

SABPP FACT SHEET

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LESSONS LEARNED FOR EMPLOYERS FROM CCMA CASES

1. Introduction

The prospect of a dispute with an employee or a former employee being taken to the CCMA, a Bargaining Council or the Labour Court is often considered with dread by HR practitioners for various reasons.

Figures quoted from the Dispute Resolution Digest¹ show that a significant number of employers do not even follow their rights and appear at CCMA, as one third of hearings end in a default judgment against the employer. And yet, where the employers do appear, they win double the proportion of cases that employees do – 67% to 34%. But why do only two-thirds of the employers who participate win their cases, as opposed to Europe's 80%? The co-editor of the Digest said "they failed to learn from their mistakes. When employers get it wrong, they get it wholly wrong: about 64% of dismissals declared unfair by the CCMA are both procedurally and substantively unfair. It means an employer did not give the worker a fair chance to state his case and firing the worker was too harsh a punishment." 80% of cases referred to the CCMA concerned dismissals.

The time to be expended, the work to prepare the case, and the possibility of an adverse finding, tempt employers to negotiate sometimes very generous settlements with employees to avoid the conciliation arbitration.

However, resolving such disputes in the best possible way is a skill that HR practitioners need to develop if they are to ensure fairness to employees and employers and to gain credibility as professional advisers to management.

This Fact Sheet looks at some common causes where employers have fallen on the wrong side of dispute resolution processes and makes recommendations for HR practitioners to follow. [For the

¹ *Conflict Reigns in the Workplace*. B Terblanche. Mail & Guardian 24 February 2012. <http://mg.co.za/article/2012-02-24-conflict-reigns-in-the-workplace>

purposes of this Fact Sheet, reference to the CCMA includes Bargaining Council Dispute Resolution processes.)

2. Ensure your internal procedures work

2.1. *Keep your disciplinary procedure up to date.*

Make sure that you review your disciplinary rules and procedure regularly to take account of changes in the organisation's operations and changes in legislation, regulation or case law. This is a complex exercise and appropriate advice should be taken.

2.2. *Use your procedure*

Some employers believe that it is simpler to "outsource" their discipline by allowing disputes to go straight to the CCMA without in-house procedures being followed. This is poor practice because it does not respect the rights of employees in the workplace and it does not build the skills of managers in conflict handling and dispute resolution.

The SABPP Professional Practice Standard on Dispute Resolution includes in its Fundamental Requirements for Good Practice, amongst others:

- Do not allow a situation where disputes are regarded as the normal course of events. Take pro-active measures to prevent all forms of dispute in the first place.
- Educate and train all levels of management and first line supervisors in conflict management, emphasising the value of joint problem-solving and consultation in reaching resolution.
- Establish and maintain internal dispute resolution procedures to be followed before external referral to Alternative Dispute Resolution, CCMA etc.

3. Be sure of your case

Unfortunately, HR practitioners sometimes find themselves in a position where line managers ask them to dismiss or discipline an employee for the wrong reasons. This is a professional problem that the SABPP seeks to assist with through setting clear expectations through the Code of Conduct and the HR Management Standards so that practitioners can inform managers that they are unfortunately unable to meet this request as it violates their code of conduct and professional standards.

In other circumstances, a dispute may arise where perhaps the investigation has not been as comprehensive as it should have been or an error of judgement has been made in categorising a misconduct charge. Other procedural and substantive errors may have been made.

It is better, in such cases, to admit the error than to incur costs in pursuing the matter. It can be helpful to obtain early legal advice to assist you in advising management of possible major gaps in the employer's case. Taking statements as early as possible will assist in evaluating the strength of your position. Never enter a dispute process with "dirty hands".

4. Prepare carefully

Again, taking statements early and carefully is essential. Detail wins because details leads to the truth.

When you receive a referral notice, evaluate it carefully for vagueness, citation of incorrect categories of other signs of a case that is not well founded. Slogans such as "you retrenched me because I am female/Black/gay" (or such discriminatory grounds) are easy to throw at the employer, but if the employer has followed proper process, such allegations can be shown to be untrue.

5. Use the process

The CCMA is founded on the principle of conciliating first before arbitrating. Approach the conciliation process in good faith, it is not a useless exercise as it often helps to get a proper understanding of perceptions of the problem. CCMA disputes often involve many grey areas involving perceptions and clashes of assumptions, beliefs, customs and so on.

It is advisable to seek assistance from labour lawyers who do not polarise the parties by taking an adversarial approach from the beginning, but who use a facilitative approach. Only if this fails, should you move to an adversarial approach.

6. Know your rights

At the CCMA, it can happen, due to the pressure of work on Commissioners and the attitude of many employers that conciliation is a waste of time, that the Commissioner may hurry through a conciliation process rather than allowing the issues to be fully aired. The employer is fully within his rights to request to Commissioner to slow down in order to allow all the issues to be ventilated and possibly resolved. The employer can be firm on this.

If the Commissioner appears to be one-sided and/or has made assumptions about the case, the employer should address the Commissioner directly on this in the first instance. Subjectivity can interfere with a proper conciliation process as envisaged in the LRA. If the Commissioner is still exhibiting bias, and refuses to listen, this should be reported to an official of the CCMA.

7. Evaluate likely outcomes

It is a myth that employers are expected to pay 12 or 24 months' salary in found misconduct or in discrimination cases. Most such rulings provide for payments of only 3 – 4 months' salary. Do not be disconcerted by initial outrageous demands.

For cases that go to the Labour Court, the employee will normally use a lawyer and will therefore incur costs. This can be a factor in seeking a settlement at an early stage before referral to the Court and the employer should evaluate the advantages of settling at this stage, where appropriate.

Dishonest employees should not however be rewarded through a settlement.

8. Conclusion

Litigation is expensive, and inevitably becomes more so as the case proceeds because additional issues get involved such as one party becoming obstructive, using delaying tactics, changing lawyers and so on. Litigation is therefore not always the answer to resolving a dispute that could and should have been resolved between the parties long before. But if you have acted properly and done your homework, and the complainant is pursuing a clearly spurious case, defend yourself vigorously and don't simply avoid the CCMA appointment.

Take legal advice early - early legal advice is cheap, later legal advice when there is a problem, is more expensive. As HR practitioners, develop your expertise in this area, but don't attempt to act beyond your level of expertise.

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