LABOUR RELATIONS
FOR SHOP STEWARDS

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2012
Preface

This book is specifically intended for shop stewards. Its purpose is to encourage and motivate shop stewards to believe in themselves and also to lay a foundation in their capacity building as far as labour relations law are concerned.

This book is intended to provide shop stewards with the very basics of labour law in order for them to have at least a workable knowledge thereof. The knowledge gained from it is intended to make it easier for them to perform their functions.

I have seen on a daily basis how difficult shop stewards find it to represent the interests of their members, very simply because of a lack of understanding or knowing the basic principles.

This publication will not provide shop stewards with all the necessary tools to function optimally. They still need to read more widely and the trade union leadership must ensure further development of their shop stewards.

This book does not cover all the sections of the pieces of legislation under discussion herein but merely provides a brief overview to equip shop stewards at least with the basics. They would still need further education and training.

But be that as it may, I sincerely hope that, in some small way, I could contribute to make life easier for shop stewards and look forward to further planned interactions with them.

Please do the self-test on page 136 and forward any comments, questions or suggestions to hickleychris@iburst.co.za. Any suggestions on what you would like to see discussed in a future publication for shop stewards would be most welcome.

I wish all the shop stewards in the various workplaces, from whatever organization, the best of luck in their future endeavours and keep up the good work in protecting and defending the rights of workers.

Chris Hickley
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Chapter 1
The Trade Union Representative
(Shop steward)

1. Why do we need trade unions?
Trade unions did not all of a sudden appear in workplaces. They fought a hard battle to be recognized by the employers and to be allowed in the various workplaces to represent the interests of workers. It was not an easy battle then, nor is it an easy battle today. The main aim of employers then was on making as much profit as possible without having any regard for the interests of workers. Workers basically had no rights at all. They were dismissed for no reason at all and were treated and paid very badly but the owners of these businesses got richer. Workers then realized the power and strength in unity and so the battle for the recognition of the first trade unions begun.

The main membership of these unions consisted of tradesmen like carpenters and workers with a particular trade in the motor industry, milling factories etc. That is where the name ‘trade union’ comes from. Some of the first trade union organizations were formed and originated in Europe during the 1700. The leadership of these unions were killed, beaten up and thrown in jail by the police in an attempt to break them and discourage others from either joining and/or forming other trade unions.

In the United Kingdom, for example, workers formulated and started their own unions in the 1700.¹ In 1799 the UK passed the Combination Laws that made trade unions illegal. Workers were not allowed to form trade unions or to force employers for more pay and shorter working hours. This was a period of vigorous fighting between the British government and trade unions. It was only in 1871 that unions secured legal status.

In South Africa trade unions were formed in the early part of the 1900 but workers in the mining sector showed dissatisfaction with their work situation as early as 1882 during the strikes in the mining sector.²

The South African Communist Party played a vital role in the formation of trade unions in South Africa and also the subsequent fight for better working conditions. In 1941 Ray Alexander, the Secretary of the Communist Party

from 1934, played a vital role in the formation of the Food and Canning Workers Union (FCWU) in 1941.3

Even today still there is heavy resistance to trade unions in our country. South Africa is a highly unionised country with a very large number of trade union organizations and thus very large numbers of membership. These large numbers of trade unions and their membership is a clear indication of the disrespect that employers have for worker rights.

In a perfect society, where the rights of workers are respected, trade unions might not be necessary. Unfortunately this is not the case. Workers are still badly treated by their employers, especially those vulnerable workers in the agricultural and domestic sectors. Quite a large number of these workers do not belong to trade unions and must endure the abuse from their employers on a daily basis. As a matter of fact, more could be done for vulnerable workers in the agricultural and domestic sector and that includes contract workers and those employed by labour brokers. The latter two types of employment are used by employers to avoid having to follow due processes when considering dismissing employees.

Employees are on contract for many years without having any benefits at all and until the employer decides that there is no use for them anymore. In such a case the contract is very simply not renewed. The same applies to employment through labour brokers. If the ‘client’ decides not to renew the contract with the labour broker, then the employment of the worker is simply terminated by the labour broker. The so-called ‘client’ then distances itself from the termination on the excuse that the worker was not employed by it but by the labour broker. The labour broker, on the other hand, uses the excuse that its contract was cancelled by the ‘client’. Both the ‘client’ and the labour broker avoid responsibility by putting the blame for the termination of employment on each other. But the person that suffers most is the dismissed worker whilst the labour broker and its ‘client’ count the profits made through the labour of the dismissed worker.

The argument is that South Africa’s labour laws are too rigid and over-protects the employee. Just imagine a South Africa where workers have no rights at all and the employer can just dismiss without having to follow a fair process and without having a fair reason for doing so? Workers will be in constant fear of losing their jobs because of very simple mistakes that they can make. Workers will have no right to decent wages or annual leave, sick leave, family responsibility leave or any other social right.

It must not be forgotten that South Africa has a legacy of apartheid where Black workers had no rights at all, and without the protection of labour laws these unfair labour practices would have continued. Until such time that

employers change their attitude towards workers, I cannot see any relaxation of our current labour laws. Trade unions will always have a vital role to play in ensuring that these laws are enforced and adhered to in the workplace.

It is for these reasons above that we need trade unions and the shop stewards in the various workplaces to protect and fight for worker rights.

2. Newly elected shop stewards
Have you just been elected as a shop steward or have you been a shop steward for quite some time but is still uncertain as to what is expected of you? Are you also still uncertain as to what should be done when approached by a member of your trade union for assistance? It is normal to feel that way.

When you made yourself available in the general meeting to be elected as a shop steward, you took the first step in becoming a defender of worker rights. It is a noble path that you’ve chosen and not without its difficulties or barriers. You will quickly learn how to overcome and avoid those barriers. By barriers I mean obstacles like jealousy from your co-workers, pressure from your supervisors and management as well as pressure from your membership to perform.

It is impossible to become a perfect shop steward. Your commitment will also be tested because the life of a shop steward is not an easy one and far from glamorous. Yes, some of you will sometimes sleep in the best hotels, fly with some of the best airlines to conferences and eat the best of food but this is far from the realities of being a shop steward on a daily basis.

However, it is not all doom and gloom and being a shop steward or trade unionist will be a very rewarding and fulfilling experience.

3. A shop steward as a special kind of person
I view a shop steward as a special kind of person. This is the type of person that cares for his/her fellow workers and cannot stand injustices by the employer. It takes guts to avail you for shop steward elections. You were elected because of your leadership skills and members have placed their trust in you to protect them against any unfair treatment by the employer. You are also expected to engage management in collective bargaining forums in an attempt to better current working conditions for you and your fellow workers.

I mentioned shop stewards as a special breed of people because no one else was prepared to avail him/herself for the position of shop steward because it is not an easy job representing the workforce in a particular workplace.

Management does not easily accept shop stewards and you place your own future promotional prospects at risk for the sake of the well being of your fellow workers and not everyone is prepared to make this sacrifice.
Being a shop steward can be very rewarding and there are also disadvantages but let me assure you that the advantages by far outweigh the disadvantages. We will look in more detail at the advantages and disadvantages later on.

4. Development of shop stewards

Being elected as a shop steward is the first step towards your own development as a worker leader but you must know that it is up to you to become a good shop steward and a good worker leader. Developing your skills is very important and trade unions must invest in their shop stewards by arranging proper training initiatives as opposed to only provide on the job training because that is not enough. A shop steward must have a very good workable knowledge of labour laws as well.

Your trade union organization can teach you the basics of being a shop steward but it is entirely up to you to develop and capacitate yourself to a professional standard. Never underestimate your own abilities. You need to believe in yourself because your membership in your institution does and you should not fail them.

This book will pave the way and assist in your development to become a good trade unionist but you will have to read more widely as well on the topic of labour relations and labour law.

Have you ever felt powerless against management in a situation where it was expected of you to represent a member? For instance, in a disciplinary hearing, whether formal or informal? This is because the representatives from management has an advantage over you for the mere fact that they empowered themselves by keeping up to date with the latest developments in labour law as well as reading extensively on the topic.

The only way for you as a shop steward to beat management at their own game is to do the same. Information on the topic can be obtained in labour journals and on labour relations web sites. Ask your union to subscribe to these web sites. The information on these web sites is of great value and one of the ways to empower yourself and beat management at their own game. Management takes advantage of the inexperience of shop stewards and that is why shop stewards lose cases that they should have succeeded in. They simply do not know the rules of the game.

5. Shop stewards always in a defensive mode

As a shop steward you need to change your approach with management regarding a particular labour related problem as well. Shop stewards normally make the mistake of placing themselves in a defensive mode. You approach management with the intention to defend your member.

Your approach should not always be to defend a member but to represent a member. Approaching management in a defensive mode is implying that
your member has done something wrong. Remember the onus is on management to prove their allegations. Those who allege must prove.

Therefore your approach should be intended to place management in the defensive mode. They need to defend their allegation that your member has done something wrong. Even in disciplinary hearings you represent your member and do not defend him or her. More on the issue of representation in a hearing will be discussed later.

6. Balance of power

We always speak about the balance of power between employee and employer but to tell you the truth, there is no balance of power.

The power is more in the hands of the employer. You, as a shop steward, need to tip the scales more in your favour. The only way to do that is to build capacity and empower yourself. The only power that you really have is the unity of your union members and the right to strike but you cannot go on strike every time something does not go your way.

The only other way to tip the balance of power away from management is empowering yourself by being up to date with the latest trends in labour law and knowing how to effectively defend the rights of your members.

Believe in yourself because your members do and do not allow others to discourage you. Helping your fellow workers is very noble and can only benefit you in the end. Some of our most respected politicians and very successful businessmen came from the trade union movement.

7. Shop stewards are not perfect and make mistakes

Newly elected shop stewards, and sometimes more experienced ones, are afraid to represent their members because they are afraid of making mistakes. You are not perfect and everyone must and will make mistakes. You gain experience by the mistakes that you make.

If you do not make mistakes, you are not going to learn something new. Sometimes the best way to learn to swim is to jump into the deep end and just start swimming. Very soon after, you might become a very good swimmer. Do not be afraid to represent your member. If you are not confident in representing a member, you are bound to fail.

You should adopt a positive attitude even though you are dealing with negativity. The only reason why you are afraid is because you do not have the necessary ‘tools’ to do the job. Knowledge is the tools of your trade as a trade unionist. Get the knowledge and you have the tools. A carpenter cannot fit a roof without the proper tools. A shop steward will not be able to represent the interest of members if they do not have the necessary skills and capacity.

A shop steward without a workable knowledge of dispute resolution and labour law will find great difficulty in effectively representing his union
members. Once you have acquired that basic knowledge, your fears will be something of the past. You will be much more confident and your fears will be something of the past.

8. Constructive criticism

You will have a lot of critics, without a doubt. These critics are normally those few individuals sitting right at the back of your general meetings who continuously criticize everything that you do and say. Remember shop stewards are not perfect.

You are going to make mistakes. You are definitely going to ‘lose’ in disciplinary hearings because you can’t ‘win’ them all. You are definitely going to ‘fail’ in your negotiations with management. Do not allow these mistakes and critics to discourage you. You should see it as developmental and take the criticism as constructive.

As said earlier, the only way for shop stewards to learn is through the mistakes that they make. Even our most respected leaders and businessmen make mistakes but they learn from it and build on it. You must do the same. Remember no one is perfect but with time you are going to make fewer mistakes and these mistakes will be insignificant.

