

**WEBINAR**

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# Initiating and Chairing Disciplinary Enquiries

**WELCOME**



**Facilitated by: Siphamandla Ngcobo**

**Panelists:**

Michelle Naidoo | Candice Murray

**12h00 – 13h00**

- Welcome
- Panel Discussion
- On-screen Poll
- Q&A
- Closing

**WELCOME**

# Discipline in the Workplace

Initiating and Chairing Disciplinary Enquiries

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# Overview of legal principles: the meaning of dismissal

## Section 186 (LRA)

- “(1) “Dismissal” means that –
- a) an employer has terminated a contract of employment with or without notice;
  - b) an employee reasonably expected the employer to renew a fixed term contract if employment on same or similar terms but the employer offered to renew on less favourable terms, or did not renew;
  - c) an employer refused to allow an employee to return to work after she took maternity leave;”

# Overview of legal principles: the meaning of dismissal

## Section 186 (LRA)

- “(1) “Dismissal” means that –
- d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
  - e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable...”



# Overview of legal principles: the meaning of dismissal

## Section 187 (LRA)

A dismissal is automatically unfair if the reasons for dismissal relates to –

- The employee's participation in a protected strike
- The employee's pregnancy
- Unfair discrimination



# Disciplinary action: overview of legal principles

## Section 188 (LRA)

- “(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –
- a) that the reason for dismissal is a fair reason -
    - i. related to the employee’s **conduct** or **capacity**; or
    - ii. based on the employer’s **operational requirements**; and
  - b) that the dismissal was effected in accordance with a fair procedure.”

# Disciplinary action: overview of legal principles

## Section 188 of Labour Relations Act

“(2) Any person considering whether or not the reason for dismissal is for a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant **code of good practice** issued in terms of this Act”

Schedule 8 of Labour Relations Act

Code of Good Practice: Dismissal



# Disciplinary action: overview of legal principles

## Code of Good Practice: Dismissal

### Key Principle

Employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees



# Disciplinary action: overview of legal principles

## Code of Good Practice: Dismissal

### Disciplinary measures short of dismissal

- Employers should adopt disciplinary rules that establish the standard of conduct required by employees
- The form and content of rules will vary according to the size and nature of the employer's business
- Larger businesses will require a more formal approach to discipline
- This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them

# Disciplinary action: overview of legal principles

## Code of Good Practice: Dismissal

### Disciplinary measures short of dismissal

- Repeated misconduct will warrant warnings, which may be graded in terms of severity
- More serious infringements or repeated misconduct may call for a Final Written Warning, or other action short of dismissal
- Dismissal should be reserved for cases of serious misconduct or repeated misconduct

