



Examining the Consequences of Witness Failures in Providing Credible Evidence During Disciplinary Hearings: A South African Perspective

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ABSTRACT

When someone is accused of violating institutional or workplace rules and norms, a formal procedure known as a disciplinary hearing is initiated. Despite not being a court of law, it must follow fairness guidelines and may include witnesses who testify in favour of or against the accused. With an emphasis on whether witnesses who purposefully hide evidence, contradict themselves, or give misleading information should be punished, this study aims to investigate the function and importance of witness testimony in disciplinary hearings. In order to evaluate the legal framework governing witness participation in disciplinary processes, the study uses a qualitative research design with a focus on desktop research, drawing on legal texts, case law, policy papers, and scholarly commentary. The results show that whereas disciplinary frameworks place a strong emphasis on justice and due process for the accused, it is unclear how witnesses who give false or insufficient testimony will be held accountable. This leads to discrepancies that could compromise the fairness of disciplinary proceedings. In order to improve the legitimacy and equity of disciplinary actions, the study's conclusion suggests creating more precise rules and potential penalties for witnesses who wilfully mislead or hide information.

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INTRODUCTION

It is said that before one can dismiss or formally provide a sanction to either an employee or a student who contradicts a policy rule for a disciplinary matter, it is of paramount importance that disciplinary hearing proceedings are held in accordance with the rules of either the workplace or an institution where a student is involved.¹ The main purpose of disciplinary hearing proceedings is for one to discuss the allegations with the employee and to allow the employee an opportunity to respond to the allegations by asking questions, and an opportunity for the person who contradicts the policy to state their case in respect of the allegations made against him or her.² Like any other hearings, the disciplinary hearing proceedings must be conducted fairly to ensure that the outcomes of the hearing are not appealed based on unfairness.³

¹ Shabana Ishaq, "Disciplinary Hearings," *BDJ In Practice* 35, no. 7 (2022): 28–29.

² Ishaq, "Disciplinary Hearings."

³ Ishaq, "Disciplinary Hearings."

The term disciplinary hearing is said to exist to either discipline or ultimately dismiss an employee.⁴ This means that disciplinary hearing proceedings require an appointed chairperson who has a duty to analyse the evidence presented at a disciplinary enquiry.⁵ The offence that the person brought before the disciplinary proceedings must be justified, which means that the evidence must prove the points raised by a party and give validity to their arguments. For the disciplinary hearing proceedings to be fair, there must be evidence that supports the allegations made against the person brought before the hearing.

It is provided that the evidence that can be brought before the disciplinary hearing can be in various forms, being either verbal or documentary evidence.⁶ A witness can bring evidence through a person who has witnessed what happened or the alleged offence by giving oral testimony to support what he or she claims to have observed.⁷ This can be in favour of the employer or the employee in question.⁸ To ensure the reliability of the evidence given by a witness, it is provided that a witness must be appropriately prepared before giving their testimony to ensure a reliable, accurate, and understandable recounting of events.⁹

It is provided that where evidence given is documentary evidence, written records of an event, such as emails, attendance registers, or other written documents, may be used to establish events.¹⁰ If the evidence given by a witness relies on documentary evidence, the original documents must be submitted on time.¹¹ However, in instances where a sworn statement will be used as evidence in a disciplinary hearing, such a statement may be allowed if the person who made the statement is present at the disciplinary enquiry and has a duty to confirm the content or context of the statement.¹² This is done to ensure that the party to whom the evidence is given can cross-examine the witness based on the content of the statements made.¹³ It is said that if the parties are not in agreement with the authenticity of a document, a witness is needed to testify concerning its authenticity.¹⁴

Reference is made to the case of *Eskom/ NUMSA obo Galada and Others*.¹⁵ In this case, it was decided that employees are not entitled to be furnished with documentary evidence before disciplinary hearings, which the employer intends to bring as evidence. This is because disciplinary proceedings are not bound by the same standards and rules of evidence as a court of law. In respect of the disciplinary hearing, an employer can only give the details of the charges made against an employee to enable the employee to have the opportunity to respond to the allegations made against him.

