



## EMPLOYEES WHO REFUSE TO TESTIFY

What does one do with whistleblowers who refuse to testify in a disciplinary hearing because they fear intimidation?

In a recent arbitration in the matter of *TAWUSA obo Khumalo & others v Supergroup*, the employer applied to the arbitrator for leave to have the testimony of its main witness (referred to in the proceedings as 'witness X') heard in camera and not in an open forum. The witness was willing to testify, but for fear of his life he was not willing to testify in an open forum. In considering this request the arbitrator requested the respondent to call another witness to testify under oath, and in open forum, regarding the reasons why in camera proceedings were required. This witness was subjected to cross-examination. This witness's evidence was briefly as follows:

- § He was a manager of the respondent and was approached by witness X with information regarding theft.
- § An investigation was conducted based on this information provided by witness X.
- § Witness X's testimony was crucial for the respondent's case as he witnessed certain incidents and overheard certain discussions.
- § Witness X was a reliable employee, but for fear of intimidation and his safety he was not willing to testify in an open forum.
- § The dismissed employees were all gun owners and therefore witness X had reason to believe that his life might be endangered, as his evidence contributed to their dismissals.
- § The witness provided the commissioner with an affidavit deposed to by witness X at the SAPS, although witness X's name was blocked out to protect his identity.
- § The applicant was able to read the affidavit and take note of the evidence contained therein and it was obvious that this evidence was crucial.
- § The witness did however concede under cross-examination that witness X had not been intimidated yet and no SAPS case had been opened.

The arbitrator concluded, after a analysis of the law, that he had a discretion to allow in camera evidence.

He further ruled, based on the considerations outlined above, as well as the fact that the witness's evidence about the events leading to dismissal could be corroborated by verbal evidence of others, he would allow witness X to testify in camera.

The arbitrator accordingly allowed each party an opportunity to prepare questions that he, the arbitrator, would then pose to witness X. He would record the response of witness X and provide feedback to both parties. In this way, the applicant was allowed to 'cross-examine' the witness through the arbitrator.

Employers are often faced with a situation where someone with critical information about the wrongdoing of a colleague 'blows the whistle', but is reluctant to testify against the colleague for fear of intimidation or harm. The case discussed here illustrates two points: first, that employers cannot deny the accused employee the opportunity to see and question his or her accuser based purely on the assumption that the whistleblower is justified in his or her reluctance to testify. A proper foundation for this fear has to be

established. Second, it shows that where there are valid grounds for the witness's concerns, it is possible to design a process that would, on the one hand, provide protection to the reluctant witness, while at the same time giving the alleged transgressor the best possible opportunity of questioning the evidence against him or her. Employers who find themselves stuck in this type of dilemma, would be well advised to seek expert advice.

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