# Disciplinary action: overview of legal principles

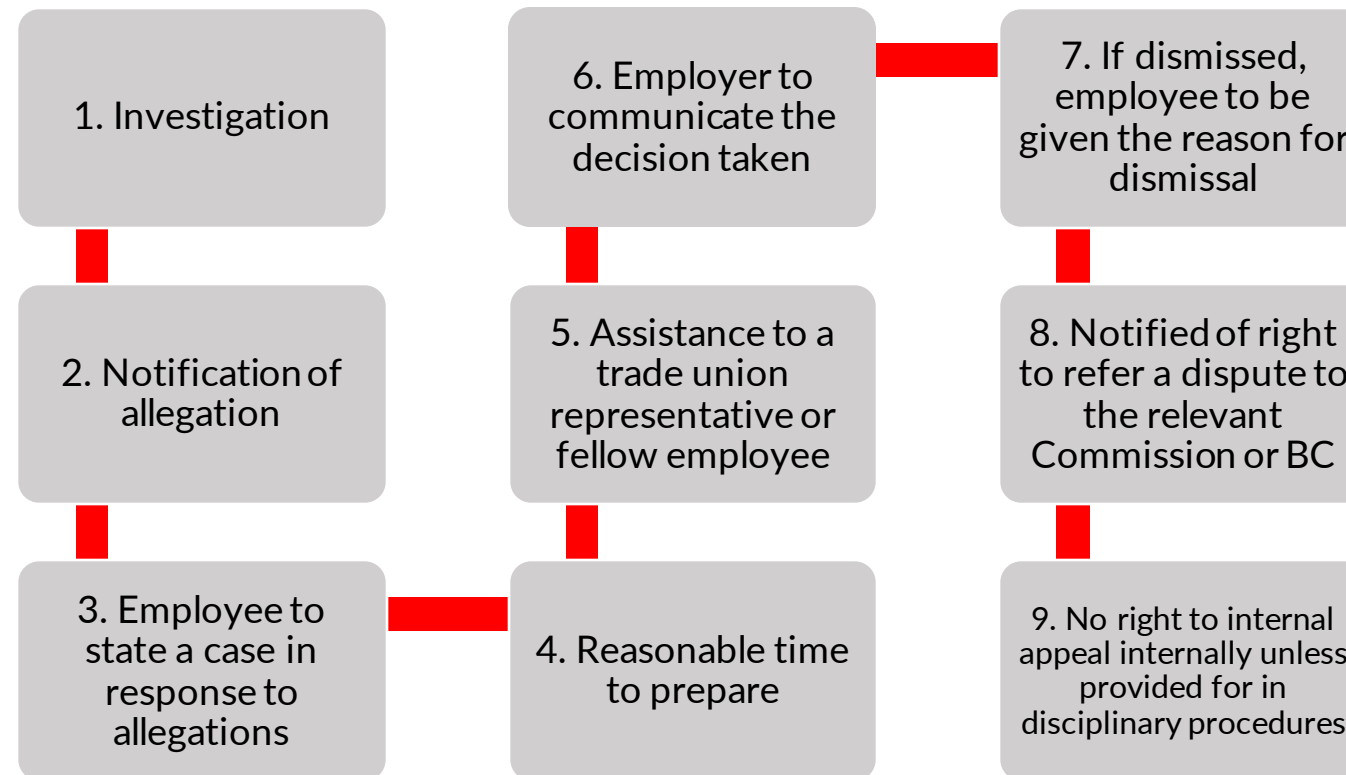
## Code of Good Practice: Dismissal

### Dismissals for Misconduct

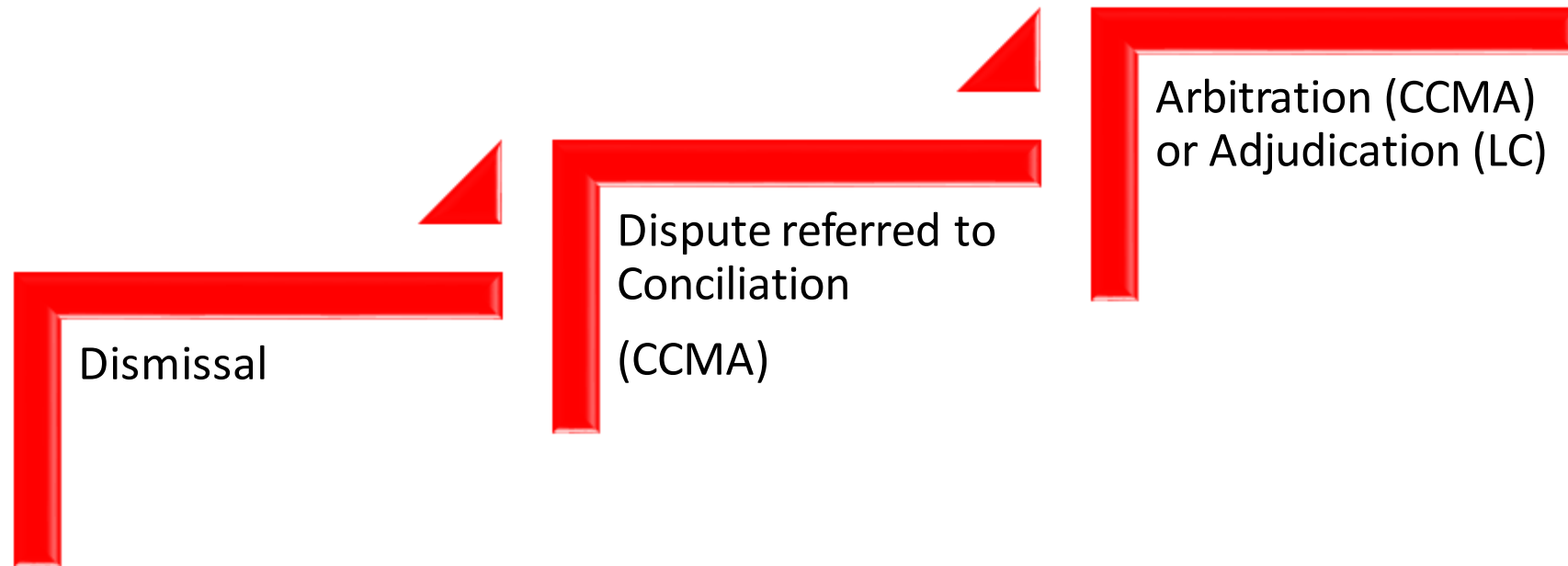
Generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is so serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that **each case should be judged on its own merits**, are **gross dishonesty** or **wilful damage to the property of the employer**. Wilful endangering of the safety of others **physical assault** on the employer, a fellow employee, client or customer and **gross insubordination**. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if does not meet the requirements of section 188.