You will also learn how to rectify these mistakes and do damage control – all in good time. Members sometimes expect you to perform the impossible and when you do not succeed they criticize. Do not allow yourself to be abused by your members. If they have done something wrong you need to be bold enough to tell them so. Do not cover up misconduct.

9. Advantages and disadvantages of being a shop steward:

As I said earlier, there are more advantages of being a shop steward than disadvantages. In this section we are going to look at some of them. There are many benefits in being a trade unionist but I am only going to highlight some of them.

Finnemore and Van Rensburg R\(^4\) list some the following advantages and disadvantages of being a shop steward. I will elaborate on it with a very brief discussion.

9.1 Advantages:

*Being in a position to help employees, which is becoming even more necessary as management employs less and less human resource persons*

Being in a position and being able to help your fellow workers is very fulfilling and rewarding. For those who have successfully assisted their fellow workers,

how did it feel? It feels great, doesn’t it? Being able to successfully assist your member builds self-esteem and confidence.

Your confidence will grow day by day and soon you will be able to challenge management on much more complex issues like arbitrations, as an example. As time goes by you will face up to any challenge and any uncertainties that you have had before will disappear. You will still make mistakes but they will become less and less and will be of no importance.

**Having opportunities to develop leadership skills**

As a shop steward you were elected for your leadership skills. Members had confidence in you to lead them. They put their trust in you to protect their interest. As time goes by you will also be elected within your organization into leadership positions, whether it be on a regional, provincial or national level.

Some of you might decide to apply for positions as officials within your organisations. You will be expected to lead in general meetings as well as other structural meetings. You are also expected to interact with management on a higher level during your interaction and negotiations with them. All these things and many more will develop you as a leader.

These acquired skills will assist you in your future career. You are not going to be a shop steward forever. Management will realize your leadership abilities and you will subsequently be promoted into higher supervisory or management positions. Shop stewards make excellent managers because of their labour relations experience. However, you should not avail yourself to become a shop steward with the intention of getting a promotion.

**Gaining status, respect and recognition**

Shop stewards are well respected by their members. Members look up to them for leadership and guidance. Shop stewards also enjoy a limited amount of status in the workplace, not only amongst members but also amongst management.

As you develop yourself as a worker leader you will be even more respected by both management and your members. Your status as a shop steward allows you to do things to a certain extent that other workers are not allowed. Just remember that shop stewards remain employees and cannot say and do what they please but are allowed some leeway to a certain extend. What you do and say must be in good faith. Always remain honest and truthful in whatever you do.

**Learning from management and gaining a deeper insight into production**

Shop stewards, through their daily interaction with members and management, know and understand the different processes and procedures in the workplace better than anyone else. In order for the shop steward to deal with
a member’s complaint effectively, he/she needs to understand what exactly the member does first and a shop steward deals with different members from different departments and components on a daily basis.

This is how you come to know exactly what is going on in the business. As a result of your interaction with management you also learn how things are supposed to be done. These developments are very beneficial when it comes to promotional prospects. You should not become a shop steward for personal gain, however like I said earlier, you still remains a worker yourself and also aspire to become a supervisor or manager one day.

There is nothing wrong with being ambitious, even if you are a shop steward. As long as becoming a shop steward doesn’t make you an opportunist. From your interaction with management you will also learn how to approach things in the correct manner.

**Learning to speak english**

English is an international language and is used by South African companies as the preferred language of communication. Most of you are already fluent in English and can speak it rather well but communicating with management and the writing of reports will improve your command of the language.

When communicating on paper you will realize that things should be reported in a particular way. Reports are written in a particular format, so are memorandums, agendas and so on. Your exposure to these will greatly improve your English.

You are also expected to verbally communicate with your members in general meetings as well as verbally communicating with management during your negotiations. All these interactions in different forums will contribute to improving your English.

**Learning how to negotiate**

Another advantage of being a shop steward is that you will very soon learn how to negotiate successfully, if you haven’t already started. To negotiate is a special skill. Some of our most successful businessmen have been very skilled negotiators for the government before going into business.

**Understanding labour law**

I cannot stress to you the importance of being very familiar with labour laws. The Labour Relations Act\(^5\) (LRA) is of particular importance to a shop steward. It is not necessary for you to know this Act by heart but at least those sections important enough for you to perform your daily functions as a trade unionist.

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Be that as it may, during your endeavors as a shop steward you will be exposed to labour laws and will become quite good at it.

The benefit of being a shop steward is that you will learn the practical application of our labour laws. You should at least have a workable knowledge of the LRA, Basic Conditions of Employment Act\textsuperscript{6} as well as the Employment Equity Act.\textsuperscript{7} At a later stage you will be required to familiarize yourself with other relevant laws as well, for example, The Promotion of Access to Information Act\textsuperscript{8} etc.

\textit{Having access to an office and facilities}

Having access to a computer, fax machine, telephone, and an office is of particular importance when dealing with employee’s problems. Having access to these facilities can also build capacity in your computer skills.

\textit{Attending local meetings and being able to discuss problems with other shop stewards}

One other advantage that Finnemore et al lists is the fact that you can share your experience with other shop stewards and they can share their experience with you when attending local and branch meetings. This can be very beneficial to you as a shop steward because it will provide you with the opportunity to see where you went wrong and you will get different views from more experienced shop stewards and the leadership on how to approach a particular problem that your members might have.

Workplace problems of a collective nature are normally discussed in your local meetings. Therefore it is very important to regularly attend these meetings.

\section{Disadvantages:}

\textit{Losing a case and having workers ‘scream and yell at you’}

One of the worst things of being a shop steward is probably when you lose a case against management and being yelled at and criticised by your fellow employees for the ‘failure’. Remember what I said earlier, you are not always going to win cases. As a matter of fact, you might even find a situation where you lose more cases than winning them.

Do not be discouraged because it is nothing to have sleepless nights over. You tried your best and that is what counts. You will also find, and I am speaking out of own experience, that many times the member that you represent is not as innocent as he/she claims to be.

\textsuperscript{6} Act 75 of 1997.
\textsuperscript{7} Act 55 of 1998.
\textsuperscript{8} Act 2 of 2000.
The idea of representing a member is not to get the person off the hook that has done something wrong but to ensure that the employee gets a fair opportunity to explain his/her case. It is also your duty to ensure that your members do not misconduct themselves and thereby giving the trade union a bad name. Members should behave in a disciplined manner.

You should never lie for your member. If he has done something wrong, rather plea bargain then lie. Plea-bargaining will be discussed more fully in the following chapter.

**Making enemies amongst management and employees**

Making ‘enemies’ amongst management and fellow employees is probably the worst that can happen to you as a shop steward. In order to fulfill your functions as a shop steward, you need to step on management’s toes. You become management’s enemy number one. Employers do not like to be told where they went wrong.

Stepping on toes is very counter-productive for your promotional prospects as well because, whenever you apply for higher positions, your supervisor will do everything possible to prevent you from getting that promotion, especially if you challenged him previously on something that he did wrong. Luckily not all employers are that petty. Most of them realize the true potential of shop stewards and are happy to promote you for your leadership qualities.

Making ‘enemies’ is part of the job of a shop steward. You will find that some of your fellow workers also become enemies. This is because of professional jealousy. They in fact admire your courage to challenge management but are too scared to do it themselves. They envy your guts.

**Discrimination and prejudice from supervisors who still perceive shop stewards as troublemakers**

The previous bullet goes hand in hand with this one. Supervisors, not all of them, still see shop stewards as troublemakers. They dislike interference because they want to do things that they should not be doing. These supervisors will do everything in their power to discourage you but what they do not realize is that even if you resign as a shop steward, someone else will just take your place.

Why do you think some supervisors and managers do not like shop stewards? It is only those ones who do not comply with labour laws and think that they can still do whatever they like. Supervisors and managers that make life difficult for shop stewards have something to hide and it is your job to find out what it is.

The bosses also do not like supervisors who break the law because of the fact that they (the bosses) can be held liable and then have to pay damages, like, compensation awarded in arbitration or by the Labour Court. The conduct...
of supervisors can also be brought to the attention of senior management for disciplinary purposes. Supervisors are also just ordinary workers like you.

If you are treated differently then other employees by your superiors, it can amount to victimisation and discrimination. Cases of discrimination can be referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation and if it remains unresolved, can be referred to the Labour Court for adjudication.

**Becoming a scapegoat when negotiations fail**

Workers always look for someone to blame when things do not go their way. When negotiations fail they always blame the shop steward. Negotiating with management for salary increases and better working conditions is not easy. It is very difficult, especially with headstrong employers.

These employers often co-opt the services of specialised negotiators from employer’s organizations. The ordinary union member does not realise or know how difficult it is to negotiate for better salaries and working conditions. They want as much as possible and on the other hand management want to give as little as possible.

Members also mandate you with unreasonable demands and expect you to perform miracles. They would, for example, mandate you to negotiate for a 20% increase whereas the inflation rate might be 8%. Most employers base their increases on the inflation rate.

If you fail to negotiate for the increase sought by your members, you will be blamed. Again, do not allow this to discourage you. You are not to blame because you tried your best and your best is good enough.

**Being seen as a traitor when promoted**

Shop stewards are ordinary workers like the rest and also aspire to become supervisors and managers. There is absolutely nothing wrong with that. Just like the others you also work to provide for your family. Just like the others you also want to progress in your career. Like I said before, it happens a lot that management realises the true potential of shop stewards as supervisors and managers and promote them. You fight for bread and butter issues on a daily basis for others, there is nothing wrong in doing the same for yourself.

The disadvantage is that you will be seen as a traitor. Members will accuse you of negotiating for yourself and that might not be true. At least you will not be seen as a traitor for long and eventually you will be accepted as a supervisor, especially if a replacement has been elected in your place.

You will eventually be accepted as a supervisor but will always be reminded of the fact that you were once a shop steward too, especially if one of your subordinates has done something wrong and needs to be disciplined by you as the new supervisor on the block.
9.3 Duties of a shop steward

Section 14 of the Labour Relations Act deals with the functions of a trade union representative (shop steward) under organizational rights. Listed below are some of the duties of a shop steward. The list is not complete and as you well know the job of a shop steward is not limited to workplace issues. Some Shop stewards have political responsibilities as well, especially those shop stewards who belong to unions that are affiliated to political parties.

Because of the trust that members placed in you and because they look up to and respect you as their leader, they will at times also approach you to solve marital problems, give financial advice, career guidance or simply just wanting a shoulder to cry on. Do not tell the member that it is not your duty but rather make an effort to point him in the right direction, no matter what the assistance is that he/she seeks.

Some employers, especially the larger ones, have employee assistance programs (EAP). It might be that the employee does not have any confidence or trust in the EAP officers. It might then be a good idea to accompany the employee to the EAP officer if you do not know what advice to give. However, you need the permission of the employee to accompany him/her to the EAP officer. Below are some of the duties of a shop steward in more detail.

Represent members in disciplinary hearings

One of the most important tasks of a shop steward is to represent members in disciplinary enquiries, whether formal or informal. The member can be represented during any stage of the disciplinary process. Representation is a fundamental right and not a privilege. Management can never refuse the representation of your member in any disciplinary proceedings. If that happens, the process followed would be unprocedural. Representation is a Constitutional right.

Represent members in conciliations and arbitrations

It is also the duty of the more experienced shop stewards to represent members in conciliation and arbitration proceedings in the bargaining council or the CCMA. Arbitrations are more complicated than disciplinary hearings and shop stewards who are not experienced enough should not deal with such a process. It is advisable that the less experienced shop stewards accompany the more experienced ones in arbitrations before dealing with the processes themselves.