It is, therefore, important that during the disciplinary hearing proceedings, one must keep an open mind, even if one believes that the evidence against the party alleged to have acted contrary to a policy seems crystal clear.¹⁶ In the case where the disciplinary hearing proceedings aim to decide whether an employee has been unfairly dismissed, the employment tribunal judge will, in all cases, review the disciplinary process held and decide whether the proceedings were fair.¹⁷

This paper is more concerned with whether any sanction can be imposed against a witness who withholds evidence and lies during the disciplinary hearing proceedings while adducing evidence either against or for the benefit of the accused party. It is not only concerned with disciplinary hearings held in the workplace against employees but also deals with disciplinary hearings where a student registered in a university contravenes a policy or code in place to ensure order within the institution.

The institution, in terms of the university, and the employer, in terms of a workplace environment, must ensure that these policies are known to all the parties that can find themselves charged with

⁴ McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence," McCarthy Attorneys Inc, November 15, 2022, maalaw.co.za.

⁵ McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence."

⁶ McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence."

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¹¹ McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence."

¹² McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence."

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¹⁴ McCarthy Attorneys, "How to Present Evidence at A Disciplinary Hearing -Types of Evidence."

¹⁵ [2000] 7 BALR 812 (IMSSA).

¹⁶ Ishaq, "Disciplinary Hearings."

¹⁷ Ishaq, "Disciplinary Hearings."

contravention of these policies and codes put into place to protect either the institution or the workplace against any harm or loss. This paper, therefore, seeks to evaluate whether there is any sanction that can be imposed against witnesses who fail to adduce evidence that is correct after having taken an oath or affirmation before adducing such evidence before the disciplinary board members during disciplinary hearing proceedings.

METHODOLOGY

This study used qualitative research methodology. Qualitative research is a form of research that aims to gather or collect, and analyse data to gain an understanding of the concepts. In this regard, the key methodological approach for this study was the desktop research approach. Data from secondary sources such as articles, literature surveys, the internet and other electronic sources dealing with disciplinary hearing proceedings, the testimony of witnesses during the disciplinary hearing proceedings and the consequences of withholding information or evidence by the witnesses that are called upon to give testimony, which can assist the disciplinary members to come to a decision, are analysed.

DISCUSSION

The Role of Discipline

It is provided that the function of discipline in the employment context is to ensure that individual employees contribute effectively and efficiently to the goals of the common enterprise.¹⁸ The employers are, therefore, vested with the right and duty to ensure that their employees adhere to reasonable standards of efficiency and conduct.¹⁹ It is further provided that, in terms of modern employment law, the aim of disciplinary sanctions is considered a corrective measure rather than a punitive one.²⁰

It is important, therefore, that when the rules of discipline are applied, one must do so fairly and consistently.²¹ The rules must be fair in that the rules made within the workplace are fairly made, and the people against whom the rules are made are given an opportunity to understand the consequences of each act contrary to the rules made.²² These rules are, therefore, applicable to those who are not adhering to them, and as a result, the employer has the right to impose these rules in such circumstances.²³

Disciplinary hearing procedure

The relationship between an employer and an employee is of paramount importance, and it can be maintained by the employee obeying and acting in accordance with the rules and regulations set by the employer in the workplace. It is, therefore, provided that the employee's duty to obey lies at the heart of the employment relationship.²⁴ According to Grogan, obedience implies discipline, discipline implies rules, and rules to be effective imply the power to impose sanctions on those who break them.²⁵ It is said that the employer must maintain discipline in the workplace.²⁶ Even though employers are vested with the right and duty to initiate disciplinary steps against those acting contrary to them in the workplace, their powers are often challenged during disciplinary proceedings.²⁷

It is provided that disciplinary action is considered to play a vital role in determining the future behaviours of employees and university students, and its decision can be for the better or worse depending on the outcomes of the disciplinary hearing proceedings.²⁸ For the disciplinary hearing to be effective, all its rules must be applied fairly and consistently through proper procedures and policies.²⁹ It is therefore

¹⁸ John Grogan, *Workplace Law*, 13th ed. (Cape Town: Juta Education, 2021).

