**DISCIPLINARY ENQUIRIES AND DRAFTING OF CHARGES FOR A DISCIPLINARY ENQUIRY**

**PRACTICAL HINTS: DRAFTING CHARGES**

* DETAIL, DETAIL, DETAIL, but with*in re*ason
* Use your code as a guideline
* There is a fall back of common law – your code can’t cover everything
* Do not duplicate/split charges
* It is possible to have more than one charge for a specific incident as long as you don’t charge an employee twice for the same thing
* There is such a thing as an alternative charge

**WHAT IS MEANT BY FAIR REASON?**

**Whether or not a dismissal is for a fair reason is determined by –**

* the facts and circumstances of the case; and
* the appropriateness of dismissal as a penalty.

**THE GUIDELINE TEST I.T.O. THE CODE:**

* Employers must establish rules
* Standards of conduct must be available & clear
* Formal procedures do not have to be invoked every time a rule is broken or standard is not met
* Dismissals should be reserved for cases of serious misconduct or repeated offences
* The employer must consider factors in mitigation before imposing dismissal
* The penalty of dismissal must be applied consistently.

**HOW TO DEAL WITH THE SANCTION OF POTENTIAL DISMISSAL**

**DEEMED TO BE INNOCENT UNTIL PROVEN GUILTY**
**(SUSPENSION WITH PAY)**

* Dismissal may be appropriate where previous warnings have not had the desired effect;

or

* Where the gravity of the offence is such that it may warrant dismissal.

Consider suspending the employee on full pay pending outcome of the enquiry.

**AN EMPLOYER MAY SUSPEND AN EMPLOYEE PENDING THE OUTCOME OF AN ENQUIRY WHERE THE CONTINUED PRESENCE OF THE EMPLOYEE:**

* constitutes a risk to the employers business;
* could result in unrest and dissention amongst the employees;
* interfere with the employers’ ability to properly prepare for the hearing.

**NOTIFICATION TO ATTEND ENQUIRY**

* For all possible dismissals
* Must preferably be read out to employee
* Employee to sign for acceptance
* Refuses to sign - explain proof of receipt and not admission of guilt
* If employee still refuses to sign, ask credible witness to sign.
* Employer retain copy, original must be handed to employee
* Right to representation
* Right to proper prior notice
* Right to call witnesses
* Right to cross-examination
* Right to produce evidence in defence
* The obligation to be present at the enquiry.

**EMPLOYEE’S RIGHTS**

* Right to representation
* Right to proper prior notice
* Right to call witnesses
* Right to cross-examination
* Right to produce evidence in defence
* The obligation to be present at the enquiry.

**THE PARTIES’ ROLES**

* The Company Rep / Initiator / Prosecutor

(Conduct investigation, get evidence & statements, formulate charges, issue notice of enquiry, present opening statement)

* The Chairperson

(have equal/higher status to complainant, must not have knowledge of the charges, impartial, facilitate orderly and procedurally correct enquiry, only to ask clarifying questions)

* The Employee / Employee Rep

(to present a defence, state its case, call & cross-examine witnesses, allowed to caucus,)

* The HR / IR Division

(facilitative & advisory role, to ensure procedural guidelines be adhered to by chairperson, to advise chairperson on matters pertaining to guilt and sanction, consistency and the like)

**INITIATING QUESTIONS / EVIDENCE IN CHIEF**

* Evidence from a witness is elicited by questions & answers
* Questions provided by Company / employee rep & the answers by the witness.
* As introduction, evidence is presented broadly by providing undisputed facts which are common cause *i.e.* to confirm date & time of a particular incident

**DO**

* Let a witness settle down by answering formal questions before answering more important questions;
* Frame questions carefully & clearly;
* Ask questions off a pre- prepared statement;
* Extract all the evidence that is needed from a witness during examination

**DON’T**

X Ask leading questions
X Ask questions which extract hearsay answers
X Ask irrelevant questions
X Ask witnesses for opinion unless the witness is an expert

**CROSS EXAMINATION**

* Questioning a witness after the rep has completed his questioning
* To elicit further relevant facts which were not forthcoming during evidence in chief
* To test the credibility of a witness
* Cross-examiner may ask leading questions
* May be used to discredit the evidence given by a witness

**DO**

* Obtain facts favourable to the case
* Show that adverse evidence is vague, contradictory, improbable, mistaken, biassed or untruthful
* Attract credibility
* Try to highlight contradictions
* Put as much of one’s own case to that witness so that one’s case may be known and commented upon
* Elicit facts which may be used to cross-examine other witnesses
* Cross-examine only for gain.

**DON’T**

X Never ask a question to which you do not know the answer
X Try to improve on a favourable answer
X Make speeches
X Answer a question put to one by a witness unless it is for clarity
X Be rude and unnecessarily aggressive

**PRACTICAL HINTS: CROSS EXAMINATION**

* Use questions that prevent the witness from evading crucial issues
* Never argue with a witness
* Caution the evasive witness
* Only Cross-examine if you stand to gain
* Follow a pattern but do not be predictable
* Do not allow a witness to be misled
* Put your understanding of the facts to the witness once the questioning is over. Ask him/her to confirm
* Listen actively
* Witnesses should normally not be allowed to ask questions

**RE EXAMINATION**
A witness who has been cross-examined may be re-examined by the party who originally called him/her as a witness. The primary aim of re-examination is to:

* place answers in perspective
* clarify matters
* give the witness an opportunity to elaborate on answers given under cross- examination

The questions asked during re-examination are limited to matters raised during cross-examination only.

DON’T extract new evidence or raise new issues

DON’T cross-examine your own witnesses.