It is also advised that, in your free time, you go to the CCMA or your own bargaining councils and just observe the process. Prior arrangements can be made with the arbitrator. Most arbitrators will allow you to sit in and observe unless the dispute might be of a sensitive nature.

There is nothing more frustrating to an arbitrator than an inexperienced shop steward in an arbitration process. That does not mean that you may not
represent members in arbitrations if you do not have the experience but at least familiarize yourself with the procedures first. Those shop stewards who wish to represent members in the CCMA must familiarize themselves with the CCMA rules. The CCMA is very strict on compliance of the rules.

If you do not have the experience yet, start with an arbitration that is not so difficult to gain the experience. A very simple promotion or transfer dispute might be a good start. Do not take on a complex matter if you do not have any experience in arbitrations at all.

Assist members with grievances
Assisting members with grievances is also of importance. Most of the times members do not know how to word their grievances. They also might find difficulty in expressing themselves on what the actual problem is. It is your duty to assist the member every step of the way. It is important to insist that management keep to the time frames.

Your assistance is also important in the sense that the grievance route might not be the appropriate channel to resolve unhappiness. For example, if the member feels that he has been discriminated against, the matter should be referred to the CCMA immediately for conciliation.

In discrimination matters it is not necessary to follow the grievance route because referring a discrimination matter to the CCMA has time frames attached. Discrimination disputes needs to be referred to the CCMA within 6 months from the time that the worker became aware of the differential treatment.

Conduct regular meetings
Most shop stewards fail dismally when it comes to this important duty. It is vitally important for you as a shop steward to hold regular meetings in the workplace. These meetings have a purpose. The purpose of general meetings is to keep members informed of the latest developments in the workplace, obtain mandates for negotiations, discuss and find solutions to problems in the workplace etc.

Therefore it is important to encourage members to attend general meetings because it is impossible, especially in large workplaces, to keep members informed individually.

It is also important for shop stewards on the local executive committees to hold and attend regular meetings in your local areas. In these meetings problems of a common nature can be discussed and strategies developed to overcome similar problems in different workplaces. You will find that the problems are, most of the time, the same in the different companies in your local area.
Provide training to members and junior shop stewards

It is the responsibility of the more experienced shop stewards to train and develop the newly elected or less experienced ones. The chairperson of the institutional committee together with the institutional secretary should implement training sessions.

Training sessions can also be arranged amongst the members of the local shop stewards council. It is not always advisable to wait for the union to make funds available for training purposes. It is not an excuse but unions also have budgetary constraints. It is your duty as a leader to take the initiative and improvise training sessions.

Training can be conducted without any funds at all. You can use your union office as a venue and each one can bring their snacks and lunch. The union can perhaps assist with transport costs for taxis and trains or petrol money for private vehicles. Sometimes there is nothing to discuss in general meetings. Then these meetings can be utilized to train institutional shop stewards and members as well on their basic rights.

You do not need any specialist in labour law to provide training. Organizers and labour relations officers can fulfil this function. It is after all their duty to provide training as well. You can also request other affiliated unions to provide training for free if you happen to know that their shop stewards or organizers are good in giving training. Not everyone can stand in front of people and teach but as time goes by you will become more confident in giving training as well.

Represent the workers in bargaining councils and workplace committees

Your duties also include representing your members in bargaining councils where better working conditions may be on the agenda for discussion and where collective agreements might be concluded.

It is also important to attend all other workplace committees as well where workers might be affected. These include committees on employment equity, skills development, transformation and recruitment etc.

You can see the importance of having at least a workable knowledge of labour laws. You do not want to represent your union and members in these committees and then participate in silence. Decisions affecting your members are taken in these committees and your active participation is vitally important.

Negotiate better salaries and working conditions

Members join unions primarily for protection against unfair treatment by the employer but they also join unions for use as a vehicle to better their salaries and working conditions. You should therefore continuously engage management in an effort to improve salaries as well as working conditions.
Unions always make the mistake of starting salary and conditions of employment negotiations at the last minute. There is absolutely nothing that says that you cannot negotiate better salaries before the normal annual increases. It is for this reason important to regularly attend meetings between management and labour.

In some big institutions it is standard to have monthly meetings between management and shop stewards where workplace problems are discussed. As a shop steward you need to act pro-actively and not re-actively. By this I mean you must prevent labour problems and not wait for it to occur and then you act.

**Attendance of structural meetings of the union**

You are required to regularly attend structural meetings of the union. It is important to attend these meetings because new strategies, long term and short term, are discussed to improve working conditions for members.

In these meetings you are also kept informed of any new developments within the organization and planning takes place for the way forward. These meetings are compulsory. It is impossible for your head office to keep the ordinary member on the shop floor informed.

For this reason it is important for you to attend these meetings so that you can then filter the information down to the members in the workplace. Otherwise you will not be up to date with what is going on in the organization and will not be in a position to answer members when they, for example, have an enquiry about the current state of wage negotiations etc.

These structural meetings are also important because this is where provincial and national congresses are arranged as well as campaigns and other important activities.

**Provide advice and assistance on various concerns and problems**

Your shop steward duties are not limited to normal workplace problems. Members will approach you with various problems that are not even work related. They see you as a father figure and a leader of the group.

You will be approached to provide financial advice on loans that the worker intends taking out. I do not wish to repeat myself but the idea is to let you know that your duties are not limited to normal workplace problems. Strictly speaking it is, but just think how your member will feel if you refuse to assist him with a personal problem. Remember, some members see you as much more than just their shop steward. They look up to you in many ways.

Another thing that I would like to point out to you is that members will phone you at very awkward hours with their problems for advice. They will phone in the very early hours of the morning or even late at night when you are already asleep. Do not get angry with the member. He or she most probably cannot sleep because of a particular problem and you might just be the
person that can give assurance or calm the member down. As a shop steward you must be available 24 hours a day. This is one of the sacrifices that you make.

**Recruitment of new members**

Who is the most important person in the union? No, it is not the president of the union, it is the member. In the retail sector ‘the customer is king’ but in the trade union, ‘the member is king’. Without union members there cannot be a trade union organisation. Unions are dependent on membership for their survival.

Membership determines the strength and power of a union and unions are dependent on member fees for their day-to-day expenses. You can now see how vitally important it is to recruit members into the organization. Your duty is not only to recruit but also to find out the reasons why members resign from the union. If you as a shop steward are the reason for the resignation, do not see it as an insult but learn through the mistakes and make an effort to find out where you went wrong.

Sometimes members resign because of perceptions or wrong impressions being created by rival unions. Rival unions will do anything in their power to discredit your organization and the easiest way to do it is to capitalize on your mistakes. Improve on your mistakes. As a shop steward you are the ambassador of your organization and new members will join because of the manner that you assist your fellow workers.

Most unions give certain incentives for the recruitment of new members. You should encourage your members to recruit their colleagues. Make it into a challenge in your general meetings. See who can recruit the most members for the month.

**Arrange campaigns, picketing, strikes etc**

Unions, like any other organization, have campaigns to let its presence be known. There are campaigns for recruitment of new members, unemployment, job losses and against cheaper imports that create ob losses. Someone must organize and lead these campaigns. This is the job of the shop steward.

Your duty is to arrange the venue, marshals, transport and obtaining permission from the necessary authorities, arranging t-shirts and banners. Your duty as a shop steward also includes arranging peaceful picketings, strikes as well as other forms of industrial action. Normally with big events like these your provincial office will assist you. Remember the emphasis is on peaceful actions when it comes to strikes and picketing. It is not appropriate to damage the property of others during strikes or marches. These vehicles parked in the road belong to ordinary workers, just like you. The vehicles of the owners of businesses are not parked in the street. They have private and protected parking. I am in no way suggesting that you should identify the property of
the owners. The withholding of labour (striking) is to force the employer in a particular direction and to gain the support of the public but if your members are unruly and damaging the property of other workers, the general public will not have sympathy for your cause and will condemn the strike. Breaking up the stalls of informal traders on the sidewalks during strikes is a big no-no too. These informal traders earn far less than what your members earn in their permanent employment and the losses suffered by them cannot be replaced. Their families at home suffer the most. These informal traders do not have any insurance at all. You need to educate the members in this regard when arrangements are made for peaceful demonstrations. Your members should always act in a responsible manner and shop stewards need to provide the leadership and direction in this regard.

Resolve conflict

In a workplace there will always be conflict. What makes matters worse is when the parties are members of your union. What to do now? Report them to management? No, you try to resolve the conflict yourself. Just imagine having to defend one of your members against someone else who is also a member of your organisation. It is an awkward situation for any shop steward but you need to be objective and find out who the real culprit is and what the conflict is all about. Once you know what the real problem is between the workers, it will be easier to resolve the situation. Get advice from others if the conflict is difficult to resolve.

At times it will also be necessary to resolve conflict between a supervisor and a member of your union. A member and a supervisor might not see eye to eye. If the member is in the wrong you should not be afraid to tell him so.

Sometimes more experienced, wiser and older shop stewards will find it easier to resolve conflict between members as well as with a supervisor by getting the parties together and adopt the role of mediator. The purpose is to prevent the situation from getting out of control to such an extent that management might consider disciplinary action. Remember what I said earlier about trying to prevent workplace problems.

Ensure compliance with relevant legislation and collective agreements

Another important duty for a shop steward is to make sure that management stay within the rules. You must make sure that they comply with labour laws as well as collective agreements. Shop stewards can be seen as the custodians of our labour laws in the workplace. What is the purpose of concluding and signing collective agreements if management does not adhere to them?

You will find in some instances that management agrees to a particular issue but afterwards find difficulty in implementing them. That is negotiating in bad faith. Management can be compelled to comply with collective agreements. They are legally binding. It is the same with our labour laws.
Management does not have the discretion to comply or not to comply with labour laws either. Any contravention of the labour laws must be reported to the proper forums in order for them to enforce compliance.

**Election of institutional shop stewards**

Depending on where you fit in the organisational structure, one of your duties will also be the election of institutional shop stewards. This is especially so if you are serving on the local structures of your union. Shop stewards come and go. They resign, get promoted, are dismissed or might be transferred to another branch.

Election of shop stewards is in line with the union’s constitution. It is normally done by secret ballot and in some cases by a show of hands in support of a particular nominee. A record of the election should be kept for reference and the names must be forwarded to the provincial or regional branch of the union. Elections of shop stewards are done every two to three years but if someone resigns in the interim, an election can be held to fill the gap. The names of the newly elected shop stewards must also be provided to management.

**Attending regular management meetings**

One of your duties is also to attend meetings on a regular basis with management. These meetings should be standard and, depending on the size of the factory or company, should be on a monthly basis or even every second week. The purpose of these meetings is to discuss possible problems experienced by members on the shop floor. Do not wait for problems to occur first before acting. Be proactive and not reactive. Your job as a shop steward is to prevent workplace problems from occurring.

Preventing workplace problems will make your life much easier as a shop steward because that way you do not have to sit in disciplinary meetings and hearings every day. It is however not advisable to sit in day-to-day management meetings. The reason is very simple. The day-to-day running of a business has nothing to do with the union unless workers are collectively affected or if there are issues on the agenda for joint decision-making.

Management would, for example, decide on a particular day-to-day issue that is against the interest of the workers but will spread the word that you were part of the decision-making because you were in the meeting. Rather arrange these monthly or bi-monthly meetings for discussing workplace problems and it is advisable to stay away from management meetings where the day-to-day running of the company is going to be discussed.

