

When is hearsay evidence enough in a labour dispute case?

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The Labour Court (LC) in South Africa was recently tasked with considering the weight that should be attached to the transcribed record of an internal disciplinary hearing. Ordinarily, in the absence of the presence of witnesses, a record of oral testimony would not hold much weight or value.



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The LC in *Minister of Police v M* (2017 38 IJL 402) (LC - judgment) highlighted the importance of having a comprehensive and reliable record of internal hearings. In this case a young girl, K, was sexually abused and raped by her father - RM - over a period of four years, starting when she was fourteen years old. During this time, RM was employed as a police officer of the South African Police Service (SAPS). RM, arrested in 2009, faced both a criminal trial and a disciplinary inquiry in which it was alleged that by violating his minor child he had contravened the Code of Conduct of SAPS (Code).

Disciplinary inquiry and arbitration

K testified against her father at the disciplinary inquiry and her testimony was corroborated by two other witnesses. RM's representative cross-examined the witnesses. RM also testified and was cross-examined. RM was found to have contravened the Code and subsequently dismissed. RM, having unsuccessfully appealed, referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council for arbitration.

Since the arbitration constituted a new hearing, the evidence had to be introduced again. K informed SAPS that, due to the trauma experienced during the disciplinary inquiry, she refused to testify again. Despite SAPS requesting subpoenas for K and the other two witnesses to attend the arbitration, they could not be located. SAPS had to rely on the transcripts of the disciplinary inquiry to prove the substantive fairness of RM's dismissal.

SAPS sought to have the transcripts admitted as hearsay evidence on the basis that its admission was in the interests of justice. The commissioner admitted the transcripts as hearsay. However, the commissioner found the weight of the evidence derived from the transcripts against RM "minimal without additional testimony or documents substantiating the allegations". The commissioner, after having found RM's dismissal substantively unfair, reinstated him.

Review in the Labour Court

The Minister of Police instituted review proceedings in the LC. The LC was required to determine whether the commissioner's decision was reasonable. The LC held that the commissioner correctly admitted the transcripts, since they were relevant and SAPS had a good reason for the absence of the original witness. The LC pointed out that, while it may be an error or irregularity to attach too much weight to hearsay evidence, not giving hearsay evidence sufficient weight may also constitute a material error or irregularity.

The LC held that the present case is an example of hearsay evidence not being afforded sufficient weight. The transcripts were “hearsay of a special type”, since they comprise a bilateral and comprehensive record of earlier proceedings in which:

- the victim's evidence was corroborated by at least two other witnesses, with the evidence withstanding rigorous cross-examination; and
- RM's own defence was “ventilated and exposed as being implausible”.

Transcripts, such as the ones in the present case, must be afforded greater intrinsic weight than simple hearsay evidence, because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties.

The LC provided a number of guidelines regarding appropriate factual circumstances justifying departure from the norm of hearsay evidence having less intrinsic weight than non-hearsay evidence. In terms of these guidelines, the hearsay should:

- be contained in a record which is reliable, accurate and complete;
- be tendered on the same factual dispute;
- be bilateral in nature;
- be in respect of the allegations;
- demonstrate internal consistency and some corroboration at the time the hearsay record was created;
- show that the various allegations were adequately tested in cross-examination; and
- have been generated in procedurally proper and fair circumstances.

The LC set aside the commissioner's decision and ordered that the matter be heard again before another commissioner.

Ensure recordings

The judgment highlights the importance of an employer remaining cognisant that it may have to rely on the content of the internal hearing in subsequent challenges. Employers should be encouraged to, as far as possible, make an audio recording of proceedings, which may be transcribed at a later stage. The value of this is not only found in the context of sexual misconduct, such as in the judgment, but also where, for instance, witnesses are untraceable or unable to testify due to psychological trauma, illness, or death.

Reliance on a transcribed record alone, without the relevant witness(es) present, will always be reserved for exceptional circumstances. However, the judgment confirms that it is an available (and feasible) option.

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