

# **WORKL@W'S**

## **DISCIPLINARY SKILLS WORKSHOP**

### **DELEGATES' MANUAL**

#### **MODULE 2: OBTAINING AND ASSESSING EVIDENCE**

- 1. INTRODUCTION**
- 2. APPLICABILITY OF RULES OF EVIDENCE**
- 3. WHAT CONSTITUTES EVIDENCE?**
- 4. ADMISSIBILITY OF EVIDENCE**
- 5. CREDIBILITY OF EVIDENCE**
- 6. TESTING THE EVIDENCE**

**NOTE:** This is one of 4 Modules comprising Worklaw's Disciplinary Skills Workshop. An outline of all 4 Modules is contained at the front of Module 1.

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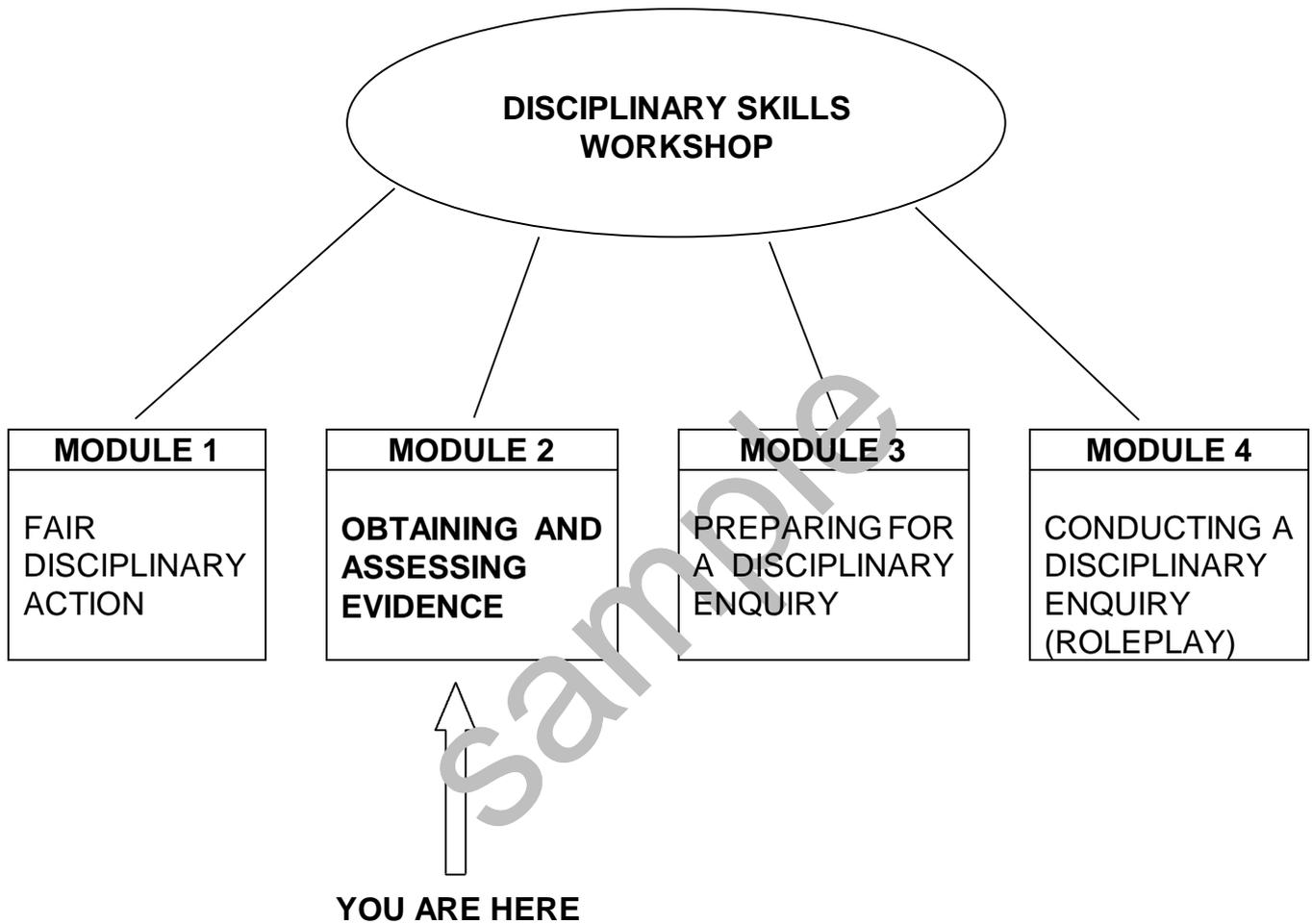
## NATIONAL QUALIFICATIONS FRAMEWORK