If there is a particular item on the agenda that affects the members collectively, management can call you to their meeting to discuss and give input on that particular point only. Once you are done, leave the meeting.

Remember also that the day-to-day running of any business is a management prerogative and unions or shop stewards can only give input but the
final say is still with management. If workers are adversely affected by a particular decision taken in a day-to-day management meeting then you refer and discuss the problem in your monthly management/union meetings.

You should also not attend meetings with management alone. Always take another shop steward with you. If one is not available, take any union member to accompany you. This will prevent management from influencing or overpowering a lone shop steward. The whole shop steward’s council must attend your monthly meetings with management and these meetings are regarded as on duty.

Before attending these regular meetings with management, make sure that you have your monthly general meeting with your members prior to meeting with management to get a mandate. You do not follow or do your own thing in these meetings with management. You need to find out from the members first what are the problems on the shop floor and after your discussion with management you need to give feedback to your members.
Chapter Two

Disciplinary Processes and Procedures

1. What is discipline?
This section is probably one of the most important sections in this book for you as a shop steward. It will cover all the important aspects of the disciplinary processes and procedures in the workplace. I will deal, amongst others, with the purpose of discipline, the different stages, the role of presiding officers, the role of you as a shop steward, discipline of a shop steward and so on.

After an applicant for employment succeeds in securing work a contract of employment is concluded between the worker and the employer. The worker in essence agrees to sell his labour in return for remuneration (wages) and other benefits. The worker also undertakes to abide by the rules of the employer. If he does not, disciplinary action might be taken against him.

As you can see, there is a contractual obligation on the employee to behave and work according to the rules of the employer. Therefore it is not unfair if the employer takes disciplinary action against one of your members for misbehaving. It is up to you as a shop steward to ensure that the disciplinary action is for a fair reason (substantive fairness) and in accordance with a fair procedure (procedural fairness). The employer is just exercising a right to maintain discipline in the workplace. There is nothing wrong with that. Your job is to make sure that it is done fairly.

2. Purpose of discipline
The purpose of discipline is to correct the unwanted behaviour of a particular individual in the workplace progressively. The Code of Good Practice: Dismissal in the Labour Relations Act (LRA) deals specifically with the issue of applying discipline progressively. Progressively means that discipline should be aimed at correcting the behaviour of the employee and should not be focused on punishment. Discipline should also be applied for a fair reason and in accordance with a fair procedure.

The main purpose of discipline is to rehabilitate the employee and to prevent or discourage him/her from committing similar conduct in the future. The purpose of discipline is also to act as a warning to others that such behaviour will not be tolerated in the workplace.

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1 Code of Good Practice in the LRA, item 2.
2 Item 4 of the Code.
3. Fair reason

The employer cannot just discipline an employee for no reason at all. The employer must have a reason why they want to discipline a worker and the reason must be fair. It will, for example, not be fair to discipline a worker for coming late for the first time because of trains and busses being late. It will however be fair to discipline a worker for coming to work late continuously because then the reason for discipline will be a fair reason.

The employee should also be aware that coming late is unacceptable. The employer must make it a rule that coming late, for example, is not acceptable. The rule must be applied consistently to everyone and not only to some employees. Just remember that it is important to note that not all workplace rules need to be written down.

Some wrong behaviour and the rules against it are so well known that it is not necessary to be contained in your disciplinary code. The list of different types of misconduct is not exhaustive. In other words it is not a complete or closed list. The employer can apply discipline for any other misconduct that is not on the list in your disciplinary code but it must be for a fair reason.

4. Fair procedure

Discipline must be applied for a fair reason and also in accordance with a fair procedure. It is your duty as a shop steward to ensure that the employer follows a fair procedure. There is an informal procedure and a more formal procedure, depending on the type and severity of the misconduct.

With minor or less serious transgressions the employer will follow a more informal type of process and for serious cases of misconduct the process will be a lot more formal.

In an informal process the employee will be called in by his supervisor or immediate superior and given the opportunity to explain his alleged conduct. This meeting can be in the office of the supervisor. The worker may be represented by a shop steward or a co-worker.

As a shop steward you should not feel insulted if workers choose a co-worker to represent them. It is not a reflection on your ability but rather that he or she feels more comfortable with a particular employee representing him/her. The employer is under obligation to follow the audi alteram partem rule. This common law rule means that the employer must give the employee an opportunity to explain his/her conduct first before making any decision.

The employer can never apply discipline without giving the worker the opportunity to respond to the allegations. At this stage it is only an allegation and the employer still needs to prove the allegation.

The employer will follow a more formal type of process if the misconduct was very serious. For example, if an employee assaulted a co-worker, stole something or damaged the employer’s property. The formal process will take...
place with an independent presiding officer chairing the proceedings. The employee will be informed of the charges in a charge sheet with the particulars of the charges as well as the date and place that the hearing will take place. The disciplinary hearing must be in a language that is understood by the employee.

I will go in more detail regarding the formal process further down in this book. You should also note as a shop steward that the employer, most of the time, would only decide on a formal process if the employer contemplates dismissing the employee. So bear in mind that when you are requested to represent a member in a formal disciplinary hearing that the outcome might be a dismissal. So take the formal process seriously.

### 5. The informal disciplinary process:

During this stage an allegation is made against one or more of your members. Someone might have reported wrong behaviour from a worker to the employer or the employer might have reasonable suspicion that something against company policy was committed by one of the workers. It might be that they suspect one of the employees to have broken a rule but that the misconduct is not of a serious nature or someone could have reported a minor transgression.

The Code Of Good Practice: Dismissal in the Labour Relations Act stipulates that it is not always necessary to invoke formal disciplinary processes every time a rule was broken or a standard has not been met. It all depends on the seriousness of the offence. If it is a minor offence, the matter can be dealt with informally between the supervisor, the accused employee and his representative.

The employer or the employee may even choose to bring a witness in support of their argument. It should be noted that this type of informal setting does not allow a situation where a witness for either side is lead into evidence and cross-examined. In this process the supervisor or you as the shop steward, on behalf of the employee, can simply ask a witness to say what his or her involvement was in the matter.

It might be that your member is accused of swearing at a fellow employee and the witness is only there to either confirm your side of the story or to confirm the story of the employer. After the witness has told what he saw or heard, he or she can be excused.

The informal disciplinary process is aimed at correcting the behaviour of the employee in a progressive manner. The progressive steps can be in the form of a counseling session, a verbal warning, a written warning or a final written warning.

It is not necessary for the employer to rigidly follow the progressive steps by starting with counseling and moving gradually up until the worker has done
enough things wrong to finally get a final written warning. It all depends on the circumstances of the misconduct.

For example, if a worker comes late for the first time, he will most probably be issued with a verbal warning or even get a lesser form of corrective discipline by being counselled by the supervisor if he can provide a reasonable explanation. It might be that the train was late but this is not always an acceptable excuse because the worker can take an earlier train or get to work by other means. An employee’s travelling problems has nothing to do with the employer. He/she must see to it to get in work on time. But be that as it may, say it was a valid explanation at the time.

On the other hand, you might have a worker coming late but who refused to give a reasonable explanation and for this misconduct, receives a written warning from the employer. So you can see how two very same situations might have two very different outcomes. In the first example, the employee came late and provided an acceptable explanation but in the second example, the worker refuses or failed to give an acceptable explanation. These are just two examples to illustrate that warnings are not necessarily given in a particular order. It depends on the circumstances of the incident.

Let’s make another example. Say for instance, one of the workers arrives late, just like the other two examples mentioned above, and he also did not provide a reason for his lateness. Let’s say this worker is a delivery driver and because of his lateness the truck could not go out in time and some orders could not be delivered in time and in the process the employer lost some clients. When deciding on appropriate disciplinary action, the employer will also consider the potential damage or actual damage caused by the misconduct.

This employee might receive a final written warning as a means of taking steps progressively. This is just another example but the circumstances of each individual matter will determine what informal progressive step should be taken. Like I said before, a formal disciplinary process will be reserved for more serious offences where there is a strong possibility of dismissal.

What is of importance to you as a shop steward to remember is, it is not always in the best interest of the member or the union just to merely deny or even lie about the allegations. If you find that there is enough evidence and truth in the matter, it is your duty to inform the member accordingly and try to resolve the matter as soon as possible informally instead of lying on his behalf.

If the worker is wrong, you as the shop steward should not encourage the member to lie about his actions but rather to assist the member in finding a suitable solution to the problem. Do not lie on behalf of your member. Think of your own credibility as well as that of your union. Your duty as a
shop steward is not to lie but to protect the interest of the employee. If the employee insists that you lie on his or her behalf, he or she can find someone else to represent him or her.

Shop stewards still remain employees and you, like your members, want to progress in your career. You do not want to be seen as a dishonest person. As a matter of importance, a shop steward has been dismissed for willfully lying in arbitration and the Labour Court has confirmed or agreed to the dismissal. This just shows you the importance of not lying on behalf of union members but rather stick to the truth.

As a shop steward it is of utmost importance to familiarize yourself with cases involving discipline being taken against shop stewards. Shop stewards are allowed some leeway but again; never forget that you remain an employee. Do not let the fact that you are an employee restrict you in doing your job as a shop steward but exercise your duties with dignity, self-respect and based on good faith.

As you can see from the above explanation, the purpose of informal discipline is not aimed at punishing the employee but to gradually bring the employee back to an acceptable standard and in line with what is expected of him by the employer.

As much as we want to believe it as shop stewards but the employer is not always wrong. It is the prerogative of the employer to apply discipline. Your duty as the shop steward is to ensure that the employer applies it fairly. The emphasis is on fairness.

Members must be allowed to be represented during any step of the informal disciplinary process. Do not allow the supervisor or management to refuse your member representation because it is your right to be represented and not a privilege. Also do not allow the supervisor to be prescriptive as to who might represent your member and who might not. It is up to the member to decide that and never the supervisor.

The Labour Relations Act in section 14(5) allows the shop steward to take time off from normal duties as a worker to represent union members. We will deal with this in more detail when we discuss the LRA and your organizational rights and statutory duties as a shop steward.

6. Phases of the disciplinary process

To make it easier for you understand, think of discipline in three stages and deal with it in that fashion. Each phase of the process has its own pros and cons. It will make it easier for you as the shop steward to observe and to make sure that the employer followed fair processes and procedures. It will also

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make it easier for you to have a more structured approach to disciplinary hearings and thereby preventing you from preparing haphazardly.

6.1 Pre-hearing phase:

The investigation

It is during this phase that an allegation of misconduct is made against the worker by the employer. The employer, during this phase, tries to get as much information as possible on the allegation. If there is prima facie (on face value) or sufficient evidence to show that the employee could have misbehaved, he or she gets called in to answer or respond to the allegation.

Based on their response and depending on the seriousness of the allegation, the employer makes a decision whether to institute an informal or formal disciplinary process.

Should the employer decide on an informal process, the matter can be finalised there and then, as explained above. If the employer decides on the formal process the matter will most probably be investigated further.

After the investigation, charges will be formulated and the employee will be informed of the allegations against him/her. He/she will also be informed of the right to a representative and the date and time of the formal hearing will be communicated to him/her. As the representative of the employee you should be kept informed by the worker of all communications from the employer.

The employer representative will arrange the venue as well as a chairperson and the employee will be furnished with copies of all evidence that might be used against him/her in order to prepare for the hearing.