¹⁹ Grogan, *Workplace Law*, 92.

²⁰ Grogan, *Workplace Law*, 92.

²¹ Grogan, *Workplace Law*, 93.

²² Grogan, *Workplace Law*, 92.

²³ Grogan, *Workplace Law*, 93.

²⁴ Grogan, *Workplace Law*, 91.

²⁵ Grogan, *Workplace Law*, 91.

²⁶ Grogan, *Workplace Law*, 91.

²⁷ Grogan, *Workplace Law*, 91.

²⁸ Xavier Knight and Wilfred I Ukpere, "The Effectiveness and Consistency of Disciplinary Actions and Procedures within a South African Organisation," *Mediterranean Journal of Social Sciences* 5, no. 4 (2014): 589–96.

²⁹ Knight and Ukpere, "The Effectiveness and Consistency of Disciplinary Actions and Procedures within a South African Organisation."

encouraged that all employers should always adopt the disciplinary rules that establish the standard of conduct required of their employees.³⁰ Generally, the form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.³¹ This means that the disciplinary procedure held by the employer would be in a way different to one that is held by the institution, even though it is expected that both proceedings must be conducted with fairness, with adherence to the procedural rules to follow when conducting the disciplinary hearings.

It is, therefore, provided that an employer's rules must create certainty and consistency in applying discipline.³² It is the duty of the employer or an organisation to ensure that the standard of conduct is clear and made available to employees in a manner that is easily understood.³³ Even though that is the case, some standard rules for certain organisations may be so well established and known that communicating them is unnecessary.³⁴ In respect of a fair procedure, the employer has a duty to investigate to determine whether there are any grounds for dismissal or any other sanction with regard to the alleged conduct that the party is accused of.³⁵

Various procedures and steps must be taken by either an employer or an organisation after having heard of the allegation made against an employee in the case of a workplace or a student in the case of a university. For the purposes of fairness, these steps and procedures must be adhered to. It is provided that before the seating of the disciplinary hearing proceedings, the employer has the responsibility to notify the employee of the allegations against him or her using a form and language that the party who is alleged to have acted contrary to the rules understands.³⁶ It is the employee's right to be given an opportunity to respond to the allegations made against him or her by stating his or her case in response to the allegations made.³⁷

After having stated his or her case, the employee or student should be entitled to a reasonable time to prepare the response, and during this step, in the case of an employee, she or he can be assisted by a trade union representative or fellow employee whereas in a case of a student he or she can be assisted by Student Representative Council or another student.³⁸ After all these steps are taken and the disciplinary hearing proceedings have taken place, it is the duty of the employer or an institution to communicate the decision taken, and it must be in writing.³⁹

The Significance of Witness Testimony in Disciplinary Hearing

It is provided that any disciplinary hearing must be conducted through the principle of procedural fairness.⁴⁰ This principle of fairness lies within the witness's testimony, as the witness plays a fundamental role in upholding the principle of fairness.⁴¹ Witnesses play a crucial role during disciplinary hearings by providing evidence that assists the disciplinary hearing board members in making decisions based on a comprehensive understanding of what transpired.⁴²

During the disciplinary hearing proceedings, both parties are vested with various rights. One of these rights is the right to provide evidence supporting the party who is alleged to have acted contrary to the rules in support of their response to the allegation against them. This also applies to the employer or an institution that called the disciplinary hearing against the party. Such evidence can either be adduced

³⁰ Marie McGregor, *Labour Law Rules!* (Siber Ink, 2017), 312.

³¹ McGregor, *Labour Law Rules*, 312.

³² McGregor, *Labour Law Rules*, 312.

³³ McGregor, *Labour Law Rules*, 312.

³⁴ McGregor, *Labour Law Rules*, 312.

³⁵ McGregor, *Labour Law Rules*, 312.

³⁶ McGregor, *Labour Law Rules*, 312.

³⁷ McGregor, *Labour Law Rules*, 312.

