

# QUICK REFERENCE

for ARBITRATORS & CHAIRPERSONS

## INTRODUCTION to ARBITRATION PROCESS

**T**his is case number ... heard on ... by commissioner (name) ... The applicant is ... and is represented by ... & the respondent is ... & is represented by ...

- This is an arbitration of an alleged unfair dismissal dispute, (or unfair labour practice dispute whichever is applicable). This arbitration is a new hearing & evidence concerning the dispute will be heard afresh. The following procedure will be followed.
- Both parties will be given an opportunity to make an opening statement (*unless a pre-arb has been conducted to identify the issues in dispute*). The purpose of an opening statement is to provide me with the background to the dispute, identify what facts are common cause, what the issues are, & what relief is being sought.
- Both parties will be given an opportunity to call witnesses in support of the disputed issues. Witnesses will be cross-examined.
- The principle of mutual respect between ER and EE applies not only in the workplace but also in this arbitration. A note will be made of instances of disrespect, if any, between the parties during this arbitration. These notes, based on my observation, & other relevant evidence, will be used to determine whether there is the prospect of a good working relationship being restored, especially where reinstatement is being sought. Being robust in the conduct of one's case must, in other words, not be mistaken for disrespect.
- Please note that merely handing in a bundle of documents at the outset does not cause those documents to be part of the body of evidence. Only those portions of any document referred to by a witness during the arbitration will be considered when the award is finally prepared.
- The purpose of cross-examination is to test the credibility, reliability & relevance of evidence, & to show that your version is more probable. It is important to bear 3 things in mind when cross-examining –
  - You must put your version to the opposing witness;
  - If an opposing witness has left out an important fact then that should be put to the witness;
  - If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness.
- The purpose of all this is to give the opposing witness an opportunity of commenting on your version.
- It is very important to contest evidence that you disagree with because evidence that is

left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part & parcel of your case previously.

- After all the evidence is heard I will decide on the reliability, credibility & the relevance of the evidence & determine which version is more probable. In this regard the parties will be invited to make closing statements & to say whether the applicant should be afforded the relief sought, if any. The written award will be issued within 14 days of the last hearing. (*The shaded portion must be read into record at the beginning of each sitting of a part-heard matter.*)

## SWEARING-IN of WITNESS

**A**dministering the oath: **DO** you have any objection to taking the prescribed oath? (Answer must be No); **DO** you consider the oath to be binding on your conscience? (Answer must be Yes); **DO** you swear that the evidence that you are about to give will be the truth, whole truth, & nothing but the truth? (Answer must be Yes); Finally ask witness: **PLEASE** raise your right hand & say: "So help me God." **Administering an affirmation:** **DO** you solemnly affirm that the evidence that you are about to give will be true to the best of your knowledge & belief? (Answer must be YES)

## TYPES of EVIDENCE

**R**eal: Such evidence can be read, seen, heard, touched or smelt. Includes documents, photos, videos that have not been tampered with. Unless there is agreement otherwise, it must be tendered by oral testimony of witness with relevant knowledge

**Documentary:** Party wishing to rely on a document must generally speaking produce the original document. If disputed, evidence must be led on the authenticity of the document & the correctness of its contents by calling the author

**Audio/Video:** Consider whether it proves the issue in dispute including identity of EE; its authenticity & whether it has been tampered with

**Circumstantial:** Direct evidence is preferred over circumstantial evidence. Circumstantial evidence is persuasive if the inference sought to be drawn from it is consistent with all the proved facts & it is the most plausible inference. It need not be the only inference

**Hearsay:** May be admitted having regard to following: nature of the proceedings & evidence; purpose for which the evidence is tendered; probative value of the hearsay evidence; reason why the evidence is not being given by person who possesses first-hand knowledge thereof; prejudice the admission of such evidence may cause; any other factor. (Law of Evidence Amendment Act 45/1988)

**Similar Facts:** Evidence that is led that EE has done something previously, with a view to arguing that an inference be drawn that the EE has done the same thing again. Such evidence is irrelevant & inadmissible. Similar fact evidence that is led with a view to establishing a pattern of behaviour justifying an inference regarding the identity of the perpetrator of the act, is relevant & admissible

