

## **DISCIPLINARY HEARING | Step-by-Step Guide**

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# **DISCIPLINARY HEARING PROCEDURE**

## **Disciplinary Enquiry Checklist**

*by*

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Thank you for downloading this handy chairman's step-by-step guide on how to conduct disciplinary hearings in South Africa.

Employers should not be blind to the fact that labour disputes and other labour problems, despite the apparent simplicity thereof, are legal matters which require legal advice and an employer should, therefore, not hesitate to acquire the services of a labour attorney in such matters.

For more information on **dispute resolution** or to find a **labour attorney** in your area, be sure to visit:

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# DISCIPLINARY HEARING PROCEDURE

## The Chairperson's Step-By-Step Guide

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### Definitions:

**'Alleged offender'** – charged employee/respondent

**'Management'** – company representative who acts as the initiator/prosecutor on behalf of the company.

**'mitigating factors'**- factors to 'soften' the misconduct that occurred. Example: length of service, family, shows remorse and is genuine about it.

**'aggravating factors'** – factors in aggravation of the misconduct. Example: the alleged offender has only been in service for a very short period of time, shows no remorse, is arrogant etc.

**'sanction'** – the penalty/punishment imposed by the Chairperson in terms of the Disciplinary code/procedure of the Company

**1 Welcome all present.** (*'I welcome all present here today'*)

**2. Introduce yourself and any other participants unknown to each other.**

**3. State the purpose of the enquiry:**

*'This enquiry has been convened to hear evidence in respect of charges brought against \_\_\_\_\_ (respondents-alleged offender's name) by \_\_\_\_\_ CC or \_\_\_\_\_ Pty (Ltd). The company is represented today by Mr./Mrs\_\_\_\_\_. Evidence will be led firstly by the company, and then by the alleged offender.*

*After all the evidence has been presented, the enquiry will be adjourned and we will re-convene on \_\_\_\_\_ at \_\_\_ am. The reason for the adjournment is to allow me sufficient time to type the minutes, and to consider the evidence presented from both sides to enable me to consider the matter on the balance of probability to decide whether the alleged offender is guilty or not guilty as charged.*

*Should the verdict be one of guilty, then at the continuance of the enquiry on \_\_\_\_\_, I will inform you of my verdict and the reasons for it. If the verdict is one of guilty, the alleged offender will be given the opportunity to present any mitigating factors.*

*The meeting will then again be adjourned to allow me to consider a suitable sanction, to type out the finding and the reasons for that finding. When I consider what sanction to impose, I will take into account such factors as any mitigating circumstances put forward, anything in evidence that may be regarded as a mitigating circumstance or mitigating evidence. I will consider the alleged offenders length of service, his/her previous disciplinary record, what training he/she has received and so on.*

*All this is necessary to ensure that the sanction is imposed for a fair reason and that the sanction is fair in all the circumstances of the matter. At the continuance on \_\_\_\_\_, I will deliver the sanction imposed and that will be the end of the matter.*

*Inform the alleged offender: 'you do understand of course that you have the right to appeal against any verdict that I may arrive at, and you have the right to appeal against any sanction that I may impose. Should you wish to appeal, this must be done within 5 days of the end of this hearing, and you must submit to management in writing a letter requesting an appeal and state the reasons on which your appeal is based. Should you not be satisfied with the outcome of the appeal, you have the right to refer the matter to the CCMA should you wish to do so.'*

**4. Ask the alleged offender if he/she understands his/her rights as explained in the Notice of Disciplinary Enquiry. If the answer is in the negative, go through his/her rights with him/her.**

*(‘Do you understand your rights in terms of the Notification of this Disciplinary Hearing.’?)*

*The employee has the right to:*

- *a formal enquiry;*
- *be present at the enquiry. (Note the importance of attending the enquiry). If you do not attend, it will be postponed and should you still be absent, the enquiry will be conducted in your absence;*
- *be given time to prepare your case;*
- *be given advance warning of the charges;*
- *be represented or assisted at the enquiry by a colleague of your choice or by a shop steward - all being employees of the Company or with the permission of the employer by a union official;*
- *ask questions of any evidence produced or of statements by witnesses;*
- *call witnesses to testify on your behalf.*
- *arrange with the chairperson to have your witnesses present; as this your responsibility*
- *an interpreter. You may request another employee to act as an interpreter. Inform the chairperson of your need for an interpreter;*
- *appeal within five working days against any penalty which may be imposed and conveyed to you.*

**5. Ask if he/she has a representative present and record the name of the representative. If he/she has no representative, ask if he/she wants one. (‘Do you have a representative present?’)**

**6. Get agreement that the enquiry will be conducted in English (or whatever other language agreed to). Ask if he/she requires an interpreter and has brought one in terms of the Notification issued to him/her.**

**7. (ONLY IF YOU HAVE RECORDING FACILITIES) Inform the alleged offender that the proceedings will be recorded, and they are entitled to a copy of the recording.**

