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EMPLOYMENT

Is an employee able to avoid a disciplinary hearing or disciplinary sanction by resigning?

9 October 2018 *4 min read*

It is trite law that employees may resign from his employment, either with immediate effect or on notice, thereby unilaterally terminating the employment relationship. The employer may not reject such resignation. However, does an employee have a right to resign from his employment in order to avoid disciplinary action? If so, is the employee still entitled to refer a dispute of unfair dismissal to the CCMA after such resignation?

The employee does have the right to resign and terminate his employment relationship with his employer as long as such resignation does not constitute a breach of the contract of employment. On the other hand, the employer has the right to institute disciplinary action against any person in his employ, if circumstances justify it.

RESIGNATION BEFORE DISCIPLINARY ACTION

An employee who resigns in order to avoid the disciplinary hearing into his misconduct from taking place must remember that upon tendering a letter of resignation, the contract of employment is not immediately terminated upon handing the resignation letter to the employer, as the employee will have to provide his employer with notice of his intention to resign. The employee remains an employee of the employer until his notice period expires and therefore the employer can still go ahead with the disciplinary proceedings.

Therefore, in order to avoid the disciplinary enquiry the employee will need to resign with immediate effect so that the employment relationship terminates immediately, which has the effect that the employer may not hold a disciplinary hearing, because the employee is no longer an employee of the employer. The employer can then claim damages from the employee due to the employee's failure to work out the notice period, if such damages can be proved and quantified.

This position was confirmed in the recent case of ***Mtati v KPMG Services (Pty) Ltd (2017) 38 ILJ 1362 (LC)***, where Ms Mtati resigned on notice once she was informed that a disciplinary enquiry would be held in relation to her misconduct. She was then handed a charge sheet and informed that a disciplinary hearing would start during her notice period. Ms Mtati then resigned for a second time, but with immediate effect. Ms Mtati attended the disciplinary hearing but only to argue that KPMG lacked jurisdiction to discipline her as the employment relationship terminated summarily with her resignation with immediate effect. This argument was dismissed by the chairperson of the disciplinary hearing and Ms Mtati thereafter withdrew from the hearing. As a result, she was found guilty and dismissed. Ms Mtati then brought an urgent application in the Labour Court seeking an order to declare the disciplinary process and her dismissal null and void. The judge accepted that employers may discipline and dismiss employees during the notice period in the event of a resignation as such persons remain employees of the employer. However, the court further stated that when an employee resigns with immediate effect and leaves immediately, the employee's status is changed from that of an employee to that of a former employee, which deprives the employer its right to discipline the employee and the employer no longer has jurisdiction over the employee. It must also be noted that nothing in law prevents an employee who resigns on notice, which is then accepted by the employer, from thereafter resigning with immediate effect during the notice period.

The only right of the employer that remains in such circumstances is the right to institute civil, commercial or criminal action against the employee in his private capacity and not as an employee. The employee has no right to refer the dispute to the CCMA alleging that it was unfair.

RESIGNATION AFTER DISCIPLINARY ACTION

In the case of ***Kynoch Fertilizers Limited v Webster [1998] 1 BLLR 27 (LAC)***, Webster had been found guilty of dishonesty at a disciplinary hearing and dismissed. Webster thereafter signed a document in which he tendered his resignation, which was accepted by his employer. In an appeal against a finding by the Industrial Court that Webster had been unfairly dismissed, the Court held the resignation and its acceptance amounted to a settlement. Whatever rights had accrued to Webster by virtue of his dismissal had been novated. Webster had made an informed choice between litigation and securing an unblemished reference, which has the effect that he was not entitled to seek relief, whether in the form of reinstatement of compensation.

Therefore, if an employee resigns after a disciplinary enquiry is held into his conduct and he is found guilty, he cannot then refer a dispute to the CCMA for unfair dismissal.



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