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EMPLOYMENT ALERT

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IN THIS ISSUE

CLEAR-CUT EVIDENCE IN A NOT-SO-CLEAR-CUT SITUATION: When usually inadmissible hearsay evidence should be weighted as *prima facie* admissible evidence

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When approaching any form of legal proceedings, all parties have to regard and adequately consider what they will use to prove their version of events. In the case of labour disputes, an employer must advance evidence that will justify the dismissal of their employee, while the employee will present evidence to demonstrate that their dismissal was unfair.

The transcripts of the disciplinary hearing will often be used as evidence by whichever party deems it favourable to their cause. It must be borne in mind by the parties that the normal rules of evidence that apply to all legal proceedings also apply to all proceedings in the Labour Court, Commission for Conciliation, Mediation and Arbitration and respective Bargaining Councils. For this reason, the transcript from a disciplinary hearing, being testimony given by the witnesses, is often treated as hearsay evidence by the commissioner or arbitrator, who will then require the relevant witness to verify the evidence given during the disciplinary proceedings and submit to cross-examination. If a witness is not present at the arbitration to corroborate their testimony as presented in the transcript, the commissioner or arbitrator would have to deal with those portions of the transcript in accordance with the rules of evidence.

Hearsay evidence is defined in s3(4) of the Law of Evidence Amendment Act, No 45 of 1988 (LEAA) as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". The general rule regarding hearsay evidence is that it is inadmissible (or, if admissible, is given very little weight in considering the merits of the matter). The reason for its

inadmissibility is that the original source of the evidence cannot be cross-examined by the party against whom the evidence is presented. Cross-examination is an integral part of the adversarial system of law, upon which South African legal proceedings are based, and all parties must be afforded the opportunity to exercise their right to question the evidence that is advanced against them through cross-examination. It therefore goes without saying that one's witnesses should be present at an arbitration to corroborate their evidence as it appears in the transcripts from a disciplinary hearing so that it is not deemed hearsay and therefore inadmissible.

But, here is a scenario: how should a commissioner or arbitrator treat a transcript from a disciplinary hearing that cannot be corroborated by the witnesses that gave testimony in the disciplinary hearing because of the very sensitive nature of the matter (ie sexual harassment in the workplace); and further, what if the transcripts presented are the only evidence that a party can advance to prove its case?

This was the main issue in the case of *Minister of Police v M and Others* (JR56/14) [2016] ZALCJHB 314. The first respondent (the employee RM) was employed in the VIP Protection Unit of the South African Police Service (SAPS), and

CLEAR-CUT EVIDENCE IN A NOT-SO-CLEAR-CUT SITUATION: When usually inadmissible hearsay evidence should be weighted as *prima facie* admissible evidence

CONTINUED

It was for this reason, and because RM was not afforded an opportunity to cross-examine the originating source of the evidence, that the commissioner found that the evidence presented by the employer was not substantial enough to prove its case on a balance of probabilities, and therefore found RM's dismissal unfair and directed the SAPS to reinstate him.



had been dismissed from his employment because he had been found to have "prejudiced the administration, discipline and efficiency of SAPS and further contravened the SAPS code of conduct". The reason for such finding was based on allegations that he had raped and sexually abused his minor daughter (K) for four years, a period within which he had impregnated her, forced her to have an abortion, and allegedly transmitted HIV to her. K, who was a major at the time of these proceedings, along with her biological brother (S) and RM's current wife (D), served as witnesses for the employer in the disciplinary hearing.

The testimony given by the employer's witnesses was extensive, detailed, and corroborative, describing points and elements relating directly to events surrounding the sexual abuse of K by RM over the years, and remained consistent despite lengthy cross-examination administered by RM's union representative, and through questioning by the presiding officer. RM's own testimony, however, seemed to be shaky and poor, as he was unable to convincingly corroborate the version that he advanced, nor was he able to convincingly dispute the employer's witnesses' averments against him.

Following closing statements by both parties, the presiding officer found RM guilty on the charges, and accordingly decided that he should be dismissed. RM exercised the internal appeal procedure available to him, and when that was unsuccessful, he alleged unfair dismissal and referred the matter to the Safety and Security Sectoral Bargaining Council (Bargaining Council).