**8. Explain the procedure to be followed:**

- All questioning will take place under my direction.
- Disorderly conduct – shouting, arguing etc will not be allowed.
- The employer will first give evidence in support of his charges and call witnesses.
- A witness is not to be interrupted while giving evidence.
- When a witness has completed giving his evidence, the alleged offender will have the opportunity to cross-examine that witness.
- After the alleged offender has completed cross-examination, management or the Chairperson may ask clarifying questions.
- After management has presented its evidence and called all its witnesses the alleged offender will then give his/her evidence in reply and call his/her witnesses.
- After the witness for the alleged offender, has given evidence, management will be given an opportunity to cross-examine that witness.
- The Chairperson will be allowed to ask clarifying questions of the witness.
- The alleged offender will be allowed to testify himself/herself and lead evidence.
- Management and the Chairperson may cross examine the alleged offender and ask clarifying questions.
- Witnesses will be called one by one and will be excused when their evidence and cross-examination has been completed (witnesses will not be allowed to sit in on the hearing for the full duration of the hearing).
- The Chairperson may also question witnesses for clarification purposes.
- Any adjournments will be at the discretion of the Chairperson.

**9. Ask if everybody understands the procedure.** (*Does everyone understand the procedure?*)

**10. Read out the charges to the alleged offender, and ask him/her if she understands the nature and the seriousness of the charges against him/her.** (*Do you understand the nature and the seriousness of the charges against you?*)

**11. Ask the alleged offender to plead to the charges and record the plea.** (*How do you plead to charge 1 \_\_\_\_\_, charge 2 \_\_\_\_\_ etc*)

**12. Ask the alleged offender what position he/she holds in the company and a brief description of his/her duties. (What is your position in the company and what are your duties)**

**13. Management must then lead evidence, and call their first witness. After the witness has finished leading his evidence, ask any clarifying questions you may have.**

**14. Ask the alleged offender if he/she wishes to question the witness.** (In other words, he/she must have an opportunity to cross-examine the management's witness)(Chairperson to allow all relevant questions. Do not allow irrelevant or frivolous questions.)

**15. When all management witnesses have testified or management has completed leading their evidence, allow the alleged offender to proceed with his/her evidence and witnesses.**

**16. When all evidence has been presented, adjourn the meeting.**

This adjournment must be for a reasonable period – say at least 2 days.

The minutes must be typed, the Chairperson must consider all the evidence, weigh it up on the balance of probability, and then decide on guilt or innocence. The Chairperson must be seen to have applied his mind to the matter.

**Note:** All this (point 16) cannot possibly be done in 15 minutes or even 5 hours. If the Chairperson is to do his/her job properly, this process (point 16) will take at least 2 days minimum. Any Chairperson who adjourns for 10 minutes, comes back and returns a verdict of guilty and a sanction at the same time, has not done his/her job and has no right to hold the title of Chairperson. The chairperson must apply his mind.

Any Chairperson who acts like that has merely rubber-stamped previous instructions received from the employer, which renders the whole procedure a total farce and grossly unfair.

**17. When the meeting is reconvened, the Chairperson will deliver his verdict and explain his reasons for arriving at that verdict. He will explain what evidence led him to believe, on the balance of probability, that the alleged offender was guilty.**

**18. The Chairperson will then ask the alleged offender if he/she has anything to add, or any other circumstances, personal or otherwise, in mitigation of sentence.**

**19. The Chairperson will then call for the alleged offender's disciplinary record (personal file) and armed with that together with a knowledge of the alleged offender's personal circumstances, will proceed to decide on a sanction based on a fair reason.**

**Adjourn the meeting for at least 2 hours. You need to give reasons for the sanction.**

**20. The meeting will be re-convened, and the Chairperson will deliver the sanction decided upon and give reasons for deciding on that sanction.**

**21. Confirm in writing to the alleged offender that the alleged offender has the right to appeal within 5 days and state reasons on which the appeal is based.**

**22. State that the alleged offender has the right to refer the matter to the CCMA if he/she feels aggrieved in any way, in terms of unfair treatment or procedure.**

It must be carefully noted that the arriving of a verdict of guilty or not guilty and the

arriving at a decision on the sanction to be imposed **are two distinct processes** – the one bears no relation to the other.

**In considering the verdict of guilty or not guilty**, the Chairperson will consider all the evidence led at the Disciplinary Hearing by both parties. Based on that evidence, he will decide, on the balance of probability, whose story is more likely to be true – that of the complainant or that of the respondent. Based on the decision of whose story is more likely to be true, he will arrive at a verdict of guilty or not guilty.

A sanction will only be considered if the verdict is a guilty one. If the respondent is found not guilty, then that verdict is communicated to the respondent and the matter is closed.

**In considering a sanction**, the Chairperson will largely ignore the evidence – he will consider facts such as the length of service of the employee, the position held in the company, the seriousness of the offence, the personal circumstances of the employee, the degree of remorse if any, and any other mitigating or aggravating circumstances.

The Chairperson must also consider the employer's own Disciplinary Code and Procedures, and also consistency in terms of previous sanctions imposed for similar offences. To warrant dismissal the Company must show that the trust relationship has been destroyed between employer and employee.

The letter advising the respondent of the sanction imposed should contain points 21 and 22 above in the same letter.

**The chairperson should also consider the Code of Good Practice - Schedule 8 of the Labour Relations Act.** Downloadable copy available from:

[http://www.graystonlegal.co.za/labour\\_lawyer.html](http://www.graystonlegal.co.za/labour_lawyer.html)