The material for the 4 modules consisting the Disciplinary Skills workshop has been developed by Worklaw with the purpose of fulfilling the requirements of the following unit standards:

- n “To institute Disciplinary Action” (No. 10984) which constitutes 8 credits towards-
  - (a) the National Diploma in Human Resources Management and Practices at NQF level 5, and
  - (b) the National Degree in Human Resources Management and Practices at NQF level 6.
  
- n “To Conduct a Disciplinary Hearing” (No. 10985) which constitutes 5 credits towards the National Degree in Human Resources Management and Practices at NQF level 6.

## 1. INTRODUCTION

### 1.1 EXPLAINING THE MODULES



## 1. INTRODUCTION

### 1.2 GROUND RULES

#### § Discussion

- times for starting, finishing and breaks
- control of cellphones
- smoking rules
- other applicable groundrules?

#### § Understanding and Applying the Training Methodology

- Every delegate will be encouraged to participate.
- Delegates will learn as much from each other as from the trainer, through sharing their experience and knowledge.
- The workshop makes extensive use of interactive training methods (roleplays, exercises, case studies etc) to maximise participation.
- We believe this is the best way and the most enjoyable way to ensure that learning takes place.

#### § Course Material

- Delegates will be given handouts during the workshop to supplement the material in their files. The handouts must be filed in numerical order.
- The handouts are not model answers, and merely serve as a “top up” after an issue has been discussed during the workshop.
- The course material is a source of reference for delegates after the workshop. The workshop may not cover every aspect of the written material.

**EXERCISE**

**1. INTRODUCTION**

**1.3 SETTING OBJECTIVES**

Set out below what you hope to achieve during this module:

Sample

## 1. INTRODUCTION

### 1.3 SETTING OBJECTIVES

**The primary objectives of this module are as follows:-**

- § To understand the law of evidence as it applies to disciplinary enquiries;
- § To decide what evidence is admissible;
- § To assess evidence in order to decide whether a particular version is true or not

Sample

<b>EXERCISE</b>
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## 2. APPLICABILITY OF RULES OF EVIDENCE

2.1 Describe what is meant by “the rules of evidence”

2.2 Consider whether the rules of evidence must be applied at-

- disciplinary hearings?
- Arbitrations?
- the Labour Court?

In considering these issues, take into account the following:

**Section 138(1) of the LRA which states - “the Commissioner must conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities”**

**And Item 4(1) of Schedule 8 (Code of Good Practice: Dismissal) of the LRA which states – “normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations.”**

## 2. APPLICABILITY OF RULES OF EVIDENCE

### 2.1 Describe what is meant by “the rules of evidence”

Stratford C.J. (in Tregear vs Goart 1939 AD at page 31 stated the following:

“Substantive law laid down *what* has to be proved in any given issue and by whom, and the rules of evidence relate to the *manner of its proof*”

By this we see that substantive law stipulates what has to be proved (eg the fairness of a dismissal) and the rules of evidence relate to how you prove this. These rules govern what evidence is accepted by a Court (**admissibility**) and how to assess whether the evidence is reliable (**credibility**)

In other words, these rules govern what “information” is taken into account and what persuasive value it has.

### 2.2 Consider whether the rules of evidence must be applied at-

- **disciplinary hearings?**
- **arbitrations?**
- **the Labour Court?**

Clearly the Labour Court has to apply the rules of evidence. A more complex question is the extent to which these rules must be applied at disciplinary hearings and arbitrations. Arbitration is a more formal process than a disciplinary hearing and there would be a greater need to apply rules of evidence at arbitrations than at disciplinary hearings. The extent to which the rules are to be applied at each more formal stage of the process, requires careful consideration.

#### **Disciplinary hearings:**

Item 4 of Schedule 8 to the LRA, the Code of Code Practice: Dismissal highlights that there is no need for a formal enquiry, although the employee should be allowed the opportunity to state a case in response to allegations made. This suggests a relatively informal process, in which the strict rules of evidence do not have to be applied. This means that affidavits or written statements are more likely to be accepted as evidence at these hearings, than would be the case in arbitrations or at the Labour Court. A more relaxed approach may accordingly be adopted regarding admissibility of evidence. If however a chairperson of an enquiry comes to conclusions which are not substantiated by the evidence presented, this is likely to be overturned by an arbitrator or by the Labour Court.