# Disciplinary action: overview for fair procedure

## Code of Good Practice: Dismissal



# Dispute resolution under the LRA





# Remedies for unfair dismissal

## Section 193 (LRA)

A Court or arbitrator may order the employer to:

- re-instate the employee retrospectively to the date of dismissal
- re-employ the employee
- pay compensation to the employee up to the equivalent of 12 months or up to the equivalent of 24 months for an automatically unfair dismissal

# Remedies for unfair dismissal

## Section 193 (LRA)

Re-instatement is the primary remedy unless:

- The employee does not wish to be re-instated
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable
- It is not reasonably practicable to re-instate or re-employ
- The dismissal is unfair only because the employer did not follow a fair procedure

# Dismissals for misconduct: onus

## The burden of proof

- The principle of “he who alleges must prove” not applicable to dismissal disputes

## Section 192 (LRA)

- “(1) In any proceedings concerning any dismissal, the employee must establish the existence of a dismissal.
- (2) If the existence of a dismissal is established, the employer must prove that the dismissal is fair”

# Guideline in cases for misconduct

- Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; **and**
- If a rule or standard was contravened, whether or not -
  - The rule was a valid or reasonable rule or standard;
  - The employee was aware, or could reasonably be expected to be aware of the rule or standard;
  - The rule or standard has been consistently applied by the employer;
  - Dismissal is an appropriate sanction for the contravention of the rule or standard

# Specific misconduct offences

## Theft or unauthorised possession

- Theft is recognised as a very serious breach of the employer's trust. It requires an intention to **permanently deprive** the owner of the use and possession of the goods
- Theft differs from unauthorised possession which requires only the removal of goods from the workplace without proper authority. This distinction is important so that charges are correctly framed.
- Theft will almost always warrant dismissal, even for a first offence.

# Specific misconduct offences

## Fraud

Fraud involves an element of dishonesty and is defined as: the unlawful making of a misrepresentation, with intent to defraud, which causes actual prejudice or which is potentially prejudicial to another. Fraud constitutes a serious form of misconduct which will in most cases justify dismissal. Examples of workplace fraud include:

- inflated capturing of time worked;
- claiming private travel on the company account;
- alleging the company car had been hijacked to conceal an accident
- repairing a private vehicle at the company's expense

