

Applying the rule test in disciplinary hearing

By Johanette Rheeder

During any disciplinary hearing, the employer must prove that the employee is guilty of the misconduct, on a balance of probabilities, therefore the employer must prove that the employee is probably guilty of the misconduct, not that the employee is guilty beyond a reasonable doubt. In the workplace, the employer runs its business mainly according to rules, policies and procedures, whether it is work rules, standard operating procedures, or disciplinary rules and procedures. When employees commit an act of misconduct, the break rules, and the employer must prove that the employee is guilty of breaking these rules.

In order to comply with the rule of fairness as set out in the Constitution and the Labour Relations Act, an employer must prove certain allegation in order to prove that the employee is in contravention of the rule. This is commonly called the rule test.

In order to pass the rule test, the employer must answer the following:

- **Has a rule or standard been broken, or a policy or procedure or the employment contract been breached?**

The initiator can consider a copy of the employer's disciplinary code, or policy and procedure manual. He must check the the disciplinary code to establish what rule has been broken, or check the policy and procedure manual to establish what policy has been breached, or the employment contract to establish what clause of the employment contract has been breached, in order to obtain this information.

- **Was the rule or standard reasonable, lawful and attainable?**

The answer to this question must be "yes". Rules or instructions must be lawful, for example, an employer may not instruct an employee to violate safety rules or legislation such as the Basic Conditions of Employment Act. Reasonableness and attainability will depend on the circumstances of the case.

- **Was the accused employee aware of the rule or standard or could he/she reasonably be expected to have been aware of it?**

This can be established by, if necessary, asking the accused employee himself whether or not he was aware of the breached rule or policy. If the answer is no, the investigator or initiator must establish, probably by questioning the line management whether or not to this employee has attended any induction procedures where she was informed of the policies or procedures or whether or not her employment contract was explained to her in the presence of a witness at the time of employment or did she sign any documents to confirm that she is aware of the rule. In this instance attendance registers can be valuable evidence.

The object of this part of the investigation is to establish that the employee was fully aware of the rule or standard, or she had been informed where she could go to find out what the company's rules and regulations are.

If the employee is not aware or denies being aware, then the employer can provide evidence, that it can reasonably expect the employee to know the rule or standard. The way in which the rule was communicated is crucial to this part of the evidence.

- **Has the rule or standard has been consistently applied by the employer?**

This is an *extremely important* part of the investigation. This must be answered before an employee can be charged. In all previous incidents of the same act of misconduct, it should be asked if the employer consistently charged employees or metered out the same or similar sanctions for the same misconduct. In other words, did all previous employees who broke this rule, face disciplinary action, and were they disciplined consistently so that the employer cannot be accused of being inconsistent in the application of his disciplinary procedures? If the employer wants to deviate from this rule it must have very good reasons to do so.

It is vitally important that the initiator carefully investigate this aspect of consistency, because in all likelihood the unions will challenge it at the disciplinary hearing. She must have her evidence ready to prove that the employer has been consistent in the application of disciplinary procedures. Obviously, that evidence will consist of the details from the files of those employees who previously committed this act of misconduct - such as date of incident, date of disciplinary hearing, and the outcome. The accused employee or his representative can challenge consistency at the disciplinary hearing and the Initiator must be ready with evidence in rebuttal if so.

Once this has been proven by the initiator, the chairman must apply the same test, just by asking: Did the employer prove to me, on the balance of probabilities that the above discussed requirements were met. If he has evidence to confirm the rule test, then the chairman can find the employee guilty of the transgression and consider sanction.

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