It is here where the abovementioned scenario presents itself, in that the employer's only witnesses, given the untenability of having to relive these traumatic events again by giving evidence

a second time, ceased communicating with the SAPS. After diligent efforts to have them testify at the arbitration failed, the employer had no other evidence available to prove that the dismissal was fair save for the transcripts from the disciplinary hearing. In the interests of justice, the employer applied to have the transcripts admitted as hearsay evidence, which application was granted by the commissioner. The commissioner's approach to the scenario was that since the arbitration became a hearing *de novo*, and having admitted the transcripts as hearsay evidence, the commissioner was at liberty to attach such evidentiary weight to the transcripts taking the situation into account. The commissioner stated in her award that RM "will be severely prejudiced if only the hearsay evidence is used herein with no additional or corroborating evidence". It was for this reason, and because RM was not afforded an opportunity to cross-examine the originating source of the evidence, that the commissioner found that the evidence presented by the employer was not substantial enough to prove its case on a balance of probabilities, and therefore found RM's dismissal unfair and directed the SAPS to reinstate him.

SAPS took the matter on review to the Labour Court. The Labour Court held a different view. The learned Judge Whitcher stated that it was correct that the commissioner admitted such evidence as hearsay and did not afford substantial weight to it (as is often the practice in labour law); however, the Labour Court also found that the commissioner, in affording too little weight to these transcripts in this particularly sensitive case, erred greatly, and this resulted in a reviewable irregularity in terms of s145 of the Labour Relations Act, No 66 of 1995 (LRA).

CLEAR-CUT EVIDENCE IN A NOT-SO-CLEAR-CUT SITUATION: When usually inadmissible hearsay evidence should be weighted as *prima facie* admissible evidence

CONTINUED

According to the judge, the transcript was *prima facie* evidence in support of the allegations against RM, and the judge gave the following six guidelines to follow when deciding whether hearsay evidence was *prima facie* proof of an allegation.



The judge held that this was “no ordinary hearsay”, but “hearsay of a special type”. In this case the judge found that “considered in full, (the transcript) comprised a bi-lateral and comprehensive record of earlier proceedings in which K’s evidence against RM was indeed corroborated by S and D; in which this substantiation survived competent testing by way of cross-examination, and in which RM’s own defence was ventilated and exposed as being implausible”.

Further, the judge stated that a reading of the transcripts revealed K’s testimony to be reliable, credible, consistent, and persuasive, and that any reasonable commissioner would be able to gather this from reading the transcript. These transcripts should therefore in the judge’s opinion, “be afforded greater intrinsic weight than simple hearsay...because they constitute a comprehensive and reliable record of a quasi-judicial encounter between the parties”. The only prejudice suffered by RM in admitting the transcripts would be that he could not advance a different type of cross-examination of K than that already conducted during the disciplinary hearing.

According to the judge, the transcript was *prima facie* evidence in support of the allegations against RM, and the judge gave the following six guidelines to follow when deciding whether hearsay evidence is *prima facie* proof of an allegation. The hearsay should:

- be contained in a record which is reliably accurate and complete;
- be tendered on the same factual dispute;

- be bi-lateral in nature, (ie it should constitute a record of all evidence directly tendered by all contending parties);
- in respect of allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created;
- show that the various allegations were adequately tested in cross-examination; and
- have been generated in procedurally proper and fair circumstances.

The Labour Court found that the “commissioner erred in unreasonably assigning minimal value to the transcripts”. The arbitration award was reviewed and set aside. This was the correct outcome for a matter of this nature.

This case is of great importance. The judge sets out factors in which hearsay evidence can be presented as *prima facie* proof of allegations made; factors which allow for some flexibility in and deviation from the often strict rules of evidence and practice. The LEAA further provides for instances when a presiding officer may admit hearsay evidence in the interests of justice in s3(1)(c).

A procedural aspect to consider is that a disciplinary hearing is meant to be an informal enquiry (as was emphasised in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others* (JR782/05) [2006] ZALC 44), where the employee is afforded an opportunity to state reasons why the allegations against them are false and why they should therefore not

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CONTINUED

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be dismissed. Although informal, all parties to the proceedings should make a conscientious effort to treat the disciplinary enquiry as if it will be the first and only account of the matter. That is to say, the transcripts of the disciplinary hearing should reflect proceedings that were thoroughly conducted, with all of the steps and requirements relating to the advancing and consideration of evidence completely and properly followed. Thus, at all levels of the witness testimony, from examination-in-chief to cross-examination to re-examination, a diligent effort should be made to gain as much from the witness as possible and to test all that the witness has said, especially with co-operative witnesses.

This is so that, should a situation occur where the witnesses from the disciplinary hearing cannot testify at subsequent proceedings, the transcripts from the disciplinary hearing will meet the six factors given by Judge Whitcher that will make hearsay evidence *prima facie* proof of the allegations at hand.

This case creates a clearer view regarding the admissibility of transcripts from a disciplinary hearing and the weight they carry. The six factors given by the Labour Court should serve as a further guideline for practitioners regarding the evidence they advance during proceedings.

Fiona Leppan, Michael Yeates and Reabetswe Mampane

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