



Resignation in the face of Discipline

It is not uncommon for an employee to resign in the face of a disciplinary hearing. But what if the employee does not resign – can the employer offer resignation as an alternative to disciplinary action?

When an employee faces disciplinary action that can lead to dismissal it is invariably an uncomfortable situation. The employer usually feels that the employment relationship has been seriously damaged. Even if the employee is found not guilty or there is insufficient reason for dismissal, the future employment relationship is likely to be more strained than before. The employee, on the other hand, may not want to risk having a blemished record.

So why not avoid all of the above by offering the employee the opportunity to resign? This is indeed what happened in a case that was heard in the CCMA recently. There was good reason to believe that one of the senior employees was conducting another business contrary to company rules. Before bringing disciplinary charges, the employer decided to confront the employee with the choice either to resign or face a disciplinary enquiry. The employee elected to resign. The employer requested him to put it in writing.

Upon handing in his written resignation, the employee packed his personal possessions and left the employer's premises. He apparently later regretted the decision and referred the matter to the CCMA, alleging that he had been constructively dismissed. He alleged that he felt intimidated by the choice given to him and said that he had made an emotional decision. At the time he felt that he did not want to blemish his record – he did not have any confidence in the dispute resolution mechanism, should he not succeed in the disciplinary enquiry. The CCMA commissioner came to the conclusion that the employee had made a clear choice and that there was no basis for his contention that the choice offered had been intimidating. The employee had made a choice and the employer did not make continued employment intolerable. Accordingly this was not a constructive dismissal.

This case therefore confirms that an employer is not necessarily bound to follow the disciplinary route in dealing with serious misconduct. It does not, however, give employers free reign to force employees into resigning as an easy way out. As a point of departure, an offer for an employee to resign should not be made unless there is compelling evidence of serious misconduct. Furthermore, when contemplating giving an employee the option to resign, the employer must consider that the employee's choice may be influenced by several factors, such as the seniority of the employee, the history of the employment relationship, the employee's knowledge of the consequences of the choice that is made, the manner in which the choice is put to the employee (e.g. is the employee told that the alternative to resignation is dismissal, rather than the prospect of disciplinary action of which the outcome could be dismissal). The employer should not offer the employee the option of resignation where there is doubt about whether the employee's choice would be truly voluntary – as a rule of thumb, one should ask if all things considered, the employee ultimately benefits from the resignation.

Before offering an employee the option of resignation, employers should consider the impact that it might have in the longer term. Especially where the misconduct involves dishonesty in one form or another, this may be seen to amount to a condonation of the employee's conduct and might create an uncomfortable precedent for similar cases in future. There is less of a problem if the offer of resignation stems not from the employee's misconduct, but his or her poor performance, ill health or incompatibility. For the employee, too, resignation is not a course that should be followed without careful consideration. It not only means that unemployment benefits are forfeited, but prevents the employee from claiming that an unfair dismissal had taken place.

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