Your involvement as a shop steward at this stage is vitally important. During this stage the employer appoints an investigator to interview possible witnesses and obtain statements to be used in the formal disciplinary process. These investigators are most of the time the supervisor of the worker or someone from the management team. Quite often, these investigators also represent the employer in the formal disciplinary process.

I have a serious problem with this because investigators who subsequently represent the employer are not always objective during the investigation and that should not be the case. Whoever does the investigation is supposed to be objective and neutral. An investigator who also acts as the representative of the employer has the opportunity to manipulate the investigation process. Let me tell you why I say so.

The job of the investigator is ultimately to collect evidence to either support the allegations made by the employer or to disprove the allegations. After the investigation the investigator is supposed to make recommendations to the employer as to whether there is enough evidence to proceed with a formal disciplinary hearing. The investigator only makes a recommendation but the final decision to charge your member still lies with management.
It might be that investigators find evidence in support of the worker but hide it or do not mention it in their report. It might be that the investigator wants to find favour with the employer and thus do not do an objective investigation.

These investigators work for and are paid by the employer. Their allegiance is with the employer and not the worker. Company prosecutors are mandated by the employers to prove your guilt therefore any evidence that he might come across during the investigation that might favour your case might be withheld from you and your member.

Their job and mandate (instruction) is to prove your member guilty and they might do everything in their power to impress the bosses. It is up to you as the representative to insist that an independent person do the investigation and that a copy of the outcome is handed to you as the shop steward of the member.

It is also strongly advised that you incorporate the neutrality of the investigating officer in your disciplinary code. If the investigating officer is also the company representative, chances are that you might not get a fair trial for your member on the basis that certain information can be withheld by the investigator acting also as company prosecutor. Therefore, you should insist that the investigating officer and the company prosecutor should preferably be different people, especially in serious cases that might lead to a dismissal.

It is expected of you as the trade union representative to act in good faith. Do you really think that company prosecutors act in good faith? They have a mandated position and that is to prove at all costs that your member is guilty. To achieve this, some company prosecutors will go out of their way to prove the employer’s case. These people are not your friend in a disciplinary hearing, so do not trust them.

That is why shop stewards should do their own investigation into the matter as well. The LRA allows you time off to do that. Read again Section 14 and 15 of the Labour Relations Act as well as your recognition agreement.

If the recommendation from the investigator is to proceed with a formal disciplinary hearing, a charge sheet with the charges, date and time of hearing will be drawn up and be handed to your member who is being charged. He/she will be requested to sign for these documents. If your member refuses to sign for the documents, it means nothing. The documents will be considered served on your member and the employer will simply get a witness to confirm that the documents were handed over.

Copies of all other documentary evidence that the employer intend to use in the disciplinary hearing should also be handed to the accused employee.

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4 Company prosecutor, initiator, and employer representative are all one and the same person.

5 A Recognition Agreement contains all the rights that you might have in the workplace. This is a collective agreement between your union and management. If you do not have a copy, get one immediately.
You are entitled to all these documents in order to properly prepare a defense for the member that you are representing. Some employers withhold this documentary evidence as a means to surprise you in the disciplinary hearing. This is not acceptable and you should be provided in advance with these documents. Insist on it before the hearing.

Access to information in preparation for the hearing

In terms of Section 16(2) of the LRA you are entitled to all relevant information in order to effectively represent your member as prescribed by Section 14(4) of the LRA. You need to read Section 16(2) of the LRA together with Section 14(4) of the LRA.

Do not get confused. Section 14(4) tells you what you are entitled to do as a shop steward and Section 16(2) tells you what information you are entitled to in order to perform your functions as a trade union representative.6

You are only entitled to information that is relevant to the matter and nothing else. For example, if one of your members has been charged with theft, which is a very serious offence, you will for instance not be entitled to see how much profit the company is making to justify the theft.

In terms of Section 16(5) of the LRA you are not allowed to the following types of information.

- Information that is legally privileged7
- Information that is prohibited by law or a court8
- Confidential information, if disclosed, may cause harm to an employee or the employer
- Private or personal information of an employee unless the employee give consent for you to have this information.

Preparing yourself for the hearing

Stage one is also where you need to prepare yourself properly for defending your member in the disciplinary hearing. You need to consult extensively with the member and do your own investigation. Try to get as many witnesses as possible to disprove the allegations of the employer. Getting witnesses to

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6 A trade union representative and a shop steward is one and the same person. The Labour Relations Act nowhere refers to a shop steward but only a trade union representative. So whenever the LRA or myself refers to a trade union representative, both the LRA and I talk about a shop steward. You are a very important person in terms of the LRA and other labour laws and never forget that.

7 Legally privileged, for example, refers to a situation where the employer consulted with an attorney regarding a particular matter and you requested the written response from the attorney. That information will be legally privileged and you will not be entitled to it.

8 Information that is prohibited by law or a court might refer to the HIV status of a particular employee. You will also not be entitled to this kind of information.
testify in defense of your member is sometimes very difficult because the witnesses are afraid of losing their jobs or are afraid to go against management.

It might also happen that your witnesses are threatened with disciplinary action against themselves if they co-operate with you in defense. Should you become aware of any threats of this nature, you should put it on record in the disciplinary hearing because you are going to need this information in the arbitration if your member is dismissed. Threats and interference with your witnesses by the employer will be unfair.

If at all possible, try to obtain statements from your own witnesses because they can tell you one thing now but in the hearing they might change their story. At least if you have a statement, the contradiction in testimony can be pointed out. It might be that your witnesses were influenced by management to change their testimony.

One of the areas where most shop stewards fail is in leading their witnesses in the hearing and cross-examination. It is for this reason that shop stewards should properly prepare questions for your own witnesses as well as that of the employer witnesses. Write the questions down in preparation. Go over the questions with your witnesses.

Do not prepare your witnesses by telling them what to say and what their answers should be to your questions. Also do not tell your witnesses to lie in the disciplinary hearing. Prepare your witnesses properly. You can formulate questions for cross-examination by reading the witness statements from the employer. If witness statements were not handed to you prior to the hearing, you can always request a postponement or a short break from the chairperson to allow you to prepare for cross-examination after the employer witness gave testimony.

If documentary evidence were not handed to you before the hearing, you must ask for a postponement on the day of the hearing. If the chairperson insists on reasons for the postponement, inform him that you could not prepare yourself properly because certain documents, like statements from the employer witnesses, were not handed to you before the hearing. Therefore you need time to go over the testimony and statements from witnesses to properly prepare your member’s case in defence.

**Plea-bargaining**

At this stage you can also consider ‘plea bargaining’. Remember what I said about lying for your member in a disciplinary hearing. A trade union is not insurance for members to do as they please and then expect you as the shop steward to get them off the hook at all costs.

Your duty as a shop steward is to lead and give guidance where necessary. If you are of the opinion, after reading through all the evidence, that your member could have committed a serious offence that might lead to a dismissal, plea-bargain. Never use plea-bargaining as a quick way to get out of a
disciplinary hearing. Try to bargain your member out of a possible dismissal only if you see that the evidence against him/her is overwhelming.

Plea-bargaining means in essence that you, on behalf of the employee, and the employer representative agree to a particular sanction (penalty) in exchange for a plea of guilty. In other words you agree with the employer representative to plead guilty in the hearing and in return the employer representative will agree to a particular sanction other than dismissal. An example of an alternative to a dismissal might be a suspension without pay for a few weeks or so. Even a demotion as opposed to a dismissal might be acceptable.

The problem with plea-bargaining in our country is that it is not legally binding and the chairperson has the final say. It means that even if you and the employer representative agree to a particular sanction in exchange for admitting the offence, the chairperson can still decide to dismiss your member. You should endeavour to make plea-bargaining binding in terms of your disciplinary code.

If you plea bargained with the company representative you should inform the chairperson of such when he ask you or your member whether you admit or deny the charges. It will be at this stage where you inform the chairperson that you plead guilty as a result of a plea arrangement. It is a bit risky but less risky than going through an entire disciplinary process and having your member dismissed anyway.

If the chairperson dismisses your member even after you have plea-bargained with the company representative, chances are that he would have dismissed your member anyway even with a not guilty plea and going through the whole disciplinary process. The advantage of plea-bargaining, if successful, is that you save the worker from losing his job. You can only agree to plea-bargain with the permission of the member.

Sometimes it is advisable to test the water by proposing a plea arrangement to the employer representative. If the employer representative does not agree, it will give you an indication of how strong they feel about the matter. If plea-bargaining does not succeed you need to prepare yourself properly to proceed to the next phase in the disciplinary process.

6.2 Hearing phase:

This phase is the actual disciplinary hearing and the entire process is outlined as follows. The process might differ slightly from company to company and the following is a general description of the procedures followed in a formal process.

Steps in a formal disciplinary hearing:

1. The chairperson welcomes everyone and introduces him/herself and requests all parties present to do the same. You will introduce yourself as the representative of the alleged offender and name the organization
(trade union) that you are from. The worker will also introduce himself and the employer representative will do the same for record purposes.

2. The chairperson will explain the process to be followed and ascertain certain issues:
   — He will remind the worker of his/her right to representation
   — He will enquire whether the employee received the disciplinary notices in time and whether he had enough time to prepare. Notices of the disciplinary hearing normally are issued to the employee between 3 – 5 days prior to the hearing.
   — The chairperson will also enquire whether the employee needs and interpreter. If necessary, the employer must arrange one.
   — The chairperson will also enquire whether there are any other outstanding issues that need to be addressed first before continuing (points in limine).

3. The chairperson or the company prosecutor will read the charges and the chairperson will enquire whether the employee understands the charges. Saying yes does not mean that you admit to the charges. It only means that you know understand what the hearing is for.

4. After the employee indicated that he understands the charges, the chairperson will request the worker to plead to the charges. You, as the shop steward, can either deny or admit the allegations on behalf of the employee. In most cases the worker pleads ‘guilty’ or ‘not guilty’.

5. After the employee has pleaded not guilty, the company prosecutor or initiator is requested by the chairperson to make his opening statement. If the employee pleads guilty, the process from here differs. Only if the employee pleads not guilty then the steps continue as follows.

6. After the company prosecutor you will be allowed to make an opening statement.

7. The chairperson then requests the initiator or company representative to present his case. The company prosecutor will present his case as follows:
   — He will call and question witnesses. He may not ask leading questions.
   — You as the representative of the employee will be given the opportunity to cross-examine the company’s witnesses. You may ask leading questions.
   — The company representative will, after your cross-examination, re-examine his witnesses.
   — The chairperson may also ask questions for clarity from the employer’s witnesses as well as your witnesses.

8. After presenting his case through witnesses and documents handed in, the company representative closes his case. Here, you may ask for a postponement to another date or call for a break before presenting your member’s case.
9. After re-convening you will be afforded the opportunity to present your member’s case.
   — You will call and question witnesses. Your member who has been charged must testify first. No leading questions are allowed.
   — The company representative will be allowed to cross-examine your witnesses. He may ask leading questions.
   — You will be given the opportunity to re-examine your witnesses.
   — The chairperson may ask questions for clarity. The chairperson is not allowed to interrogate your member on behalf of the employer. If he is not clear about something, he may ask the witness to explain a little bit more. The chairperson is supposed to be neutral and is under no circumstances allowed to take sides with the employer representative or with you.