**Expert:** Expert must have qualifications, experience & knowledge in the relevant field; he

must state the facts/assumptions he bases his opinion on; he may not simply rely on a textbook but may refer to a textbook to illustrate his opinion. Only an expert may give evidence of an opinion: lay witnesses may not **Character:** Evidence of a person's character is irrelevant unless that person puts his character in issue **Previous consistent statement:** This is a statement made at some earlier time & is said to be consistent with evidence at the hearing. It is irrelevant. It may be relevant where the previous statement was made contemporaneously with the incident being described **Witness using document to refresh memory:** This may be done provided the document is authentic & was produced by the witness himself contemporaneously ie immediately or shortly after the event. The document must be produced for inspection by opposition **Privileged communications:** A party may refuse to testify on matters that are protected by privilege, eg privilege against self-incrimination; attorney-client privilege & without prejudice communications **Inspection-in-loco:** The arbitrator must summarise the outcome of the inspection, orally or in writing, & allow the parties an opportunity to respond to it or agree to his report. This must be done on site. Later must be read into record **Surveillance cameras:** An ER is entitled to install surveillance CCTV & EEs must be informed thereof. EEs are not entitled to know location of CCTV. Placing must be done with due regard to EE's right to privacy & dignity. May not be placed in changing rooms or toilets **Entrapment:** This occurs when EE is induced/persuaded/encouraged to commit misconduct which he or she would not ordinarily commit & which he has no tendency or predisposition to commit. Entrapment does not occur when an alcoholic is offered alcohol: he already has predisposition. He is merely being offered an opportunity **Application to lead in-camera evidence:** The following would constitute legitimate & compelling grounds: one must objectively assess the real or reasonable possibility of the fears culminating in actual physical harm to persons claiming or relying on fears & threats; one must be satisfied that fear actually exists in relation to a particular witness. This evidence must be heard in-camera. Relevance of the evidence sought to be led & its bearing on the substantive issues in dispute **Polygraph:** Such evidence is inadmissible & must be rejected unless corroborated by other admissible evidence due to such tests being inherently unreliable. An adverse inference cannot be drawn against an EE who refuses to undergo such test **Breathalyser:** It cannot be used on its own to establish intoxication: it merely proves existence of alcohol in the body. Evidence of accuracy & proper calibration must be led through expert witness **Signs of intoxication:** Being loud, boisterous, disorderly, argumentative, incoherent, slurred speech, violence, bad temper, aggression, use of offensive language, fumbling, swaying, staggering, difficulty in walking straight, bumping into & leaning on furniture & others, bloodshot eyes, falling down, flushed face, rambling conversation, difficulty in paying attention, drowsiness & vomiting **Electronic Communications & Transactions Act**

**25/2002:** Data produced by electronic means must be considered in the same way that one would consider any other document.

## ASSESSING EVIDENCE

**Credibility:** Factors for testing: answers questions in a logical & straightforward manner; attempts to avoid answering questions; inability or reluctance to deal with issues of which he should have had knowledge; exaggerates version; makes concessions that he is not expected to make, or makes or refused to make concessions that he would be expected to make; implicates himself or admits culpability; becomes emotional without cause; calibre & cogency of performance when compared with other witnesses who observed the same incident.

**Reliability:** Factors for testing: witness' latent or blatant bias, ie whether he has motive to lie; internal or external contradictions; probability or improbability of aspects of version; opportunities that witness had to observe event; quality, integrity & independence of his recall; vagueness & uncertainty

**Relevance:** Evidence that according to logic & common-sense, has a tendency to prove or disprove anything that needs to be decided in order to determine a fact. Relevance also depends on the purpose for which evidence is offered

**Reliability of eye-witness' evidence:** Factors for testing: lighting, visibility, eyesight, proximity to event, opportunity for observation both as to time and situation, extent of prior knowledge of accused, mobility of scene, corroboration, suggestibility, the face, voice, build, gait & dress of EE, result of ID parade.

## DUTIES of EEs & ERs

**The aim of ER in private sector is profit while in the public sector effective service delivery.**

In either event the operation must be run efficiently. ERs and EEs must treat one another with respect. ERs may not treat EEs arbitrarily, but are entitled to satisfactory conduct & work performance from EEs.

**Duties of EEs:** to tender and place personal services at ER's disposal; remain in service until termination of employment; perform tasks agreed to with reasonable efficiency; devote energy, skill and working hours in furthering ER's business interests; not undertake any activity that conflicts with interests of ER; not use trade secret of ER for personal gain; be respectful and obedient; to refrain from misconduct

**Duties of ERs:** to receive EE into service and where required by agreement or statute to actually give work; to remunerate EE at relevant intervals (NB: no work no pay & no pay no work rule applies); not to make deductions unilaterally from EE's remuneration; afford annual and sick leave as agreed or prescribed; provide safe and healthy working conditions including proper machinery, equipment & safety clothing (if applicable).

## COMMON TYPES of MISCONDUCT

**Dishonesty:** Includes theft, fraud & other forms of underhand conduct. It is regarded by courts as a serious offence normally justifying dismissal regardless of length of service, or absence of prior warnings, or whether the EE returned the stolen property, or whether he was acting under instruction of superior, or even if EE derived no benefit. Dishonesty undermines the

trust upon which the relationship is built. Supervisors who turn a blind eye to dishonesty are as guilty as subordinates. Searches of EEs must be conducted properly & decently. Refusal by EE to submit to a **reasonable search** can in appropriate cases justify dismissal. ER must prove guilt of EE on balance of probabilities except where the ER imposes rules designed to control 'shrinkage' & losses continue through failure to comply with rules. An ER can have regard to record of criminal proceedings but give the EE opportunity to lead evidence in defence & in mitigation. A DC may also provide for dismissal if theft of goods belonging to other EEs

**Unauthorised use or removal of company property:** Property made available to EEs must be used for work related purposes unless permission has been obtained to put it to other uses.