³⁸ Schedule 8 item 4 of the Code of Good Practice.

³⁹ McGregor, *Labour Law Rules*, 312.

⁴⁰ Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

⁴¹ Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

⁴² Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

before the disciplinary board by the parties themselves, or they can request to call witnesses who will vouch for them to support their cases.

This procedure plays a vital role during the disciplinary hearing in assisting the disciplinary board in deciding. This procedure can either break or build the case of either party. It is provided that the testimony of a witness is regarded as a cornerstone of the judicial process in the sense that it ensures fairness, transparency, and accountability for both parties involved in the disciplinary hearing proceedings.⁴³ This indicates that witnesses called upon to testify during the disciplinary hearing play an important role in assisting the disciplinary board in deciding on the allegations against the party before the disciplinary hearing. It is said that these witnesses provide crucial insights by contributing to establishing the facts, which play an indispensable role in pursuing justice.⁴⁴

The South African Constitution⁴⁵ is the supreme law of the Republic, and it is provided that any law or conduct inconsistent with the Constitution's values is considered null and void.⁴⁶ It is evident that it is of paramount importance that everyone plays a role in ensuring that they uphold the rule of law. The role of witnesses during disciplinary hearings is vital to assist the panel in deciding the matter before it. It serves as a safeguard against injustices and further provides means to foster trust and confidence in disciplinary proceedings.⁴⁷

With this being said, the question that arises is what happens if the witness that is called upon to provide evidence before the disciplinary proceedings decides to intentionally lie and fail to give evidence that is credible with the intention of either delaying the proceedings or protecting the party against whom the allegations are made? How can the disciplinary board members satisfy themselves that the party is being truthful?

Is there any sanction that can be made against the person who deliberately withholds evidence that can assist in ensuring that justice is served to the aggrieved party? Does the sanction need to be contained within the policy of rules that speak to the issue of a dishonest witness during disciplinary proceedings? The disciplinary hearing proceedings do not require legal representation, which means that it is an internal procedure that is held to follow all the required procedures to ensure that whatever sanction the disciplinary board agrees upon must be both procedurally and substantively fair.

Legal Framework

Generally, the party called upon to be a witness in any proceedings must give evidence in the presence of the person to whom he is giving the evidence. This is because once a party gives evidence, the other party to whom the evidence was given is allowed to question and interrogate the evidence against them. Even the disciplinary hearing proceedings adopt this procedure when giving evidence by the witness. Even though the disciplinary hearing proceedings are not as formal as Court proceedings, the rationale for ensuring that evidence is given in the presence of the parties involved is that parties should have an opportunity to confront the witnesses who testify against them and are allowed to challenge and confront the witnesses who testify against them.⁴⁸

As a general rule, a party that is called upon to give evidence must do so by first taking an oath or affirmation.⁴⁹ According to section 162 of the Criminal Procedure Act,⁵⁰ no person shall be examined as a witness unless he or she has taken the oath in the form required by this section.⁵¹ During Court proceedings, the oath-taking is administered either by the judge, registrar, or a presiding officer. In

⁴³ Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

⁴⁴ Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

⁴⁵ The Constitution of the Republic of South Africa, 1996.

⁴⁶ Section 2 of the Constitution of the Republic of South Africa, 1996.

⁴⁷ Belinda "Uploading Justice and Integrity : The Significance of Witness Testimony in South African Disciplinary Hearings." 8 April 2024 (Witnesses in Disciplinary Hearings: The Crucial Role they Play (transcriptionservices.co.za) accessed 14 August 2024.

⁴⁸ Pamela-Jane Schwikkard and Steph E Van der Merwe, *Principles of Evidence* (Juta and Company Ltd, 2009).388.

⁴⁹ Schwikkard and Van der Merwe, *Principles of Evidence*.389.

⁵⁰ Section 162 of the Criminal Procedure Act 51 of 1977.