10. When you are finished leading your witnesses in defence of your member you close your case as well.

11. At this stage the employer will request you as well as the employer representative to submit closing arguments. You are not allowed to come up with new evidence and can only provide closing arguments about the evidence that has been led during the hearing and that applies to the company representative or company prosecutor as well. You may request the chairperson to provide your closing arguments in writing. If it is a simple matter, you may request a short break in which to prepare your closing arguments. The hearing is adjourned or postponed for this purpose. It also gives the chairperson the opportunity to go over all the evidence and testimonies in order to make a finding of guilty or not guilty after both you and the employer representative have submitted your closing arguments, either in writing or in person.

12. The chairperson will reconvene the meeting after both of you submitted your closing arguments and convey his finding of guilty or not guilty to you and your member. If your member is found not guilty he will be acquitted and the hearing ends here. If he finds the employee guilty the hearing will continue as follows.

13. The chairperson will request you to provide factors in mitigation to assist him in deciding on the appropriate sanction. The company prosecutor will be requested to provide aggravating factors.

14. The chairperson will adjourn or postpone the hearing again to consider both the factors in mitigation as well as the aggravating factors before deciding on an appropriate sanction (penalty).

15. The chairperson will reconvene the hearing after considering the mitigating and aggravating factors and inform parties of his decision of what the appropriate sanction under the circumstances will be. It can be anything from a verbal, a written or final written warning, a suspension without salary, a dismissal or a combination of these sanctions. For example, a
chairperson might suspend an employee without salary for two weeks, as an alternative to dismissal, and issue a final written warning.

16. The chairperson will inform your member of his/her right to appeal (if you have an appeals process) or inform you of your right to challenge his decision in a bargaining council or, if there is no bargaining council, you must refer the matter to the CCMA. This will be the end of the disciplinary hearing.

7. What happens if the employee pleads guilty?
If the employee has pleaded guilty, the process will proceed up to point 4 but will differ from point 5 onwards. The following process is followed from point 5 onwards when the worker pleads guilty or admits the charges:

5. After the employee has pleaded guilty or admitted the charges, the chairperson may (or may not) request the company prosecutor to give a brief overview of the alleged misconduct.

6. The chairperson will enquire whether the worker agrees with what has happened. If the worker agrees, the chairperson will record a plea of guilty.

7. The chairperson will request you or your member to provide factors in mitigation before deciding on a sanction. He/she will also ask the company representative to address him/her on aggravating factors. The chairperson will then consider these factors and inform parties of his decision in terms of an appropriate sanction.

8. The worker will be informed of his right to challenge the sanction in an appeal application, bargaining council or CCMA. This will end the hearing.

You cannot appeal on the guilty verdict if you pleaded guilty but you can still appeal on the sanction if you have an appeals process. Or you can challenge the harshness of a sanction (e.g. dismissal) in the bargaining council or the CCMA, if you do not belong to a bargaining council.

7.1 Post-hearing phase:
What happens after the hearing is finalized? Is it the end of the matter or not?

Sue or lay a criminal case against the employer?
If your member was found not guilty, this is the end of the hearing and everything continues as normal. However, quite often you will find workers who were departmentally charged and ultimately found not guilty feeling very unhappy and hurt and wants to sue the employer for damages in a civil case for defamation of character or even make a criminal case against the employer.
I cannot think of any employee who succeeded with such action before but on the other hand I am not a civil or criminal law expert and honestly do not know what your chances of success will be. At least I assume you need to prove that the employer was frivolous and vexatious. The latter might be very difficult to prove, especially if there was sufficient reason, from the employer’s side, to believe that your member might have been the guilty party. Besides, civil cases are very costly.

Your duty as a shop steward is to ensure that the employee is treated fairly as prescribed by our labour laws and collective agreements. If the employee feels that he wishes to challenge the action of the employer in a civil or a criminal court, this has nothing to do with you as a shop steward or the trade union for that matter.

Your advice to the member will be to speak to a lawyer and inform him that your role as a shop steward is restricted to workplace issues in terms of labour law.

Now let’s get back to what happens after the hearing. Like I said, if your member was found not guilty the process ends there. But if he was found guilty, the decision of the chairperson is not the end and can still be challenged.

*Appeals process*

The Labour Relations Act does not make any provision for an appeals process but not to worry, you still have legal recourse. In bigger organizations you might find that the disciplinary codes make provision for an appeals process. An appeal means that you are unhappy about the outcome of the disciplinary hearing. Therefore you appeal to higher authority (someone more senior than the presiding officer) to reconsider the decision.

For example, if the chairperson dismissed you, you will, in writing, request a more senior supervisor/manager to overturn the decision of the chairperson. The more senior manager might agree with you and change the decision of dismissal to a final written warning.

If you have an appeal process in your disciplinary code, the sanction cannot be implemented before the outcome of the appeal.

Even if you do not have an appeals process in your disciplinary code, there is nothing stopping you from appealing to senior management to reconsider the dismissal by the chairperson. Such appeals are very often successful. If the more senior manager then indicates that he/she is going to consider the appeal, then the sanction, in this case also, cannot be implemented until after the manager has come to a decision.

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9 Legal recourse means that you still have the opportunity to challenge the decision of the employer through other legal channels like the bargaining council or CCMA for example or even the Labour Court.
If you do not have an appeals process in your disciplinary code and you do not want to request a more senior manager to reconsider the decision from the chairperson, then you can refer your dismissal to the CCMA or your bargaining council as an unfair dismissal dispute.

If you do have an appeals process in your disciplinary code, it is advisable that you exhaust this internal process first before you refer the matter to the bargaining council or CCMA.

As a shop steward you need to assist the member in drafting a proper appeal. When you appeal, you are basically saying that the decision of the chairperson was procedurally and/or substantively unfair. You need to give detailed reasons why you think the decision of the chairperson in the hearing was unfair. Write your reasons down.

The more senior manager might decide to change the dismissal to a more lenient sanction or he might order a complete new hearing with a different chairperson, especially if the hearing was procedurally unfair or if the chairperson was biased.

The hearing then starts de novo (from the beginning) as if there was no hearing before or the senior manager can arrange a hearing only to consider the grounds for appeal. Your appeal application might look something like the following. This is just an example. Depending on the circumstances, your appeal will be much more structured or detailed.

Dear Mr Sithole
On (… date …) I was found guilty in a disciplinary hearing and sanctioned to a dismissal. I was represented by Mr Bongani from the General Workers Union. I would like to appeal the decision of the presiding officer, Mr. Grey, on the following grounds:

1. Procedural issues:
   1.1 I was informed of the date of the hearing only one day before the time and did not have enough time to prepare a proper defense. The chairperson unfairly refused to allow a postponement and in terms of our Disciplinary Code I should have been allowed at least 5 days to prepare.
   1.2 The chairperson did not allow me to cross-examine the company witnesses on certain issues.
   1.3 I could not understand the proceedings. I informed the chairperson as such but he refused to allow an interpreter.
   1.4 I was not given the opportunity to argue factors in mitigation.

2. Substantive issues
   2.1 At the time of the incident I was not even at work because I was sent by my supervisor to do an urgent delivery and came back just before closing time.
2.2 The chairperson did not take the testimony of my witnesses into consideration because he was of the opinion that they all lie on my behalf but there was no evidence led in this regard.

2.3 I was also wrongly charged for stealing and eating a pie but the evidence led was that someone took a milk tart from the fridge.

3. Outcome required

3.1 The hearing was therefore substantively and procedurally unfair.

3.2 It is my request that the decision of the chairperson be reconsidered and that the decision of dismissal be set aside and that I be reinstated retrospectively.

Respectfully yours

John Smith

Date)

CCMA or Bargaining Council Conciliation/Arbitrations

If you do not have an appeals process then the matter will be referred to the bargaining council as an unfair dismissal dispute. If you do not belong to any bargaining council, the matter will then be referred to the CCMA as an unfair dismissal. If you do not have experience in arbitrations, please do not gamble with the future of your member.

The bargaining council or the CCMA will conciliate the dispute before arbitrating. Conciliation is an informal process prior to arbitration where parties get together and the arbitrator try in a final attempt to get a settlement between the parties. If the conciliation fails, the matter will proceed to arbitration.

It is advisable to accompany the more experienced shop stewards to arbitration hearings first before you attempt it on your own. Alternatively, you can go to the CCMA in your free time and just observe how it is done. You need to get permission from the CCMA commissioner first to sit in as an observer.

Most arbitrators, if not all of them, will allow you to observe the process but some arbitration hearings might be about a sensitive issue and the applicant might feel uncomfortable with outside people in the arbitration. Just find another arbitration hearing.

Arbitrations are a lot more formal than a disciplinary hearing with a lot more rules. Before attempting arbitrations in the CCMA, you should familiarize yourself first with the CCMA rules. The CCMA is very strict in complying with these rules. Copies of the CCMA rules and all other labour laws can be obtained from the government printers for a few rands or can be downloaded for free from the government web sites on the internet. Bookshops also sell pocket size booklets of all labour laws, including the CCMA rules.

If an unfair dismissal is referred to the bargaining council or CCMA for arbitration, the decision taken by the arbitrator is final. However, the decision
cannot be taken on appeal but can be reviewed by the Labour Court on certain
grounds as set out in Section 145(2) of the LRA. These grounds are as follows:
‘… (a) that the commissioner —  
(i) committed misconduct in relation to the duties of the commissioner as an
arbiter;  
(ii) committed a gross irregularity in the conduct of the arbitration proceed-
ings; or  
(iii) exceeded the commissioner’s powers; or  
(b) that the award has been improperly obtained.’

If you challenge the dismissal on procedural unfairness alone and you succeed,
your member will only be awarded compensation. Procedural irregularities do
not nullify the conduct of the employee. What it means is that if it was proven
on a balance of probabilities that your member is guilty of the misconduct
but that proper procedures were not followed, he will not be reinstated but
will get compensated up to a maximum of 12 months’ salary in the case of
misconduct dismissals.

Only if substantive unfairness has been proven, does your member get
reinstated. So if you want your member to be reinstated, do not concentrate
on the procedural unfairness alone. You need to prove that the reason for the
dismissal was unfair as well as the procedure followed. If you fail to prove
substantive unfairness, you might succeed in proving procedural unfairness
and your member can still gain from the process.

However, if the conduct committed far outweighs the procedural irregular-
ity, the chances of getting compensation in arbitration, based on flawed pro-
cedures, are slim. The Commissioner will take into consideration the impact
of the procedural irregularity in comparison with the severity of the miscon-
duct committed.

Labour Court

The following types of dismissals must be referred to the Labour Court
for adjudication and nor the CCMA neither the bargaining councils have
jurisdiction.

* All dismissals that is automatically unfair as listed in Section 187 of the
LRA,
* Operational requirement dismissals (retrenchments),
* A dismissal based on strikes; and
* Dismissals based on the fact that membership by the union was refused in
terms of a closed shop agreement.

If any matter, whether it be a dismissal or otherwise, needs to be referred to
the Labour Court get your branch, regional or provincial leadership involved.
Do not attempt to handle the matter in the Labour Court on your own
without having the necessary experience. Rather refer the matter to the legal department of your union or have the matter handed over to a legal person. Before a matter can be referred to the Labour Court it must be referred to the CCMA first which will attempt to resolve the matter through conciliation\(^{10}\). If conciliation fails, it will be referred to the Labour Court for adjudication\(^{11}\).

8. Commenting on the formal disciplinary process (phase two)

I wish to make some comments on the formal disciplinary process as outlined in stage two and I want you to give careful attention to what I have to say. You will not become an expert in handling disciplinary hearings overnight. I can only attempt with this book to lay the foundation and you need to build further on your own development as far as handling formal disciplinary hearings are concerned.