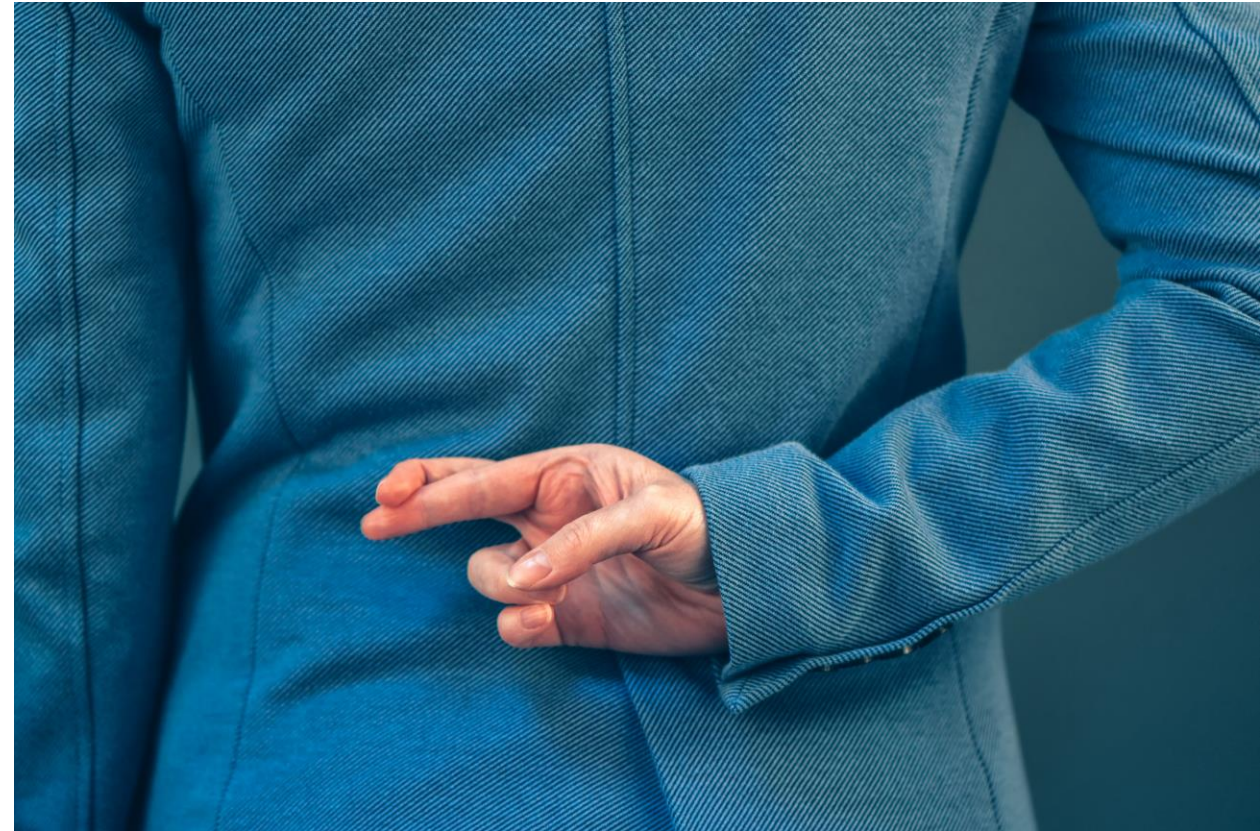
The misrepresentation may be non-verbal. An example of this would be fraudulent non-disclosure, where the employee omits to disclose relevant information in his CV or during his interview.



# Specific misconduct offences

## Dishonesty

Dishonesty will usually have the effect of destroying the trust relationship between the employer and employee. In order to dismiss fairly for dishonesty, the employer must show the employee had the intention to deceive



# Specific misconduct offences

## Negligence

- Negligence, in the employment context, is a failure to do a job with the degree of care which an employer can expect from an ordinary reasonable employee with resultant loss (or at least the threat of it)
- The failure to exercise due care and attention can manifest itself in two ways being ordinary or gross (serious) negligence.
- Negligence is not an offence on its own. It involves:
  - a breach of some standard, like not adhering to the proper manner in which to perform a job or task or in not following a specific procedure or;
  - an act which is improperly performed or an omission (not done at all); **and**
  - which does or could lead to loss or a threat to the business or safety standards in the workplace.



# Initiating a hearing

# Initiator's role

## Investigation

- Gathering evidence
- Formulation of disciplinary charges
- Suspension pending a hearing