⁵¹ Section 162 of the Criminal Procedure Act 51 of 1977.

contrast, the disciplinary hearing is administered by the chairperson of the disciplinary proceedings. There is, however, a right vested in the witness to object to taking an oath due to his or her religious beliefs.⁵²

In these instances, an affirmation is taken, and it has the same legal effect as an oath, and both are binding on the party.⁵³ An affirmation is taken in section 163 of the Criminal Procedure Act.⁵⁴ It is said that if the witness has taken either an oath or affirmation and acts contrary to the oath of telling nothing but the truth, they can be charged with perjury or statutory perjury.⁵⁵ This raises a question as to whether, during disciplinary hearing proceedings, a witness who has taken an oath or affirmation can be charged if they intentionally act contrary to the oath or affirmation they took.

It is a common cause that disciplinary hearings and the Court do not have the same legal effect because in disciplinary hearing proceedings, one is not allowed to have a legal representative, and a sanction imposed by the disciplinary hearing must be in terms of the policy codes and not that of Court proceedings. Even though these rules are followed during the disciplinary hearing proceedings, one would find that some parties are called upon as witnesses and give false evidence, which is later established after the cross-examination stage in the proceedings.

Inconsistencies and Contradictions

There are cases where a person can be called upon to give evidence before the disciplinary hearing proceedings as a witness, and they end up giving contradictory facts while adducing evidence. This indicates that either the witness is not telling the truth or does not know anything about the alleged offence committed by either an employee or a student during the disciplinary hearing proceedings. One can argue that this act on its own is contrary to the oath or affirmation that the witness took to tell “nothing but the truth.”

Since disciplinary proceedings do not follow the exact same procedure as court proceedings, there is a need to ensure that all the disciplinary procedures are respected and adhered to by all the parties involved. There is a need to ensure that whoever acts contrary to the disciplinary hearing procedure is held accountable. When a party has done something wrong during a court proceeding, they are regarded as having acted in contempt of court. Such a person can be sentenced or given a fine depending on the seriousness of the offence or conduct.

Since disciplinary proceedings are conducted per the policy of a certain institution or organisation and not by the court rules, there is a need to include a sanction that deals with the failure of witnesses to comply with the rules of the disciplinary proceedings. This means that the policy must not only be concerned about the sanctions that can be given against the party that is alleged to have contravened a rule put in place. There must be consequences for witness failures, which suggests that the focus must not be solely on the accused party but on the witnesses, as they play a major role in assisting the disciplinary board when making a decision based on the evidence that was led during the disciplinary proceedings.

RECOMMENDATIONS

Based on the findings of this study, several recommendations are proposed to strengthen the integrity and fairness of disciplinary hearings. Disciplinary rules should specifically include measures for witnesses who purposefully mislead, contradict themselves, or withhold information, in addition to the penalties that apply to the accused person. Policies should cover how to deal with situations in which witnesses waste the disciplinary board's time or create needless delays by giving false or untrustworthy testimony. Educational institutions ought to educate staff members and students on the gravity of witness testimony in disciplinary cases, reaffirming the moral and legal obligation to give accurate testimony. To guarantee equity, stop misuse, and preserve the legitimacy of disciplinary procedures, a uniform strategy for witness responsibility should be implemented in both higher education and workplace settings.

⁵² Schwikkard and Van der Merwe, *Principles of Evidence*. 389.

⁵³ Schwikkard and Van der Merwe, *Principles of Evidence*. 389.

⁵⁴ Section 163 of the Criminal Procedure Act 51 of 1977.

⁵⁵ Schwikkard and Van der Merwe, *Principles of Evidence*. 389.

CONCLUSION

Examining the function of witnesses in disciplinary hearings and the consequences of providing false, inconsistent, or withheld testimony during such processes were the goals of this study. As seen, disciplinary rules and processes tend to focus on treating the accused fairly, but they frequently ignore the responsibility of witnesses who violate the integrity of their oath or affirmation. The analysis emphasises how this discrepancy might cause the proceedings to lose credibility and cause the decision-making process to drag on. The results, taken together, support the need for more thorough disciplinary procedures that acknowledge the obligations of all parties—not just the accused. Institutions can improve the efficacy and fairness of disciplinary hearings by highlighting the importance of the witness's involvement.

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