8.1 Role of the chairperson in the formal hearing

The chairperson in the formal disciplinary hearing must be impartial. In other words he or she cannot take any sides. There is the tendency of chairpersons to take the side of the employer because most of the time the chairperson is from the ranks of management and do not clearly understand his role in a disciplinary hearing. If it appears that the chairperson takes sides with the employer representative you must request him to recuse or withdraw himself on the basis that he shows bias.

Bias means taking sides and the chairperson is not allowed to do it. If the chairperson refuses to recuse himself (withdraw from the hearing) make sure that you place it on record. A refusal of recusal on very good grounds is a clear indication of what the outcome of the hearing is going to be. A disciplinary hearing has been found to be procedurally unfair because the presiding officer\(^{12}\) showed to be taking sides.\(^{13}\)

A shop steward must not communicate with the presiding officer outside of the hearing and the same applies to the employer representative. If you see the two of them into a discussion outside of the hearing, you must request the presiding officer to recuse himself because for what reason would he communicate with the employer representative? Chances are that they might have

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\(^{10}\) Conciliation is an informal process just before arbitration to see whether parties cannot resolve the matter. The discussion in the conciliation is without prejudice. It means that whatever is discussed during conciliation cannot be held against each other in the arbitration hearing.

\(^{11}\) Adjudication means to judge or settle a matter in the Labour Court.

\(^{12}\) A presiding officer and a chairperson is one and the same person, only different terminologies are used.

\(^{13}\) Madondo v SA Breweries [2001] 8 BALR 875 (CCMA).
discussed the case. The presiding officer needs to maintain his impartiality at all times.

8.2 Opening statement

An opening statement gives a very brief summary of what has happened from your point of view. In the opening statement you will also list the issues that are in dispute (the facts that you disagree on) and those that are not in dispute. You also need to briefly outline to the presiding officer how you intend to disprove the allegations of the employer.

It is also a good idea to mention the number of witnesses you intend to call in defense of your member.

An opening statement gives the chairperson an idea of what you intend to prove and it will also give you some direction on how you need to disprove the allegations of the employer. Use your opening statement as a yardstick to measure whether you have covered everything in order to prove your case. The matter at hand will depend on the length and contents of your opening statement.

Use the opening statement as a checklist of what you need to prove in the hearing. Prepare the opening statement well in advance in much the same way as you would prepare the questions that you want to ask the witnesses. Write it all down for your own purpose. You must give the chairperson and the employer representative a copy of your written opening statement if you are going to read it out. Don’t give any of them the list of questions that you wrote down for yourself.

8.3 Closing arguments

The closing arguments must be based only on evidence that was lead in the hearing. You cannot bring new arguments into your closing arguments. For example, you cannot say that it was proven in the hearing that the incident happened around 13:00 when no one testified to that effect. Your closing arguments should also be linked to your opening statement.

In your opening statement you briefly outline what you intend to prove and in your closing arguments you outlined to the chairperson what you have proven. For example, in your opening statement you said to the chairperson that you intend to prove that your member was not in the office at the time.

In the closing argument you will point out to the chairperson how you have proved that your member was not in the office at that particular time. In other words you will remind the chairperson what you have proved in the hearing.

You will in closing, for example, remind the chairperson that the company’s witness testified, and thus agreed under cross-examination, that your member was not in the office. And so you do it with all other issues that you
have mentioned in your opening statement. Following this method will make it much easier to prove your case.

Let me just recapture the method for you. Firstly, in the opening statement you sort of list all the issues that you think is necessary to prove the innocence of your member without going into detail. Secondly, during the hearing you must structure your defense and cross-examination in such a manner to prove what you have listed in your opening statement.

Lastly, in your closing argument you remind the chairperson of how you have proven what you undertook to do in your opening statement. This way you will have a more structured approach of handling a disciplinary hearing.

In order to have this structured approach to disciplinary hearings it is advisable to list all the things that you need to prove in order to show the innocence of your client. During the hearing you can tick the issues off as you deal with them. In this way it will ensure that you do not leave anything to chance.

8.4 Attendance at the hearing:
The biggest mistake that you, as a shop steward, can make is to walk out of a hearing with your member. That is the one thing that you must never do. The disciplinary hearing is not the end of the process. You can still appeal, if you have an appeals process, or you can refer the matter for conciliation / arbitration.

If the presiding officer shows obvious bias, mention it to him and make sure it is on record. It is going to win your case for you in arbitration. After you have recorded and mentioned your concerns regarding the biasness of the chairperson, request him to recuse himself. If the presiding officer refuses to withdraw from the hearing, continue with the hearing, do not walk out.

If you walk out of a disciplinary hearing, you forfeit your right to challenge the allegations made by the employer and you forfeit your right to state your side of the story. There might be circumstances under which you can walk out of the hearing but to be on the safe side, rather never walk out.

An allegation of bias is not sufficient to ask for a recusal. You must have genuine reasons to believe that the chairperson is bias. For example, he might interfere when you cross-examine witnesses by not allowing certain relevant questions to be asked. In other words he might try to unnecessarily protect the witness against cross-examination.

The presiding officer needs to be totally neutral and therefore should not sit in a hearing and behave like a supervisor or manager. If you pick up that he is behaving like a supervisor or a manager, then he is bias and takes the side of the employer. Place it on record that you have a problem with the way in which the hearing is conducted, especially the attitude of the chairperson and request a recusal.
8.5 Onus of proof: balance of probabilities

The onus in any disciplinary process is on the employer to prove its case. This is based on the principle of those who allegation must prove. The employer has to prove its case on a balance of probabilities. What this means is that a decision is taken by the presiding officer on whose version he believe is the most probable.

In other words, whose version of the events is more believable? Therefore your job as a shop steward in the disciplinary hearing is to prove and convince the presiding officer that your version or the version of your member is more probable or believable than that of the employer.

In a criminal court the finding of the judge of guilty must be ‘beyond reasonable doubt’. This means that there should be no doubt at all otherwise the accused gets the benefit of the doubt and walks free. In a disciplinary hearing this is not the case.

Even if there is some doubt in the disciplinary hearing then the employee can still be found guilty. If it looks probable or reasonably possible for the employee to have committed the alleged offence, that could be enough to make a finding of guilty.

It is for this reason that lawyers in a criminal court will spend most of their time creating doubt because it will benefit their clients. You on the other hand are not a lawyer in a criminal court but a shop steward in a disciplinary hearing. Your job, as opposed to the lawyer, is to create probabilities that your member did not do what he/she is accused of.

You need to create probabilities that will prove the innocence of your member. If the employer try to prove that there is the probability that your member could have committed the offence, it is up to you to prove otherwise by creating a probability that your member did not commit the offence.

The employer might try to prove that your member was the only one in the office at the time that a particular item went missing. Therefore the most probable person to have committed the offence can only be your member. You on the other hand will prove that your member is not the only one with access to that particular office and therefore create the probability that someone else could have taken the item as well.

Can you see now that it is not necessary for a person to be seen committing an offence, circumstances can point that he probably could have done it, whereas in a criminal court this might not be acceptable.

A disciplinary hearing is not a criminal trial. Technical arguments might work in a criminal court but not necessarily in a disciplinary hearing. Stick to the facts of the case and do not concentrate on too many side issues.

You will not succeed in trying to trick the presiding officer by diverting the hearing from the real issues. In the end the presiding officer is going to concentrate on the facts of the matter and make a decision accordingly. Presiding
officers are very competent and clever because they get good training from experts in labour relations and labour law.

If your member is charged with theft, do not try to divert the attention to an old incident of five years ago where your member and the person, who caught and reported him, had an argument and were involved in some skirmish or fight. I say again, stick to the facts of the case and disprove the theft charge.

8.6 The charge sheet

Make sure that you, as the shop steward, and the member both understand the charge sheet. If there is a technicality on the charge sheet or something that is not clear, ask for clarity. Do not attempt to ignore the ambiguity with the intention to come up with technical arguments later that the charge was formulated incorrectly.

For instance, the employer representative might have typed the date incorrectly on the charge sheet. Some inexperienced shop steward might see this as an opportunity from heaven to prove that his member did not commit the alleged offence because on that particular date his member was not at work. This technical argument is not going to hold any water because later on the error will be corrected then the shop steward sit with egg on his face. The mistake might be a bona fide typing error and will not count in your favour. So if something is wrong and not clear on the charge sheet, say so, in order for the employer representative to give clarity.

The presiding officer will ask whether you and the alleged offender understand the charges brought against your member. If you say yes, your technical arguments are not going to hold water. Because by saying yes it means that you know quite well what incident led to the hearing. Besides, unnecessary technical arguments waste valuable time and irritate the presiding officer. I am not saying that you should not argue technicalities but don't waste time with frivolous arguments.

It is important to note that charge sheets or the charges can still be adapted or changed at any stage unless you have pleaded to the charges already. Some shop stewards are under the impression that if you plead not guilty to a wrong charge and gets acquitted (found not guilty) that that is the end of the story. There is nothing stopping the employer from formulating the correct charges and charge your member again on the correct charges. If the charges are completely different this will not amount to double jeopardy.

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14 ‘Bona fide’ is Latin for ‘in good faith’, meaning that there were no ill or bad intentions. As opposed to mala fide, which means the opposite, ‘in bad faith’.


16 Double Jeopardy means being charged for the same offence twice.
Charge sheets and the notice of the disciplinary hearing must be given to your member well in advance. Normally this will be between 3 to 5 days before the hearing or even longer. The intention is to give you and your member enough time to prepare for the hearing. The notice also needs to include the date, time and venue of the hearing. Some charge sheets list the documentary evidence that the employer intends to use in the hearing.

Remember that you are entitled to all documentation that the employer representative is going to use in the disciplinary hearing. If the employer refuses to provide you with this information, put the request in writing and have the employer representative sign receipt of the written request. You need to keep this written request for the arbitration.

8.7 Questioning your witnesses

When presenting your case on behalf of your member, he or she must testify first. This is to prevent your member from adjusting or changing his/her testimony after listening to your other witnesses first. When you present your evidence through witnesses it is important not to ask leading questions. The idea is for your witnesses to tell in their own words what they have seen or heard.

A leading question most of the time is the type of question that one ask that gets answered with a yes. For example, you should not ask, ‘Was the colour of the car blue?’ This is a leading question because you already answered on behalf of your member that the colour was blue and he is just going to say ‘yes’. Your question should be, ‘What was the colour of the car?’ In this way the employee himself can give the colour of the car.

A few more examples:

- Wrong – ‘Did the incident happen at eight o’ clock?’
  Right – ‘What time did the incident happen?’
- Wrong – ‘Was it a t-shirt that he stole?’
  Right – ‘What was the item that he allegedly stole?’
- Wrong – ‘Was Mary with him?’
  Right – ‘Who was with him?’
- Wrong – ‘When he came to work, was there a bottle of brandy in his bag?’
  Right – ‘What did you find in his bag when he came to work?’
- Wrong – ‘When he arrived at work late, was it 08:20 or 08:30?’
  Right – ‘What time did he arrive at work?’

I am sure you get the idea. Leading questions suggest an answer and suggestions are not allowed. That is why I was saying earlier; it will make it a lot easier if you write all the questions down that you intend asking your witnesses before the hearing. In this way you will see beforehand whether it is a leading question or not. You can ask ‘leading questions’ if the answer is common cause (a known fact) and not in dispute.
For example, you can ask from a witness, ‘Are you working for the company for the past ten years?’ or ‘Does your working day start at eight o’clock and ends at five o’clock?’ In both questions the answer might be yes but it will not be a leading question because the answer is a known fact and not in dispute. You are just confirming a known fact. When something is in dispute it means that parties disagree with each other. This is what is called an irrefutable or irrebuttable fact.

