

GUIDELINES FOR FORMULATING ALLEGATIONS

- Ideally, the person who investigates the matter should be the person who formulates the allegations against the employee. This person would be best informed about the incident.
- The allegations must be formulated clearly and correctly.
- The formulation of the allegations is important. If an employee is incorrectly charged it may be difficult to prove the intended allegations against him/her. It is also unfair on the employee and impacts on his / her ability to prepare a response to the allegations and to know what evidence is required.
- The way the allegations are drafted is important as incorrectly drafted allegations may have the following consequences:
 - Cause damage to the reputation of the employee, especially if the wording of the allegations implies criminal activity without actual justification for this.
 - Ambiguous allegations are confusing for employees and also pose difficulties for employers to prove.
 - Where allegations are criminalised (e.g. an accusation of theft), there is more of a duty on the employer to show that the employee is “guilty” on all the elements of that charge such as intent to steal). Allegations stick, so one should be sensitive to the nature of the wording used.
- In *EOH Abantu (Pty) Ltd v CCMA and Others (2019) 40 ILJ 2477 (LAC) paragraph 16* the Labour Appeal Court stated that it is best for the charges to be precisely formulated and be specific enough for the employee to answer them. However the courts have more recently confirmed that employers are not expected to draft charges with the same precision as would be required in a criminal court, as long as the essence of the charge is clear.
- Don’t complicate the allegations. The allegations should be written in plain language outlining the conduct complained of and should be as clear as possible.
- Be as specific as you can when drafting allegations. The date, time, place and conduct complained of should be referred to so that the employee knows what the allegations against him / her are.
- A mistake that employers can make in drafting allegations is to make the allegations complicated or attempt to classify the misconduct, without referring to the incident giving rise to the allegations. This fails to assist the employee and the employer in developing a proper understanding of how to prepare for disciplinary proceedings.
- It is suggested that the allegations start with the words “it is alleged that...” Using the word alleged is important since the employer is communicating that they haven’t made a finding yet.
- It is important to charge an employee correctly as finding an employee guilty of an offence he was not charged with would be procedurally incorrect as the employee would not have prepared his or her defence at the disciplinary enquiry in respect of that charge. However a “competent verdict” is possible, where an employee is found guilty on a lesser charge; for example a finding of guilty of ordinary

negligence, when the employee has been charged with gross negligence. Such a finding is possible only if the employee has had a fair opportunity to defend him/herself on that charge.

Consider the following example.

An employee is absent from work from the 21st to the 25th of January. The employee did not have permission to be absent and did not telephone the company or let the company know where he was and why he was absent. The allegation may read:

“Gross misconduct in that **it is alleged** that you were **absent from work from the 21st to the 25th of January 2018 without authorisation/permission**. During this time, you did not inform the company of the reason for your absence as is required in terms of company policy”.

Other examples:

- **Physical assault**

“Gross misconduct in that on the 1st of October 2017 at approximately 16h00 hours at the 15th floor, Cromwell Office Park, Johannesburg; in the passage opposite room 502, it is alleged that you hit and punched Mrs Philippa Ndlovu.”

- **Breach of safety rules**

“Misconduct in that it is alleged that you broke the safety rules by not wearing a safety helmet and a harness on Friday the 6th of September 2018, at approximately 10h00 am at the Pearl Resort construction site, when you ascended the crane that you were operating.”

- **Misrepresentation of the truth/being untruthful**

“Gross misconduct in that it is alleged that you misrepresented your qualifications on your CV by falsely indicating that you hold a Bachelor of Arts Degree from Wits University and a Master’s Degree from Stanford University.”