## **2. APPLICABILITY OF RULES OF EVIDENCE (Cont.)**

### **Arbitration:**

Section 138(1) of the LRA suggests the possibility of a relatively informal approach. The problem however is that the Labour Court and Labour Appeal Court in considering review applications, have often adopted a more legalistic approach. Arbitrators are increasingly conscious of the need to conduct the process and make decisions in a manner that is “review proof”. Whilst there will be different approaches adopted by arbitrators to the extent to which the strict rules of evidence need to be applied, arbitrators are increasingly likely to adopt the same approach to the rules of evidence that may be applied by the Labour Court.

### **CONCLUSION**

A more formal approach is adopted as one moves through each stages of the dispute process, beginning with the disciplinary hearing, through arbitration to the Labour Court. A chairperson or arbitrator however runs the risk of being scrutinized by a more senior body that may adopt a more legalistic approach in deciding whether fairness was applied. For these reasons, it is recommended that chairpersons of disciplinary hearings as far as possible follow the basic rules of evidence as are applied in arbitrations and the Labour Court.

It is also important to note that an arbitration constitutes a “hearing de novo” (i.e. a new hearing). This means that it does not constitute a reconsideration of the decision taken by the chairperson of the disciplinary enquiry, but constitutes a totally new hearing at which the arbitrator assesses afresh the evidence led and decides for himself/herself on the fairness of a dismissal. We believe that if the evidence is not going to stand up to scrutiny at the arbitration stage, it would be better to apply a similar approach to the evidence at the internal disciplinary hearing. This is preferable to having the chairperson’s decision overturned at arbitration at a later stage.

### 3. WHAT CONSTITUTES EVIDENCE?

There are many different forms of evidence, each of which may be used to prove/disprove something.

#### **Oral Evidence**

This is the most frequently used form of evidence, and consists of a witness giving evidence, describing what he/she saw, heard, observed etc.

#### **Admissions**

If something is admitted, the chairperson or arbitrator may accept that it has been proved. For these reasons, admissions are a form of evidence. Something may be admitted at any stage of proceedings e.g. during the opening or closing arguments in an arbitration, at a pre-trial conference before a Labour Court hearing or at any stage during a disciplinary hearing. Admissions are often recorded in writing to prove their existence.

#### **Documentary evidence**

This includes documents, photographs, videos and other exhibits. If admitted, they may be accepted as evidence. Alternatively they may have to be proved through a witness (e.g. a person who took the photograph, drafted the document etc).

#### **Inspections in loco**

This involves the disciplinary hearing or the arbitration convening at the scene at which something occurred, and certain observations being made which may have a bearing on the case e.g. the height of a wall or the distance between certain objects. At this inspection, the parties should point out issues they wish to have recorded as evidence (e.g. the fact that you cannot see something from a particular window, when this has been claimed by one of the witnesses). This is then taken into account as evidence.

### 3. WHAT CONSTITUTES EVIDENCE? (Cont.)

#### Presumptions

Certain presumptions exist in law and effectively constitute evidence that should be taken into account. For example, in criminal law it is an irrebuttable presumption that no child under 7 is capable of performing a crime. No evidence can be led to suggest otherwise. It is a rebuttable presumption that a child between 7 and 14 cannot commit a crime. This means that evidence may be led to overturn this presumption. A similar rebuttable presumption exists in terms of section 200A of the LRA, as to who is an employee. Until the contrary is proved, a person is presumed to be an employee in terms of this section if certain circumstances exist.

#### Judicial notice

We all constantly accept or reject proof of things, based on our own “world view”, without being given actual evidence to substantiate those conclusions e.g. we should all accept that it is impossible to run from Durban to Pietermaritzburg in 4 ½ hours (this would break the comrades marathon record by almost an hour), without evidence being necessary to substantiate this.

A chairperson, an arbitrator or a judge may accept the truth of certain facts through “judicial notice”, even though no evidence may have been led to prove those facts. These are generally facts that are so well known as to be obvious, e.g there are seven days in the week, it is dark in Durban by 6p.m. in mid winter, consuming alcohol will at some stage affect a person’s state of mind.