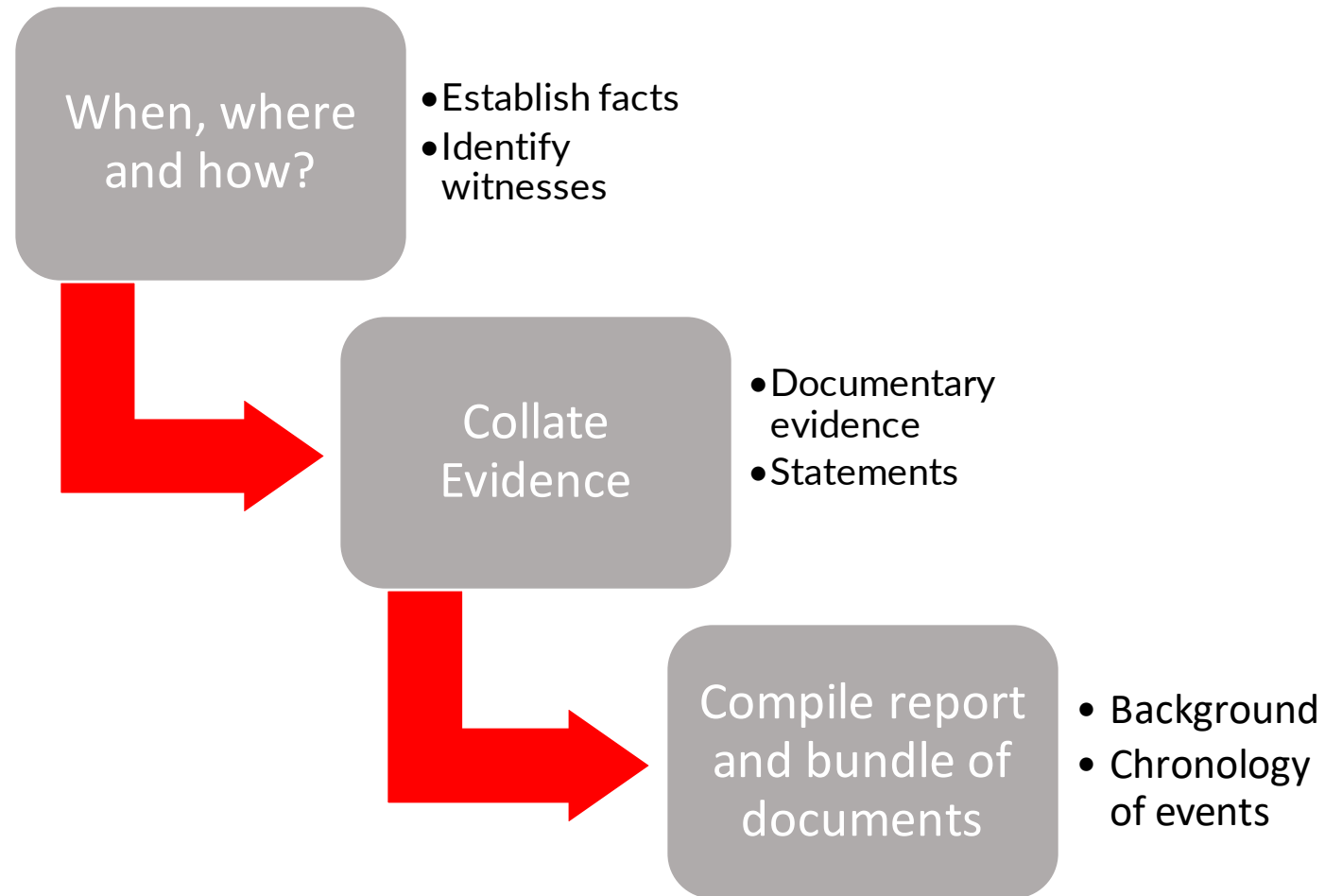
## Hearing

- Leading Evidence
- Proving the allegation/elements of offence

## Sanction recommendation

- Circumstances and severity of offence
- Aggravating factors
- Impact on relationship of trust

# Investigation



# Understanding evidence

- Real evidence refers to an object which can be examined
- Direct evidence is given in person at a hearing : “I saw” “he said the following to me...”
- Documentary evidence (emails, contracts), if in dispute needs to be proved by calling a witness. Witness statements and affidavits not sufficient without calling the author
- Hearsay evidence is evidence which is tendered by a person recounting what he/she heard from someone else. Hearsay evidence must be treated with caution as it is generally unreliable
- Circumstantial evidence requires a decision maker to draw an inference from a chain of events. Each fact relied upon to form the link needs to be proved. Circumstantial evidence should be treated with caution



# Formulating allegations

## Do's

- Gross dishonesty in that ...
- Gross insubordination in that you failed and or refused to comply with a reasonable and lawful instruction...
- Gross misconduct: Unauthorised absence from work on...

## Don'ts

- Gross misconduct by committing a criminal offence ...
- Gross misconduct in that you breached the relationship of trust by...

