



NAPTOSA Gauteng

National Professional Teachers' Organisation of South Africa

DISCIPLINE: An Introduction to the Rules of Natural Justice

1. What is Natural Justice

In English law, natural justice is technical terminology for the rule against bias and the right to a fair hearing. While the term natural justice is often retained as a general concept, it has largely been replaced and extended by the general "duty to act fairly".

2. The Fundamental Rule of Natural Justice

The maxim means that no person can be a **judge** in his own cause. The fundamental **rule of natural justice** in departmental proceedings is that the disciplinary authority should be impartial and free from bias. It must not be interested in or related with the cause which is being decided by him.

3. What are the two Pillars of Natural Justice

Natural justice is identified with the **two** constituents of a fair hearing, which are :

- the rule against bias (nemo iudex in causa sua, or "no man a **judge** in his own cause"), and
- the right to a fair hearing (audi alteram partem, or "hear the other side").

4. Audi Alteram Partem Rule

Audi alteram partem (or audiatur et altera pars) is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well".

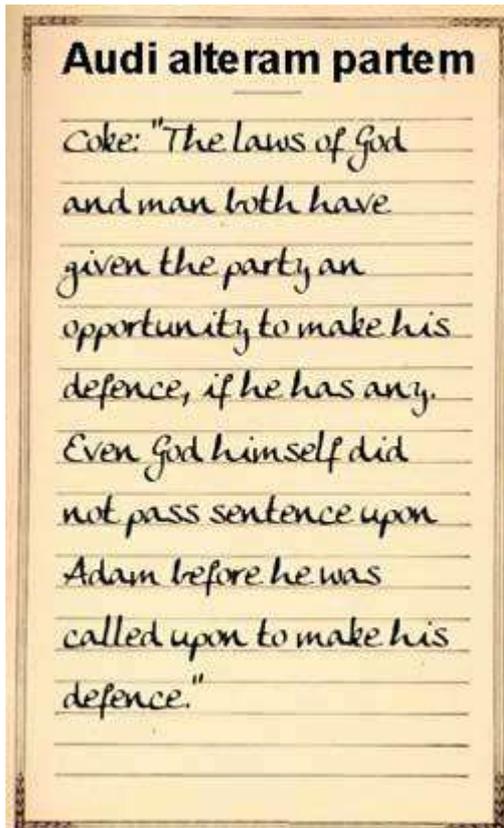
It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

A principle of **natural justice** which prohibits a judicial decision which impacts upon individual rights without giving all parties in the dispute a right to be heard.

Habeas corpus was an early expression of the *audi alteram partem* principle.

In more recent years, it has been extended to include the right to receive notice of a hearing and to be given an opportunity to be represented or heard at that hearing.

5. Justice Bayley (1832) wrote in *Chapel v Child*



Chapel v Child 2 **Cr. & J.** 579 (1832)



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NAPTOSA DISCIPLINE GUIDELINES

DISCIPLINE FOR MEMBERS: WHAT DO YOU DO WHEN THE DEPARTMENT BEGINS TO INSTITUTE CHARGES AGAINST YOU

1. What do you do when you receive an Audi Letter

- 1.1 Read and analyse the allegations that are levelled against you carefully.
- 1.2 Draft your response to these allegations in detail. You must give careful thought to every word that is contained in the allegation.
- 1.3 Then contact the Union so that you can be assisted in making your final response to the allegations. You may contact the Union before drafting your response to the allegations but the Union representative whom will ask you to draft your response before meeting with him/her.
- 1.4 It is advised that you do not respond directly to the Department without going through the Union.
- 1.5 It is also advised that you should not make any written or verbal submission to the Department without getting advice from the Union.
- 1.6 Note that if you make any admissions to the allegations without consulting the Union, the Union will not be able to defend those allegations.

2. What do you do when you receive a Charge Sheet

- 2.1 Call the Union immediately you receive the charge sheet.
- 2.2 A copy of the charge sheet must be e-mailed to the Union for **Attention Chauntal Ross** at email chauntalr@naptosa.org.za or infogauteng@naptosa.org.za.
- 2.3 You will then be allocated a representative who will then call you to make an appointment.
- 2.4 If you are not called immediately then a follow up call should be made to the Union to arrange an appointment with the Union.
- 2.5 It is important that you draw up how your case should be defended and determine what can be used as evidence and who can be called as witnesses. You will be assisted by the NAPTOSA representative to do this but you should give careful thought to this process as it is your case.

