ship. In an application in terms of s 43 of the Labour Relations Act 28 of 1956 the court found that, although suspicion of attempted theft rested heavily upon Sosibo, the evidence against him was not conclusive, particularly in the absence of cross-examination. There was no question about the bona fides of the respondent company in the conduct of the various enquiries, but they were inadequate procedurally and did not fulfil the requirements of an impartial enquiry. Because of the shortcomings in the evidence and in the form of the enquiries, Sosibo had established that he had a reasonable chance of success in further proceedings. Reinstatement order granted.

Application in terms of s 43 of the Labour Relations Act 28 of 1956. The facts appear from the reasons for judgment.

Mrs E Pillemer for the applicant.

Respondent represented by a company official.

Judgment reserved.

JOHN, Additional Member: This application for reinstatement under s 43 of the Labour Relations Act 28 of 1956 arises out of the dismissal of the applicant on 2 July 1986 and the alleged defects in the enquiries which led to his dismissal.