**Unauthorised possession** can also include possession outside EE's workstation. In such cases an intention to steal can be inferred

**Conflict of interest:** EEs are required to devote their energies to advance the ER's interests. Conduct whereby EE intentionally places himself in a situation where his own interest conflicts with that of ER renders the relationship intolerable & justifies dismissal

**Wilful damage:** To justify dismissal the damage must be wilful & significant. Negligence is insufficient to justify dismissal except where it is gross, ie the EE foresaw or should reasonably have foreseen the possibility of damage & continued regardless on course of action

**Wilful endangering of safety of others:** Consists of wilful disregard of safety rules & procedures. It is not relevant that actual injury did not occur. Horseplay that endangers other EEs can lead to dismissal

**Assault & fighting:**

Assault is the unlawful & intentional application of force to a person or the threat thereof. An ER may dismiss an EE even if the assault occurs away from the workplace. The circumstances of all those involved must be examined to determine whether there was aggression, provocation, previous relationship, self-defence.

**Intimidation** can lead to dismissal provided that threat has been uttered seriously. Can also involve the use of muthi & witchcraft

**Abusive & racist language:** Abuse may amount to harassment & may merit dismissal if serious & done in presence of other EEs & without justification. Racist language cannot be tolerated in the workplace & merits dismissal

**Insolence & insubordination:** Insolence is impudence, cheekiness, disrespect or rudeness. It justifies dismissal only where it is wilful & serious. Unless it is serious or gross the proper action is to give a written warning in first instance. Refusing to obey an instruction is not the only form of insubordination. A challenge to or defiance of an ER's authority may be insubordinate. The Code requires that defiance must be gross to justify dismissal meaning that it must be serious, persistent, deliberate & public. Mere frustration with working conditions is not enough to justify a refusal to obey a reasonable & lawful instruction

**Intoxication on duty:** An EE may be dismissed for consuming alcohol or narcotic drugs that renders him unfit to perform duties. It may be a case of incapacity where there is alcohol or drug abuse. Where an EE is charged with being 'under the influence' then evidence must be led to show that the faculties were

impaired & incapable of working properly. This may be done by blood or breathalyser tests. Physical observations may also be made of EE. (See reverse side for signs of intoxication.) Whether an EE is able to perform his work depends on the nature of the work. That an accident did not occur while an EE is under the influence is not relevant. Some codes prohibit working with a particular level of alcohol. In such cases it must be proven that the level was exceeded by way of a test. Refusal by EE to undergo test may justify dismissal.

**Negligence:** Negligence is the culpable failure to exercise the degree of care expected of a reasonable EE with experience, skill & qualifications comparable to the accused EE. The test is whether a reasonable EE would have foreseen the possibility of harm & taken steps to avoid it. It is not relevant that no harm actually occurred. Negligence is akin to carelessness. If EE actually foresaw the harm then the misconduct is deliberate & not negligent. Negligence in the workplace can consist of a single incident or poor work performance which relates to consistent slipshod work. A single incident may not warrant dismissal unless it amounts to recklessness. Negligence & poor work performance must normally be dealt with initially by way of warnings

**Bringing ER's name into disrepute:**

EEs are required to respect & sometimes defend their ER's reputation. Making statements to customers or the public calculated to damage the ER's good name is a serious disciplinary offence. Derogatory comments made after a dismissal may make reinstatement inappropriate unless the comments constitute protected disclosures

**Absenteeism:** The EE is under a general duty to render service & failure to discharge that duty is a disciplinary offence. The ER may not dismiss in the first instance unless the period of absence is unreasonable. The onus rests on EE to provide a reasonable excuse for absence. Persistent absences may be due to illness & may be attributable to incapacity. Counselling & warnings should be given at the outset

**Abscondment or desertion:**

An EE will be deemed to have deserted when the evidence warrants the conclusion that he has formed a clear & unequivocal intention to abandon his employment. The onus is on the ER to establish this. Where an EE presents himself after a lengthy absence he must be given an opportunity to explain his absence

**Non-disclosure of information:** In terms of concept of 'derivative misconduct', there may be a duty to disclose the identity of perpetrators of serious misconduct where the EE knows or ought to know that withholding the information may result in harm to the ER or other EEs

**Derivative misconduct:** Arises where an EE, whilst not participating in misconduct, fails to reasonably assist ER detect those responsible, or who remains silent about such knowledge. This undermines the trust between parties..

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