3. Preparation for the Hearing

- 3.1 A meeting will be held with representative to determine how the case will be defended.
- 3.2 You will be required to bring in all material that will or can be used in your defence. This may include documents, photos or camera footage amongst others.
- 3.3 You will also be required to provide a list of witnesses that who may be used to provide evidence in your defence. You will have to obtain their consent to participate in the hearing. The Union may assist in this regard.
- 3.4 The evidentiary will have to be compiled into a bundle prior to the pre-hearing and copies will have to be made for the initiator, the presiding officer and witnesses.
- 3.5 Witnesses will have to be prepared prior to the hearing.
- 3.6 You will also have to be prepared to answer questions in the hearing. This is a very stressful process and preparation is key for success.

4. The Parties to the Proceeding

4.1 The Role of the Initiator

- 4.1.1 The initiator is the prosecutor of the case.
- 4.1.2 He / She is the person who has requested for the charges and made the initial draft of the charges.
- 4.1.3 The initiator will lead evidence on the case with his/her witnesses to prove that you are guilty of the allegations levelled against you.
- 4.1.4 The initiator will also cross examine you and your witnesses after they have led evidence.
- 4.1.5 It is important to note that the initiator is not your friend and anything you say to the initiator will be used against you. The initiators sole purpose is to win his/her case and will use whatever means necessary to achieve that goal.

4.2 The Role of the Presiding Officer

- 4.2.1 The presiding officer is appointed by the Employer to preside over a specific case.
- 4.2.2 The presiding officer's role is to ensure that the hearing is conducted in an orderly fashion free of any aggression or disorderly conduct.
- 4.2.3 The presiding officer will hear the evidence presented by both parties and after thereafter issue a verdict of guilty or not guilty based on the evidence presented to him/her.

- 4.2.4 It also rests on the presiding officer to make a determination on sanction after mitigation and aggravation on a finding of guilt.
- 4.2.5 It is important that the presiding officer is independent and free of bias and or prejudice.
- 4.2.6 The problem that the Union has found is that the presiding officer suffers to maintain his/her independence as they often come from the same office as the initiator and the parties that drafted the charges.

4.3 Role of the Representative

- 4.3.1 The representative will represent you at all stages throughout the disciplinary hearing.
- 4.3.2 He / She will speak on your behalf at all stages of the hearing.
- 4.3.3 The representative will lead evidence through you and your witnesses and will cross examine witnesses brought by the initiator.
- 4.3.4 The representative works in your interest and anything that you need him/her to ask or say will have to be brought to his/her attention.

5. The Disciplinary process: A Brief Explanation

5.1 Opening statement

- 5.1.1 An opening statement is a brief outline of the case by both parties which gives a road map of how the case will be presented.
- 5.1.2 It is the first impression of the case given by both parties to the presiding officer.

5.2 Evidence in chief

- 5.2.1 Evidence in chief is led by the parties by using witnesses and other evidentiary material as discussed above.
- 5.2.2 It is important that the evidence in chief led by the defence covers all elements in each and every charge.
- 5.2.3 It is vital that the facts of the case are presented in such a manner that the presiding officer must be convinced to make a finding of not guilty.
- 5.2.4 The presiding officer will only apply his/her mind to the facts presented and not opinions, hearsay or circumstantial evidence.

5.3 Cross examination

- 5.3.1 Both the initiator and representative will be given an opportunity to cross examine each other's witnesses.
- 5.3.2 This is the most stressful part of the hearing as the cross examiner is given latitude in the manner in which they carry out cross examination.
- 5.3.3 The cross examiner may ask leading question and also confuse the witness.
- 5.3.4 The cross examiner may also confuse the witness and even provoke the witness get them to retort in anger.
- 5.3.5 It is important to listen carefully to the question and to answer slowly and carefully.