# Notification of hearing

- Details of hearing : when and where
- The allegations
- The rights afforded to employee
  - reasonable notice of hearing
  - to call witnesses
  - to state a case in response
  - an interpreter
  - A representative (trade union or fellow employee)
- Identity of person issuing the notice
- Acknowledgement of receipt and witness

# Suspensions

- Applicable when allegations are of a serious nature as a precautionary measure to prevent interference in investigation
- Written notification of suspension stipulating conditions must be issued

# Presenting case at hearing – opening statement

- Summarise material facts supporting the allegations
- Identify the witnesses and summarise the relevance of their evidence to the allegations
- Submit argument on the conclusions that should be drawn by the chairperson and the appropriate sanction that is sought

# Presenting case at hearing – leading evidence

- The employer bears the onus to prove the charge on a balance of probabilities
- Initiator presents evidence by leading evidence of witnesses
- Lead evidence in a chronological sequence for each charge
- Leading evidence means to adduce facts from one's own witness
- Lead evidence on impact on the relationship of trust
- The basic rules of leading evidence are:
  - Ask open ended questions
  - Leading questions (where question suggests the answer) are generally prohibited
  - Documentary evidence must be adduced and authenticated or explained

# Cross-examination

- Cross examining means to question the opposing party's witness
- The basic skills are: -
  - Do not “examine crossly”
  - Adhere to the purpose of cross examination that is, to elicit concessions and/or admissions on issues of fact or law
  - To challenge facts and documents in dispute
  - Put a version or a supposition to a witness “I put it to you...”
  - Highlight inconsistencies



# Closing argument

- Purpose of closing argument is to persuade the Chairperson to accept the employer's version of the case and to reject the employee's version
- Summarise the employer's case
- Highlight inconsistencies and improbabilities in employee's version
- Argue why employer's witnesses are more reliable and credible
- Deal with the gravity of the misconduct with reference to the disciplinary code
- The circumstances surrounding the infringement
- Aggravating factors e.g. lack of remorse, wilfulness
- Impact on relationship of trust/operational risks



# Chairing

# Chairperson's role

Impartial  
decision  
making

Custodian  
of  
procedural  
fairness

Determine  
guilt and  
appropriate  
sanction

# Procedural checklist

- Explain and record procedural confirmations
  - All parties introduced for the record (tape/minutes)
  - Employee had reasonable notice of the hearing?
  - Does employee understand the charge?
  - Employee requires an interpreter?
  - Employee's representative?
  - Ask employee whether he/she is aware of the following:
    - a representative (trade union or colleague)
    - an interpreter
    - stating a case in response to the allegations
    - call witnesses and submit documentary evidence
    - cross examine employer's witnesses



# Procedural checklist

- Explain and record the procedure to be observed:
  - Exchange of documents
  - The charge to be read out
  - The employee requested to plea to charge (guilty or not guiltily)
  - Opening statements
  - Employer to begin and lead evidence
  - Employee will be afforded the opportunity to cross examine the employer's witnesses
  - After the employer completes it's case the employee is afforded the opportunity to state a case in response
  - The employee may call witness in support of his/her case
  - The employer's representative may cross examine each of the employee's representatives
  - Closing statements (Optional)
  - Submissions in aggravation and mitigation

# Guideline for written outcome

- Record attendances
- Procedural confirmations
- Summary of evidence presented
- Analysis of evidence: probabilities, credibility, consistency/inconsistency, reasons for findings
- Sanction recommendation taking into account all relevant factors:
  - Gravity of offence
  - Circumstances surrounding the commission of the offence
  - Aggravation and Mitigation

# Disciplinary Codes

- The various disciplinary offences detailed in Disciplinary Codes are usually merely intended to serve as guidelines and do not constitute inflexible sanctions that may not be deviated from.
- The circumstances and merits of each individual case needs to be considered to determine the appropriate sanction.
- Sanction guidelines are not intended to be an exhaustive list of possible disciplinary contraventions.
- Disciplinary action may be taken against an employee even if the specific offence is not listed.





# THANK YOU

## Q&A

*“A leader takes people where they want to go, a great leader takes people where they don’t necessarily want to go, but ought to go” –  
Rosalyn Carter*



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