

LEGAL REPRESENTATION IN DISCIPLINARY PROCEEDINGS

Are employees entitled to be represented in disciplinary hearings?

Under the 1956 Labour Relations Act, the industrial court generally upheld the exclusions of lawyers (and for that matter, even union officials) from disciplinary hearings.

From time immemorial, the situation was accepted that in 'domestic' or quasi-judicial proceedings, persons appearing before administrative tribunals were not entitled to be represented by lawyers, except, perhaps, in exceptional circumstances.¹

This situation has changed. The Constitution ushered in the principles that legal representation is a fundamental right of all accused persons, and that administrative justice must not only be legal, but also fair.

The Promotion of Administrative Justice Act 3 of 2000, designed to give the constitutional right to lawful and fair administrative action, expressly supports the principle that persons appearing before administrative tribunals are entitled, in appropriate (serious and complex) circumstances, to be represented by attorneys or advocates.

The practical consequences of these constitutional and legislative changes were first reflected in the case of Mr. Hamata at the Peninsula Technikon who was expelled for misconduct.²

Mr. Hamata after failing to secure his reinstatement by way of the High Court approached the Supreme Court of Appeal. He raised the point that the chairman of the inquiry has summarily dismissed his application for legal representation. He attacked the reason the chairman cited for refusing the request. This was that the Technikon's disciplinary regulations prohibited him from permitting a legal representative to appear on behalf of a student.

The rule in question provided that an accused student may conduct his/her own defence or may be assisted by any student or a member of the staff of the Technikon. The chairman took the view that the rule's silence on legal representation impliedly meant that it excluded lawyers.

The Court summed up the current legal position on rules regulating legal representation in administrative proceedings as follows; "*There may be administrative organs of such a nature that issues which come before them are always so mundane and the consequences for their decisions for particular individuals so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor required to be 'read down' (if its language so permits) to allow for the exercise of a discretion in that regard.*"

¹ Dabner v SA Railways & Harbours 11920 AD 583; Lamprecht & another n McNeillie [1994] 11 BLLR 1 (A); Fourie v Amatola Water Board (2001) 22 ILJ 694 (LC)

² Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others (2002) 23 ILJ 1531 (SCA)

However, the court also held, there may also be administrative organs “*which are faced with issues, and whose decisions may entail consequences, which range from relatively trivial to the most grave*”. In these cases: “*Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might well very well impair the fairness of the administrative proceedings, cannot pass muster in law.*”

In other words, a rule absolutely excluding legal representation would be struck down as unconstitutional.

The *Hamata* judgement, then went only this far, if a disciplinary rule governing representation can be interpreted in such a way as to permit legal representation, a presiding officer is bound at least to *consider* an application from an accused person that he/she be permitted to appoint a lawyer. To reject such an application out of hand constitutes a reviewable irregularity, and will fatally infect all subsequent proceedings.

Rule 25(1)(c) of the CCMA states:-

“(c) *If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee’s conduct or capacity, the parties, despite subrule (1)(b), are not entitled to be represented by a legal practitioner in the proceedings unless-*

(1) the commissioner and all parties consent;

(2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-

(a) the nature of the question of law raised by the dispute;

(b) the complexity of the dispute;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.”