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Winning Tactics in the CCMA

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1. INTRODUCTION

Paul Bryant said that: "*It is not the will to win matters that are important, everyone has that. It is the will to prepare to win matters that makes the difference*". Preparation is key in any matter. Moreover, understanding legal principles, and accordingly aligning the evidence and facts to the law, and legal principles, will proof key in winning any matter.

The Commission for Conciliation, Mediation and Arbitration ["**the CCMA**"] or Bargaining Councils alike, have been created with the intend of allowing aggrieved employees to approach it for relief in accordance with Labour Legislation.

This article will give the reader a brief overview on the process of referring a matter to the CCMA or Bargaining Council, with specific reference to Unfair Dismissals. As an employee, dealing with a dismissal, either because of disciplinary action, or undergoing a retrenchment process, it is the worst fate to befall any person. After a dismissal, an employee usually feels aggrieved, and therefore probably would want to act against the employer. When an employee is dismissed, it can be justified to refer an unfair dismissal dispute to the CCMA or Bargaining Council. The process is fairly simple and are to a simplified extend explained below.

Employees can be dismissed for various reasons, from misconduct or poor work performance to operational requirements ["***Retrenchments***"]. Irrespective of the reason for the dismissal, a dismissal is only fair if: (1) There is a good reason for the dismissal ["***Substantive Fairness***"], and a (2) Fair Process was followed before the employee was dismissed ["***Procedural Fairness***"].

2. SUBSTANTIVE & PROCEDURAL FAIRNESS

The CCMA mainly looks at two elements when an employee refers a dispute, the one is Substantive Fairness and the other Procedural Fairness, as also highlighted above, and will be more fully explained below:

2.1 *Substantive Fairness* relates to a valid and fair reason for the sanction imposed. The employer must be able to prove the following on a *balance of probability*:

(a) Was there a rule in the workplace?

(b) Was the rule reasonable?

(c) Was the employee aware of the rule or reasonably had to be aware of the rule?

(d) Did the employee break the rule?

(e) Did the employer apply progressive discipline (consultation and warnings, according to the offence)?

(f) Was discipline consistently applied? and

(g) Did the misconduct justify the sanction applied?

2.2 ***Procedural fairness*** relates to the required legal procedure, that has to be followed, before imposing a sanction. An employer cannot merely dismiss an employee, even if the employer has a valid reason, if the employer did not conduct a disciplinary hearing. This latter process ensures that a fair procedure is followed. The employer must be able to prove the following:

(a) That a disciplinary hearing was held.

(b) The employee received Notice of Disciplinary Hearing.

(c) That the Notice referred to in paragraph 2.2 (b) supra, was timeous [whether the employee has received at least 48 Hours' notice]

(d) That all of the documents complied with the necessary information required by legislation.

(e) Appoint a chairperson who is unbiased.

(f) That the charged employee was afforded an opportunity to prepare their case/defence, and that the charges are properly formulated in such a way that the employee is able to defend it.

(g) Aggravating and mitigating circumstances has to be considered, in respect of the sanction reached.

(h) The outcome of the hearing was based on the facts presented during the hearing.

(i) The sanction was appropriate to the offence.

(j) The employee received the outcome in writing.

3. HOW TO PREPARE A CCMA CASE

Preparing for a case can be quite daunting. To the general public, most concepts relating to legal matters are foreign and are sometimes said to be difficult to grasp. However, we will in the paragraphs to follow, create an outline of what is expected in respect of the preparation of a matter referred to the CCMA or Bargaining Council for Arbitration.

3.1 A BRIEF OUTLINE ON THE CCMA PROCESS

The CCMA and Bargaining Council/s outlines a two – step process.

(i) The process entails the process of *conciliation*, wherein the parties endeavour to settle the matter, without engaging in a formal hearing, and which are informal.

(ii) Arbitration is the next step in the CCMA process. This process comes about due to the fact that a dispute cannot be resolved through conciliation. Arbitration is a formal process (unlike conciliation), and it functions like that of a court because you are given the opportunity to produce evidence, present your case, call witnesses, etc and the order that the commissioner awards is enforceable like an order of the court.

3.2 PREPARATIONS – 3 STEP PROCESS

3.2.1 *Prepare your evidence*

Arbitrations, as already mentioned, is like a court process, where you need to present evidence. Presentation of evidence should be made easy to follow for everyone involved in the proceedings. Evidence can be any evidence inclusive of photos, verbal evidence, evidence through audio, recorded video or documents. All documents should be gathered in the order that you wish to present the documents. Copies of the evidence should be presented in the form of a bundle, which should be provided to each of the role-players at the arbitration, inclusive of the Commissioner, the Opposing side, and a witness bundle.