5.4 Re-examination

- 5.4.1 After cross examination is concluded by one party, an opportunity is given to the party who led evidence to conduct re-examination.
- 5.4.2 The purpose of re-examination is to correct any damage that may have taken place during the process of cross examination.
- 5.4.3 Sometimes witnesses are so intimidated and worn out by the process of cross examination that they unwittingly make admissions concessions just because they are weary.

5.5 Closing argument

- 5.5.1 After evidence is led and both parties close their cases the Presiding Officer will allow both parties to submit closing arguments
- 5.2.2 A closing argument is a speech made at a trial after all evidence has been presented by each party.
- 5.2.3 It reviews and summarises the evidence and succinctly explains why the verdict should be granted in favour of the arguing party.
- 5.2.4 It is the final and factual legal argument made by each party before a verdict or judgement can be made by the presiding officer.

5.6 Verdict

- 5.6.1 It is defined as a decision on an issue of fact in a civil or criminal case or an inquest.
- 5.6.2 In this case a verdict is delivered by the presiding officer after consideration of all the evidence (facts) put before him.
- 5.6.3 The presiding officer will come to a decision of either guilty or not guilty.
- 5.6.4 If he/she issues a verdict of not guilty the hearing will come to a close.

5.7 Mitigation and Aggravation

- 5.7.1 Aggravation is a process whereby the employer gives reasons why the employee should get the most severe sanction and in mitigation the defence gives reasons why the sanction should be lighter.
- 5.7.2 Mitigation is defined as the action of reducing the severity, seriousness, or painfulness of something. These mitigating circumstances refer to evidence brought by the employee that may persuade the presiding officer to hand down a penalty than would normally be imposed.
- 5.7.3 Aggravation or aggravating circumstances are those factors brought by the employer to the attention of the presiding officer where he/she requests that the employee should be given the severest sanction. This has to be done in conjunction with the nature of the offence committed.

5.8 Sanction

- 5.8.1 The sanction is determined by the presiding officer using section 17 and section 18 of the Employment of Educators Act 76 of 1998 as amended.
- 5.8.2 He / She will also have to take into consideration the mitigation and aggravating circumstances presented and the length of service of the employee.
- 5.8.3 The presiding officer has to also take into consideration the nature and severity of the offence in determining sanction.
- 5.8.4 With regards to dismissal there should be an irretrievable breakdown in the trust relationship and the nature of the offence committed and the subsequent relationship should show this breakdown.

6. Appeal

- 6.1 In terms of the Departmental processes an employee has a right to appeal within 7 days of receiving the outcome of the sanction if he / she is not happy with the outcome. The union will assist the employee with both the appeal and or dispute if the union determines that there is a prospect of success in taking that route.
- 6.2 The appeal must be completed and submitted on the form provided to the Office of the MEC with 5 working days or 7 days.
- 6.3 This process is completed by that office on the papers. It is not compulsory that they would call or interview you.
- 6.4 Sometimes the appeal process may take too long and the employee and or the union may decide to refer a dispute before the outcome is received.

7. Dispute

- 7.1 If the employee is not happy with the outcome of the appeal the employee may lodge a dispute within 30 days of receipt of the outcome of the appeal.
- 7.2 Depending in which capacity you are employed the case may be referred to the Education Labour Relations Council (ELRC) if you are an educator or employed in terms of the Employment of Educators Act 76 of 1998, General Public Service Sector Bargaining Council (GPSSBC) or Council for Conciliation Mediation and Arbitration (CCMA) for SGB employed personnel.
- 7.3 The process will first go into conciliation. At conciliation, if the parties do not come to a settlement a certificate of non-resolution will be issued.
- 7.4 The applicant (employee) will then have to refer a dispute within 30 days of receipt of the certificate.
- 7.5 The arbitration hearing is a hearing *de novo*. This means that the hearing will take place as if it is a new hearing in front of an independent commissioner.
- 7.6 It follows the same process as the disciplinary process unless the parties and the arbitrator decide otherwise.

8. Conclusion

We have made a detailed analysis of the whole process and we trust that this will prove to be an invaluable tool should you be placed in such an unfortunate situation