

THE EMPLOYER'S RIGHT TO DISCIPLINE- THE RULE AGAINST DOUBLE JEOPARDY – Karen Phiri (Associate)

Employers have a right and a duty to uphold discipline and order at the workplace. This right includes taking disciplinary measures against any breach of the standards of conduct and performance set by the employer. The rules of natural justice and fairness dictate that before an employee is found guilty of misconduct, the employee must first be given a fair hearing at which he/she has an opportunity to put forward a defence to the allegations of misconduct. Once the disciplinary hearing has been concluded, an often controversial issue that arises is whether management can ignore the decision of a chairperson of a disciplinary hearing and hold a second inquiry, in instances where the chairperson has acquitted the employee of the offence or has imposed a penalty less severe than a dismissal.

As a general rule, once an employee has been acquitted at a disciplinary enquiry or the presiding officer imposes a penalty that is less severe than a dismissal, the employee cannot be subjected to a second disciplinary enquiry nor can management ignore the decision of a chairman of a properly constituted disciplinary hearing. The rule against double jeopardy requires that a man must not be at peril twice for the same offence. This principle is applicable under employment disciplinary matters. The principle entails that an employer may not, on the same set of facts of an event, charge an employee twice for the same or a similar offence. To that end, it matters not whether the new charge is couched differently from the first, so long as the facts that form the basis of the charge are the same. What the rule seeks to prevent is for an employee to be put to task twice for offences that arise from the same event. A dismissal in such circumstances would always be unfair. The foregoing was confirmed by the Industrial Court in the case of ***Bence Kgoadi V Grinaker Whyte (Botswana) (Pty) Ltd (J609) Case No. IC 123/2001 of 24th October 2004.***

The Courts have, however, held that it is fair to hold another disciplinary hearing only in exceptional circumstances e.g where new and previously unknown evidence that a more serious offence was committed comes to light. The employee may, in those circumstances, be charged with a different offence other than the one initially proffered, and must be afforded an opportunity to put forward an answer to the new charge. In this regard, the appropriate test that would be employed by the Court, in cases where there is an alleged breach of double jeopardy, is fairness. In order to determine whether it is fair to hold a second hearing, the Court considers inter alia the circumstances in which the new and relevant information came to light after the first hearing, whether the second enquiry is provided for in the employer's disciplinary code, whether the second enquiry was conducted in conformity with the rules of natural justice, and whether the employer is acting in good faith in holding the second enquiry. Each case would be determined on its own facts.

In conclusion, it can be said that employers are, as a general rule, not entitled to have a second bite of the cherry when a properly conducted disciplinary enquiry has been concluded and a penalty has been imposed. It is, therefore, important that employers should ensure that they are not remiss in their investigations of suspected misconduct before a disciplinary enquiry, that accurately framed charges are issued against the employee from the onset, and that persons who are appointed to chair disciplinary proceedings are fully conversant with the employer's disciplinary code and the principles of natural justice.