Chairpersons of enquiries should however be careful not to take judicial notice of something based on their perceptions or background, if it does not fit this category. For example, it may be inappropriate for a chairperson to reject the evidence of a witness who says he visited a bank at 8.15 a.m., because it is generally known that banks in South Africa do not open until 9 a.m. The bank may have been providing a particular service to its customers. Also don’t forget that generally regarded presumptions may change over time e.g. we all now accept (hopefully) that the earth is round, whereas this has not always been the case.

# **WORKL@W'S**

## **DISCIPLINARY SKILLS WORKSHOP**

### **TRAINER'S MANUAL**

#### **MODULE 2: OBTAINING AND ASSESSING EVIDENCE**

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#### **NOTE:-**

*This is one of 4 Modules comprising Worklaw's Disciplinary Skills Workshop. If you conduct this workshop on its own, please note the following:-*

- *an outline of all 4 modules is contained at the beginning of Module 1 in the delegates' manual;*
- *you should refer to the pre-workshop instructions contained at the beginning of Module 1 in the trainer's manual*

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## 1. INTRODUCTION

8.30-9.00 (30)

Page 1-6

### **DESIRED OUTCOME**

**For delegates to-**

- **Understand how this module forms part of a 4 module program**
- **Establish ground rules for the workshop**
- **Set objectives for this particular module.**

### **PROCESS**

*The trainer should introduce him/herself and the workshop in a way that establishes credibility for the workshop. If delegates do not know each other, mention that they will have an opportunity to introduce themselves/each other shortly. Refer to Section 1.1 and contextualise this module within the four modules comprising the Disciplinary Skills Workshop. Refer the delegates to the detailed index at the front of their manuals which should give them a "road map" for the workshop.*

*Discuss and agree on applicable ground rules, explain the training methodology to be applied and explain how the course material will be used. (Section 1.2) Move onto the "setting objectives" exercise. If delegates are unknown to each other, you may ask delegates to briefly introduce themselves (name, background, job function, experience etc) **or** the person sitting next to them prior to describing their objectives. Allow a short period for delegates to think about their objectives and then given each delegate an opportunity to briefly describe his/her objectives for this particular module. As each delegate gives input, summarise the group's objectives on flip chart. Advise delegates that you will return to this list of objectives before the end of the module to ensure that these objectives have been achieved.*

*After input from each delegate, distribute the handout summarising the primary objectives of this module. Discuss the extent to which delegates' objectives are different from the objectives in the handout. If so, discuss how delegates' objectives may be achieved. (This may mean you have to adapt sections of the course – be flexible!)*

***If modules are being combined into 1 workshop, adapt this introductory session accordingly e.g. it will obviously not be necessary to re-introduce everybody to each other. But still get delegates to set new objectives for this module, if this was not covered at the beginning of Module 1.***

**2. APPLICABILITY OF RULES OF EVIDENCE****9.00-9.45 (45)****Page 7-9****DESIRED OUTCOME**

*To understand the extent to which the rules of evidence apply at disciplinary hearings.*

**PROCESS**

*Refer delegates to the questions contained in this section. Highlight the need to read the extracts from the legislation referred to. Request delegates to work in large groups (2-3, depending on the size of the class) and to nominate a spokesperson to present their views.*

*Obtain feedback from delegates obtaining answers from different groups to the questions posed. Generate discussion to ensure that delegates understand that the rules of evidence cover both **admissibility** and **credibility**, and the need for a conservative approach in applying the rules of evidence at disciplinary hearings (refer to the conclusion in the handout).*

*Distribute the handout as a top up. Discuss any issues requiring clarification. Ask delegates for their comments on the conclusions contained in the handout. Ensure delegates understand what is meant by a hearing “de novo”.*

*Please note the importance of this section, in influencing how evidence is dealt with at disciplinary enquiries.*

**3. WHAT CONSTITUTES EVIDENCE?****9.45 –10.15 (30)  
Page 10-11****DESIRED OUTCOME*****To understand the different forms of evidence.*****PROCESS**

*Provide brief input on the various forms of evidence contained on the pages opposite. Generate discussion and highlight key issues. Note that this input session should be kept fairly brief.*

*Ensure that delegates understand the meaning of each form of evidence discussed in the delegates manual.*

**TEA****10.15-10.30(15)**