3.2.2 *Arrange your witnesses*

Talk to your witnesses beforehand to make sure they are able to attend. In the event they are unable to attend or do not wish to attend, consideration should be given to subpoenas, this to formally call them before the CCMA or Bargaining Council. Witness testimony should be tested beforehand to circumvent the risk of not knowing what the witness will testify. During the Arbitration the witnesses will be asked a sequence of questions, formulated in different categories, namely (1) ***examination in chief***, by the representative who called the witness to come and testify, (2) ***cross–examination*** by the opposing side, and (3) ***re-examination*** by the person who dealt with the examination in chief.

3.2.3 *Get the right representation*

In arbitration you are allowed to have legal representation, in the event that the other party consents, and there is compliance with

Rule 25 of the CCMA rules. Legal Representation is not always allowed, the rule of thumb is that more integrate matters, which is legally challenging, will be allowed to be presented by a Legal Representative, specifically with reference to misconduct; incapacity and poor work performance matters.

4. WHICH MATTERS CAN BE REFERRED TO THE CCMA

4.1 Misconduct

Misconduct is any conduct not compliant with the rules; regulations and policies of the employer. In regard to misconduct, for example theft; fraud or absenteeism, you should consider the case at the hand in respect of the prescripts listed in paragraphs 2.1 *supra*.

4.1.1 *Considerations within the bounds of* **substantive fairness**

Further substantive fairness is to be considered at the hand of whether there is a valid reason for the dismissal. If not, the dismissal would be substantively unfair.

- An employee has to be aware of the workplace rule that they have broken, in order to be substantively dismissed [refer to paragraph 2.1 for the test].
- Misconduct should also be serious enough to warrant dismissal, this can either be serious misconduct or several less-serious offences in a short time.

4.1.2 *Considerations within the bounds of* **procedural fairness**

Did the employee receive a proper notice of a disciplinary hearing (48 – 72 hours before the hearing), informing the employee of:

- *The alleged misconduct;*
- *The time and date of the disciplinary hearing;*
- *The employee's rights at the disciplinary hearing;*
- *That the misconduct is of such a nature that could lead to your dismissal, if found guilty.*

If the employee did not receive proper notice of a disciplinary hearing, the dismissal will be unfair.
Was the disciplinary hearing conducted properly? If not, the dismissal would be unfair.

- Was the chairperson objective and unbiased;
- Was the employee afforded an opportunity to state his/her case;
- Did the chairperson consider the matter before making a ruling;
- Was the Employee afforded an opportunity to present mitigating factors to avoid dismissal.

4.2 Retrenchment

Retrenchment pertains to a dismissal based on the operational requirement of an employer. The latter more specifically relates to Economical; Technological or Financial Reasons.

A proper retrenchment process should have been followed:

(i) An employee has to be issued with a Notice of Intention to Retrench in line with Section 189(3) of the Labour Relations Act, 66 of 1995 [**"LRA'**];
(ii) The parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus;
(iii) Notice must be given to the employee informing of the outcome of the consultation and why the alternatives to retrenchment are not accepted.

4.3 Incapacity /Poor Work Performance

Generally, when employees are no longer able to carry out their employment obligations, due to either ill-health or injury, the Employer has to evaluate this in regard to policies within the company as well as consider alternative work arrangements. If the employer has considered alternatives, but alternatives are not feasible, they may be eligible for medical boarding. Labour legislation requires an employer to reasonably accommodate the needs of an employee with physical or mental impairments if such impairment substantially limits the employee's ability to perform the essential functions required in relation to the basic requirements of the position held by the employee.

An employer intending to dismiss an employee due to incapacity must do so in accordance with item 10 and 11 of Schedule 8 to the Labour Relations Act, no 66 of 1995 (LRA), failing which, the fairness of such dismissal falls to be challenged.

The Employer thus have to undertake incapacity enquiry before consideration can be given to dismissing an employee for ill health or incapacity. The Incapacity Enquiry is aimed at assessing whether the employee is capable of performing their duties. A conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's

condition has been made. If the assessment reveals an employee to be permanently incapacitated to render the functions the employee was employed for, the enquiry must continue and the employer must establish whether accommodate the incapacity, or adapt the employee's duties, or provide the employee with alternative work if same is available.

An employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances, or duties cannot be adapted. A dismissal in these circumstances will be fair if it is based on a (1) proper investigation and (2) alternatives have been considered.

5. WINNING AN ARBITRATION AS AN EMPLOYEE

Unless dismissal is in dispute, in which case the onus will be on the employee, the onus is usually on the **employer to proof that the dismissal was substantively and procedurally fair**. Once it is established that an employee was dismissed, every dismissal is deemed to be unfair until the contrary is proved.

