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Common mistakes employees make during disciplinary hearings

By Johan Botes

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The processes related to workplace discipline often confound employees. Whether this is the result of lapping up Suits or Law & Order is an open question, but we frequently see employees misconceiving their rights and obligations when faced with allegations of wrongdoing in the workplace. Employees do their cause more harm than good when labouring under misapprehensions on the nature of workplace discipline.

Many jurisdictions require employers to have just cause for terminating employment and to follow a fair preceding procedure. The prescribed local procedure varies from merely allowing the employee an informal opportunity to state a case, on the one extreme, and a quasi-judicial processes involving presiding officers, employer-prosecutors, extensive leading of evidence and cross-examination on the other end of the spectrum. However, critical in most disciplinary inquiries are the fundamental questions of (1) did the employee do something wrong and, if so (2) what sanction should be imposed?

Did the employee do something wrong?

In respect of the first question, we often see or read in the law reports of employees adopting an attitude of "Well, prove it". The difficulty with this approach is that employees fail to appreciate the difference in proving matters using the civil onus versus the criminal onus. Internal disciplinary matters are considered on a balance or preponderance of probabilities. This essentially means "which of the various versions is more probable?" An employer is not required to prove beyond a reasonable doubt that an employee committed misconduct (the criminal law onus used by the state in prosecuting criminals).

A presiding officer or manager considering whether an employee broke workplace rules has to evaluate the evidence and argument available, then determine which version is more probable. There may still be reasonable doubt as to whether the

employee committed the misconduct, but based on the probabilities, the manager or PO should be comfortable that the employee probably committed the offense.

Employees folding their arms, waiting for the employer to prove the case against them are regularly surprised when the chairperson of the inquiry rules against the employees. Where the employer puts up a plausible case, the employees are obliged to present a version that is more probable if they wish to escape a finding that they committed misconduct.

What is the appropriate sanction?

The next common mistake made by many employees in internal hearings is an unwillingness to acknowledge their mistakes or wrongdoing. Dismissing employees is the final act in managing risk posed by errant employees to the business. Where an employee is found to have committed misconduct, the presiding officer has to consider the risk posed to the organisation of the employee repeating the misconduct. If employees are unwilling to acknowledge wrongdoing and recommit themselves to the values of the company, the lingering doubt will be whether the employee will contravene the rule again in future.

In practice, it is difficult to convince an employer to take a chance on the employee and extend a lifeline where the employee remains steadfast that he or she did nothing wrong, even after the hearing's finding to the contrary. Showing true remorse and pledging full support to ensure that such behaviour is not repeated can go a long way in comforting an employer that retaining the employee in service will not result in undue risk.

Perhaps when we hear Harvey Spectre advising his clients to say "Sorry, I made a mistake and will never do that again," we will see employees changing their approach during internal disciplinary matters. Clever tactical defences may look spectacular on the big screen or television, but does little to strengthen the relationship between employer and employee.

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