

Guideline: Representation at a Disciplinary Hearing

It is a requirement for procedural fairness for an employee to be granted the right to be assisted by a fellow employee or a trade union representative at a disciplinary hearing.

1. Representation by a fellow employee

- Schedule 8 to the Labour Relations Act 66 of 1995 (LRA), the Code of Good Practice: Dismissal (the Code) provides that employees are entitled to be assisted by a fellow employee during disciplinary hearings at the workplace. The employee needs to be informed of this and of the fact that it is his/her responsibility to make arrangements for such representation if it is required.
- If the employee wishes to arrange for the release of his/her representative to attend the enquiry, s/he needs to notify management at least 24 hours before the time of the hearing.

2. Representation by a trade union representative (shop steward)

- The Code provides that employees are entitled to be assisted by a trade union representative (shop steward). However, this only applies if a registered trade union has been granted organisational rights to have elected shop stewards for this purpose.
- A trade union representative who does not satisfy this criterion may only assist the employee if s/he is a fellow employee. Under these circumstances, the employee must be made aware of the procedure that needs to be followed as discussed under item 1 above.

3. Representation by a labour consultant or legal representative

- The Code does not mention whether the employee may be assisted by an attorney, an advocate or by a labour consultant during disciplinary proceedings.
- Sometimes, a contract of employment, disciplinary code or a collective agreement will state who may represent an employee during disciplinary proceedings at the workplace, in which case, this should be applied.
- Traditionally disciplinary codes or collective agreements are based on the view that workplace discipline is a function of line managers, and that representation of employees should therefore also be limited to fellow employees or shop stewards.
- Furthermore, as most line managers do not have any legal background, in the interest of fairness, it has not been considered advisable to allow employees legal representation at workplace proceedings.
- According to our courts there is no general and unrestricted constitutional right to legal representation at disciplinary proceedings.
- However, where a disciplinary code or a collective agreement does not allow for legal representation at disciplinary proceedings, this does not prevent an employee from requesting this.

- According to the courts, in order for disciplinary proceedings to be fair, it is necessary for the person presiding over the hearing to allow and consider a request for legal representation based on the company procedures, the comparative ability of the parties, and-
 - the nature of the allegations against the employee;
 - the factual or legal complexity raised by the allegations;
 - the potential seriousness of a finding against the employee; and
 - the prejudice that an employer may suffer in permitting legal representation.

4. Disciplinary action against a trade union representative, official, or office bearer

- The Code provides that where disciplinary action may be taken against an employee who is a trade union representative, office bearer or official of a trade union, this should not happen without first informing and consulting the trade union.
- While the Code is silent on whether this should be extended to allowing representation by a trade union official who is not employed by the employer, it is suggested that the same considerations that apply to legal representation should apply here.

5. General

- While there is no automatic right to representation during a workplace disciplinary hearing by a person other than those listed in a collective agreement, contract of employment, disciplinary procedures, or the Code, it may be manifestly unfair for the person chairing the hearing to dismiss such a request without first having applied his/her mind to the particular circumstances of the case.
- The guidelines set out above would also apply to an incapacity hearing.