5.1 To win arbitration, and employee has to prove:

5.1.1 That he /she has been dismissed, only if that is in dispute;

(i) The commissioner will usually ask the employee to start the proceedings when the dismissal is disputed;
(ii) The employee can prove a dismissal by:

(a) proving an employment relationship;
(b) proving termination of the employment relationship;
(c) proving that the employer's conduct/ actions caused/resulted in the termination of the employment relationship.

5.1.2 Once the dismissal is proven, the proceedings will turn to the employer to prove the fairness of the dismissal.

(i) All the employee needs to do is:
(a) Effectively cross-examine the employer's witnesses in such a way to uncover any untruths; and
(b) Present his/her own evidence that the dismissal was unfair, by placing evidence before the commissioner, supporting either/or both requirements for Substantive or Procedural Fairness, and confirming that same was not met by the employer.

An arbitration hearing can be intimidating, but it does not need to be. The CCMA/Bargaining Council follows a set procedure. As long was you follow the set procedure and align the facts of your matter to procedural and substantive unfairness, the commissioner should find in your favour.

5.2 Available Remedies

5.2.1 *Reinstatement:*

(i) If continued employment is possible, given the circumstances, the employee can request reinstatement with full remuneration from the date of dismissal.

5.2.2 *Compensation:*

(i) If continued employment is impossible, the employee is entitled to compensation. It is good practice to request compensation as an alternative, even if you want to be reinstated.
(ii) For Automatically Unfair Dismissals, the maximum compensation is 24 months' remuneration.
(iii) For Unfair Dismissals that are not automatically unfair, the maximum compensation is 12 months' remuneration.

5.2.3 It is important to note that the principle of fairness usually dictates the amount of compensation awarded. The higher the degree of unfairness, the higher the compensation will be. It is therefore important for employees to not only focus on one or two reasons to show why their dismissal was unfair.

6. EVIDENTIARY VALUE OF EVIDENCE AND RECENT CASE LAW

6.1 Evidence is the most important aspect of case, as commissioner can only make decisions based on the evidence that has been presented. If reliable and admissible evidence is not provided, the case, in all probability, will not be won.

It is thus essential to be familiar with the basic rules of evidence.

(i) Evidence should not be seen as an argument. It is factual proof that is used to support an argument. Without evidence to support a case, a case will be lost.
(ii) Evidence should be evaluated on the basis of the strength thereof; the strongest evidence should be used to persuade a commissioner in order for a case to be decided in your favour.
(iii) Various ***forms of evidence exist*** –
  (a) Oral evidence – is verbal statements witnesses make during a hearing. It can be seen as the relay of facts, experienced by the witness in relation to the matter at hand.
  (b) Documentary evidence – is evidence produced/submitted during the matter to support the case, which evidence can be in various written formats.
  (c) Real evidence - is actual objects produced as evidence during an arbitration.
  (d) Video evidence – is a video presented with footage supporting the evidence presented.

6.2 It is imperative to prepare well.

6.3 All allegations must be assessed, and a defence prepared in rebuttal.

6.4 Evidence should be reviewed, in correlation with the case a person wants to present, to evaluate acceptable evidence and what is speculation or unreliable evidence.

6.5 Evidence presented by the opposing party, should be tested, by virtue of posing a version, as recently explored, and decided upon in **Berry & Donaldson (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration and Others**[1]

(i) this is an application in terms of section 145(1) and section 145(2)(a)(ii) of the of the Labour Relation Act ["LRA"] in terms of which the applicant seeks an order reviewing and setting aside the arbitration award ["award"] issued by the fourth respondent ["commissioner"] under the auspices of the first respondent ["CCMA"] and case number GAEK4560-119, dated 07 July 2019. The commissioner found the dismissal of the third respondent substantively and procedurally unfair and ordered compensation equivalent to six months' salary.

(ii) The award is impugned on several grounds of review but mainly that the commissioner misconstrued the nature of the enquiry and, alternatively, rendered an unreasonable award.

(iii) In the present[2] case, the applicant led the uncontroverted evidence to prove that the third respondent's retrenchment was operationally justifiable on rational grounds. The reason for embarking on the retrenchment process was because it was experiencing low volumes in the export department. In fact, despite the third respondent's assertion that she had not been favoured with the reasons for the retrenchment or information to show that the applicant was not financially viable, she conceded during her cross-examination that she did handle a part of the profit sheets and was aware that her department was only one affected at that time. As a result, she did try to improve the numbers. Regrettably, this evidence eloped the commissioner's attention.