### 8.8 Cross-examination

Cross-examination is not easy. You can only become better with time. It is not a skill that can easily be taught by anyone. Therefore I say again, ask for a postponement and think your questions through very thoroughly before you start with your cross-examination. Here are some tips in cross-examining.

- During your cross-examination of the employer witnesses you are allowed to ask leading questions. This is the type of questions that I have mentioned above.
- Do not get into arguments with the company witnesses.
- Never answer any questions from the witness. Tell the witness that you ask the questions and not him or her.
- If a company witness refuses to answer just note it on the record but do not pursue the matter. You will only waste time. You can also request the presiding officer to instruct the witness to answer if the question is relevant and important.
- Try to point out inconsistencies in the statement and the testimony of the witness. Witnesses sometimes give statements before the hearing but testify something else during the actual hearing.
- If a witness has answered you to your satisfaction, do not try to improve on the answer. You heard what you wanted to hear, so move on.
- Always keep calm under all circumstances. The witness is for the employer and will in most cases be unfriendly towards you but you can change this attitude by being nice and friendly.
- Never be rude to a witness. Be very polite. In this way you will achieve much more and the witness will be more open to you.
- Never try to trick the witness. For example, asking if it was a R100 note knowing it was a R200 note in the hope that the witnesses will agree with you. This type of questioning is not allowed.
- Always put your version of the events to the witness and ask the witness to respond to it. For example, ‘Mr Jones, I put it to you that you are lying and that you were at no time even close to the store room. Therefore you could not have seen my member take the item. I also put it to you that you were on your lunch break in the canteen at that particular time. Would you like to respond to that?’
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Putting your version to the employer witness is very important. The response will give an indication whether he was lying and might benefit your member in general. The purpose is also to get some response to determine whose version may be more probable, that of the company witness or that of your member.

It is also important to keep your own record of what witnesses say under cross-examination. You know exactly what your witnesses said but you will not be able to remember what the company witnesses said. You are entitled to a copy of the tape recording but you will not find the time to listen to tapes of a hearing that took three days. You need to have a condensed record of what was said by the company witnesses for your closing arguments. In time you will be experienced enough to write answers down and ask questions at the same time but it is advisable to ask someone to accompany you to take brief notes for you. It is allowed.

8.9 Re-examination

Re-examination is an opportunity for you to ask questions based only on what was asked by the employer representative during cross-examination. You are not allowed to ask new questions. You must remember that the company representative will try to plant certain ideas in the head of the presiding officer by asking tricky questions to your witnesses. Under re-examination it will be your opportunity to rectify and counter the effect of his questions.

Company representatives are very clever and you might not understand at first why they ask the question but you must read between the lines and try to find a link. It is like playing chess, you need to pre-empt or guess the next move or the reason for a particular move. The same applies when your witnesses are cross-examined by the employer representative.

Try to figure out why a particular question was asked and counter it under re-examination. Leading questions under re-examination is not allowed. Although I said earlier that to trick the company witness is not allowed, it does not mean that the company representative is not going to do it either. He might not be as honest as you, so you must be aware and alert at all times.

Say, for example, the employer representative ask your member under cross-examination whether he works next to the store where the item went missing and your member said yes, you need to ask the member under re-examination if he was close to the store on the date that the item went missing from the store.

You must counter all the damaging questions from the employer representative during re-examination, unless it was already clarified by your witness during his main testimony.
8.10 Mitigating factors

Factors in mitigation refer to those issues that you can mention to the chairperson that might influence his decision to consider a more lenient sanction. It is intended to show that your member is not really a bad person but that his conduct was a mistake or as a result of circumstances.

This is not an opportunity to prove or come up with arguments to prove your member’s innocence. He was already found guilty therefore nothing will reverse the guilty finding. It is important to raise factors in mitigation, especially if there is the possibility of a dismissal.

You can also request the chairperson to allow you to submit factors in mitigation in writing. This way you can think it through more clearly. You can also bring in witnesses to testify in mitigation. The witness will testify to your member’s character only and not on issues in defence. This witness can be a supervisor, manager, his mother etc. It can be any person. Factors in mitigation might be the following. This list is not complete.

- The years of service of your member. Maybe he has long service and this was his/her first misconduct after all those years with a clean record
- The fact that he is married with children to support
- He might have a house that he recently bought and still pay off his bond
- Financial commitments and being the only breadwinner that has to support extended family members as well
- The fact that he was remorseful. Remember that remorse is the first step to rehabilitation. Make sure your member does not display arrogance during or after the hearing.
- The fact that there was no damage or loss to the company
- The fact that the stolen items were found
- He/she is prepared to pay for losses suffered by the employer

8.11 Aggravating factors

The company representative will argue aggravating factors. These are factors to show that your member is a troublemaker. He will also try to show that your member is in fact a bad worker who does not have any regard for company rules. Some of his arguments might look as follows. This list is also not complete.

- The employee does not have a clean record and has a warning on his file
- It was not the first time that he committed this type of misconduct
- He was spoken to and counselled regarding his behaviour on numerous occasions
- He did not show any remorse and clearly is not sorry for what he has done.
- He is a senior employee with long service and should have known better.
- He is a supervisor and should have led by example
8.12 Finding and Sanction

The presiding officer will make a finding of guilty or not guilty based on the facts that were presented in the hearing and before deciding on a sanction will take into consideration the mitigating and aggravating factors. For example, the chairperson will consider before sanctioning, the seriousness of the misconduct, the years of service, the remorse shown by the employee and the personal circumstances of the employee. That is why it is important for you to think carefully when presenting facts or evidence in mitigation. This was discussed above.

A sanction refers to the ultimate punishment that a worker receives for his wrongful conduct. After your member has been found guilty, the chairperson will make a decision as to an appropriate sanction. As seen from the above discussion on the purpose of discipline, the punishment part of the sanction is only one element of discipline.

Sanctions vary according to the size of companies and also in terms of what was agreed to in your code of conduct. Smaller family businesses might have a shorter list of possible sanctions, whereas you might find a much longer list of options in the public service.

A sanction must also be consistently applied. What that means is that the employer cannot give a verbal warning to one employee for coming late the first time and on the other hand give a final written warning to another for a similar offence. See also the informal disciplinary process discussed elsewhere in this book.

The sanction must also be in proportion with the misconduct. In other words, the punishment must fit the misconduct. It will, for instance, not make sense to dismiss an employee for coming late the first time. The punishment does not fit the misconduct. It is ridiculous under the circumstances and not proportional to what was done.

Sanctions can be any one of the following or even a combination thereof:

- Counselling
- Verbal warning
- Written warning
- Final written warning
- Suspension without pay for up to three months
- Demotion (only as an alternative to dismissal and with the employee’s consent)
- Dismissal
- A combination of the above

8.13 Reasons for finding

The presiding officer must listen to both sides and come to an objective conclusion. The presiding officer must also give reasons for his decision after all
the facts of both sides have been considered. The reasons for his decision must be in writing.

For example, the presiding officer cannot just find your member guilty without giving any reasons. He needs to justify his decision. He must give detailed reasons why he found your version to be less probable as opposed to that of the employer. His decision must also be objectively based.

8.14 Evidence

Evidence is in a nutshell the documents that you produce in the hearing or the testimony of the witnesses. Evidence presented in a case must be relevant to the issue at hand. You cannot lead evidence on sexual harassment if your member is charged with theft, for example. This evidence might not be relevant and irrelevant evidence will not be allowed in the hearing.

There are different kinds of evidence but discussed below are the most common types of evidence presented in disciplinary hearings.

Direct evidence

This is the statement or testimony of a person who saw for himself what has happened. For example, Jannie saw Bongani and Peter fighting during lunchtime. The evidence of Jannie will be direct evidence.

Hearsay evidence

Hearsay evidence is third party evidence. It is when a person testifies on what he has heard from another person. For example, Jannie testifies to the chairperson that Bongani told him something that might not be true. That evidence of Jannie will be hearsay.

Hearsay evidence is, as a rule, inadmissible but will be allowed under the following circumstances.

Hearsay evidence can be allowed when a particular issue is not in dispute. Say for instance, whatever Bongani told Jannie is not in dispute, then the hearsay evidence of Jannie will be allowed. In other words if any of the parties do not deny what was said, the hearsay evidence will then be admissible.

Hearsay evidence will also be allowed if the parties agree to it. Say for instance, if the other party agrees that Jannie can testify to what he was told by Bongani, then the evidence will be allowed.

The hearsay evidence of Jannie will also be admissible if the third person (Bongani) is also going to testify at a later stage.

Oral evidence

Oral evidence is what the witness testifies in his or her own words. For example, Jannie testifies verbally in the hearing that he saw Peter assaulting Bongani. That is oral evidence.
Documentary evidence

Documentary evidence is very simple. These are the documents handed in at the hearing as evidence. For example, attendance registers, written statements and copies of invoices.

Documents can also not speak for itself. Somebody needs to explain the document and its contents. If the attendance register is handed in to prove absenteeism, the supervisor or manager must come and explain the contents of the attendance register.

It must be the originals and it must be authenticated. In other words someone must testify that the document is genuine. Copies of documents are allowed, provided that there was agreement between parties that the documents are what it purports to be.

If documents are handed in as evidence, the other party is always entitled to a copy. If you, as the shop steward, hands in a statement as evidence, the employer representative must be given a copy of the same document.

Real evidence

Real evidence is a physical object that can be touched, seen, felt and smelled. Examples of real evidence might be the t-shirt that was stolen, the pipe that Peter used to assault Bongani, the half eaten pie with which Susan was caught in the bakery or the toilet role that was found in David’s bag.

Circumstantial evidence

Circumstantial evidence refers to a situation where there is no direct evidence but circumstances are such that it all points to a particular person.

For example, Jannie is accused of stealing two roles of duct tape from the storeroom. There is no real evidence to that effect but Jannie was the only person in the storeroom at the time. This type of evidence is circumstantial but it still needs to be proven that the two roles of tape went missing during the time that Jannie was in the storeroom.

Inspection in loco

Inspection in loco refers to a situation where it is required that the location of where the misconduct took place must be inspected.

For example, the employee may have been charged with damaging company property and the chairperson wants to see the extent of the damage for himself.

Expert evidence

In a nutshell, this is evidence given by an expert on a particular subject, like a doctor, a qualified electrician, a fingerprint expert and a psychologist.

For example, it might be that your member is charged for burning down a building because of negligence. Now you might need an electrician to testify,
as an expert, that it was not because of negligence but because of normal wear and tear.

Or it might be that a nurse is charged with being negligent and thereby causing the death of a patient. You might need a doctor, as an expert witness, to testify that the patient died of natural causes and not because the nurse was negligent.

**Character evidence**

Character evidence refers to the characteristics of a person.

This might be someone’s opinion about another person or testimony about prior good or bad acts by a particular person.

Character evidence, as a rule, is not allowed but if the accused employee testifies how a good person he/she actually is, then the other party will be allowed to bring in evidence to prove otherwise.

**Opinion evidence**

Opinion evidence is when a witness comes to a particular conclusion without substantiating his view. Opinion evidence is not admissible in a disciplinary hearing.

Opinion evidence is, for example, when a nursing assistant testifies that, in her opinion, the patient could have been saved if he received a particular medication. This will be her opinion because the nursing assistant is not a registered and qualified medical practitioner.