(iv) In addition, the third respondent testified that she had offered alternatives to her retrenchment which had not been considered. It is, therefore, mind-boggling that she would offer alternatives for cost savings when she was not aware of the rationale for her retrenchment. On the issue of consultation, it was the applicant's evidence that there were about three consultation meetings before the retrenchment of the third respondent. Pertinently, according to Mr Vock, the applicant's General Manager, on 1 February 2019, he had a meeting with the third respondent and one of her colleagues and issued them with the section 189(3) notices and explained the contents thereof. Consistent with this evidence, the third respondent testified that she was aware that her chances of

[1] (JR1554/19) [2022] ZALCJHB 184 (12 July 2022)
[2] Berry & Donaldson (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration and Others - refer to vn. 1

escaping retrenchment were very slim as she was the last to be employed in her department and the applicant applied the LIFO principle as a selection criterion. The third respondent conceded under cross-examination that there were at least two further consultation meetings with Mr Vock before she was issued with the retrenchment letter on 13 February 2019. Nothing much turns of the fact that the third respondent did not receive a response in writing on her proposed alternative suggestions for retrenchment. Mr Vock testified that the suggestion that was proposed by the third respondent had been discussed with her prior to her sending the email to the senior management on 13 February 2019. It is absolutely clear that the commissioner's finding that the dismissal of the applicant was procedurally and substantively unfair is at odds with the uncontroverted evidence of the applicant that was before him.

6.6 **The importance of Cross – Examination was further explored in *Berry & Donaldson (Pty) Ltd*[3] as follow:**

(i) In **President of the Republic of South Africa and others v South African Rugby Football Union and others**[4], the Constitutional Court held that:
'…[61] The institution of **cross-examination not only constitutes a right, but it also imposes certain obligations**. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct…

[62] The rule in *Browne v Dunn* is not merely one of professional practice but *"is essential to fair play and fair dealing with witnesses"*…

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the **imputation relies upon inferences to be drawn from other evidence in the proceedings**. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[18] While in **National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others**[5] the LAC referred with approval to the decision in **ABSA Brothers (Pty) Ltd v Moshoana NO and Others**[6] where the following was said about the failure to cross-examine on an important point:

'It is an essential part of the administration of justice that a cross-examiner must **put as much of his case to a witness as concerns that witness (see Van Tonder v Kilian NO en 'n ander**[7]). He has not only a right to cross-examination but, indeed, **also a responsibility to cross-examine a witness** if it is intended to argue later that the evidence of the witness should be rejected. The witness's attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see **Zwart and Mansell v Snobberie (Cape) (Pty) Ltd**[8]. **A failure to cross-examine may, in general, imply an acceptance of the witness's testimony**. In this regard Pretorius has the following to say in '*Cross-examination in South African Law*' Butterworths 1997 at149-150:

"… it is unjust and unfair not to challenge a witness's account if offered the opportunity, then later argue – when it is no longer possible for the witness to defend himself or offer an explanation – that his evidence should not be accepted.

…It would create an untenable situation if each witness had to be recalled later to respond to claim emerging from the opponent's case which the witness might be able to elucidate. In the interest of finality and convenience of witnesses, it is clear that

3 Refer to vn. 1 & vn. 2
4 2000 (1) SA 1 (CC) paras 61-63.
5 [2015] 1 BLLR 77 (LAC) at para 35.
6 [2005] 10 BLLR 939 (LAC) at para 39.
7 1992 (1) SA 67 (T) at 721
8 1984 (1) PH F19 (A)).

all matters must, as far as possible, be dealt with at a single opportunity. There can thus be no doubt that there is a clear responsibility on a cross-examiner to cross-examine if a witness's account is rejected.'" (Emphasis added)

[19] The third respondent's contention that the omission to put her version to Mr Vock is inconsequential is, in my view, untenable. It is apparent from the above authorities that the commissioner ought to have rejected the impugned evidence. **Yet not only did he admit this evidence, but he also based upon it his decision that the third respondent's dismissal was premeditated. By acting the way, he did, the commissioner misconstrued the nature of the enquiry and deprived the parties of a fair hearing.**

The arbitration award dated 7 July 2019 issued under case number GAEK4560-19 in the *Berry & Donaldson (Pty) Ltd*[9] matter was reviewed and set aside and substituted with an order that the dismissal of the third respondent was procedurally and substantively fair.

7. CONCLUSION

It is clear from all the concepts, along with case law, supra, that preparation is key. A party to any dispute, wishing to adequately present his/her matter at any forum, inclusive of the CCMA, should know and understand legal principles, as set out above. Further the party will have to adequately evaluate their own facts, and evidence available to proof their case, as well as evaluate the case of the opposing party, in order to prepare evidence in rebuttal of the evidence that the opposing party will present. Understanding and applying the principles set out in the article will assist any party in presenting their case in such as way that they will be capable of winning at the CCMA/Bargaining Council.